

CANADA'S LEGAL PROFESSION: SELF-REGULATING IN THE PUBLIC INTEREST?

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The only justification for state actors to delegate the legislative and judicial functions inherent in the self-regulation of a profession is the public interest. But this paper argues that Canada's self-regulating legal profession was born out of professional self-interest. For much of its history, the profession was not called upon to justify its privilege to self-govern. When external pressure forced the profession to more clearly define the public interest it served, the profession argued its interest and the public interest coalesce around a core value – an independent bar. For the bar to be independent, the profession insisted, it must be regulated through law societies comprised of lawyers elected by other lawyers. A central question this paper asks is whether self-regulation is essential to the existence of an independent bar.

After briefly examining the curious birth of a self-regulating legal profession in Upper Canada, the paper will consider both mythical and principled reasons advanced by the legal profession to justify self-regulation. It will argue that the profession frequently conflates self-regulation with the right of the individual to retain independent legal representation. Only recently have law societies and bar associations embraced a more expansive definition of the public interest. The profession itself, however, is averse to change and frequently expresses disagreement with the direction in which its leaders seek to take it.

The paper argues that while there is now general recognition on the part of the profession that it must govern itself in the public interest, professional self-interest continues to stand in the way of necessary reforms. A profession truly dedicated to the public interest would make greater efforts to address significant problems relating to access to justice, client centred service, and public confidence in the discipline process for lawyers. As a result of the profession's apathy, the public perceives lawyerly self-government as conflicted, self-serving and opaque. After briefly reviewing how governments in other countries responded after concluding that their legal professions had adopted reactionary attitudes to reform, the paper will conclude by considering the future of lawyerly self-regulation in Canada.

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Le seul motif légitime pour les agents de l'État de déléguer à une profession les fonctions législatives et judiciaires de sa réglementation est l'intérêt public. Le présent article soutient cependant que l'autoréglementation de la profession juridique au Canada est pourtant née de l'intérêt professionnel. Pour une bonne partie de son histoire, la profession n'a jamais eu à justifier son privilège d'autoréglementation.

Puis, lorsque des pressions extérieures l'ont contrainte de définir plus clairement l'intérêt qu'elle servait, la profession a soutenu que son intérêt et celui du public convergeaient vers une valeur fondamentale : l'indépendance des juristes. Et pour que les juristes soient indépendants, a insisté la profession, ils doivent être régis par des associations, les barreaux, composées de juristes élus par d'autres juristes. Une question centrale posée par cet article est de savoir si l'autoréglementation est bel et bien essentielle à l'indépendance des juristes.

Après avoir examiné brièvement la curieuse naissance d'une profession juridique autoréglementée dans le Haut-Canada, cet article se penchera sur les arguments, à la fois mythiques et de principe, avancés par la profession pour justifier son autoréglementation. Il fera valoir que la profession confond souvent l'autoréglementation avec le droit des individus à être représentés par des juristes indépendants. Ce n'est que récemment que les barreaux et les associations d'avocats ont adopté une définition plus large de l'intérêt public. Les avocats eux-mêmes répugnent cependant au changement et expriment souvent leur désaccord avec l'orientation que leurs dirigeants cherchent à donner à leur profession.

Cet article fait également valoir que si la profession reconnaît aujourd'hui, de manière générale, que c'est dans l'intérêt public qu'elle doit s'autorégir, l'intérêt personnel des professionnels constitue un frein aux réformes pourtant nécessaires. Une profession véritablement dédiée à l'intérêt public ferait de meilleurs efforts pour s'attaquer aux questions importantes que sont l'accès à la justice, la conception des services en fonction des clients et la confiance du public dans la procédure disciplinaire des avocats. En raison de l'apathie de la profession, le public perçoit l'autonomie réglementaire des juristes comme contradictoire, intéressée et obscure. Après un bref examen de la façon dont les gouvernements des autres pays ont réagi après avoir conclu que leur profession juridique adoptait une attitude exagérément conservatrice vis-à-vis de leurs projets de réforme, cet article conclut en discutant de l'avenir de l'autoréglementation des juristes au Canada.

1. Introduction

The privilege of self-regulation is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned. Accordingly, provincial or territorial legislation creating a law society as a self-regulating profession with the authority to set and maintain professional standards requires that the law society adopt as its paramount role the protection of the public.¹ But as a matter of public policy, is granting the legal profession self-regulating status the best way to protect the public interest? Would the public interest be better served by direct state regulation? Critics of direct state regulation characterize it as inflexible, expensive, often inadequately designed, poorly enforced and vulnerable to special interests. They maintain professional self-regulation brings a wide range of advantages over direct state regulation. These include leveraging the information and resources of the profession, higher compliance and lower monitoring costs because of “buy in” by the profession, greater flexibility because the regulatory rules are less formal and easier to change, and lower costs to the profession. The critics of professional self-regulation focus on one central concern – self-interested behavior by the profession which benefits the profession at the public expense.²

It is unlikely any of the above considerations played a role in the decision of the fledgling legislature of Upper Canada to confer self-regulating status on the colony’s tiny legal community on July 3, 1797.³ We will never know for certain because the relevant documents went up in smoke when the United States army set the colony’s legislative building on fire in 1813. What we do know is that the decision was unprecedented. Supervision of lawyers by the judges they appeared before was standard practice throughout the British Empire at the end of the eighteenth century. Since 1785 the status of the legal profession in Upper Canada had been governed by an ordinance providing the colony’s chief justice with authority to call lawyers to the bar and govern the standards of the profession.⁴

¹ *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 36, [2003] 1 SCR 247 [Ryan].

² Andrew Green and Roy Hrab, *Self-Regulation and the Protection of the Public Interest* (June 2003), online: Bora Laskin Law Library Online <www.law-lib.utoronto.ca/university/reports/rp_26.pdf> at 3.

³ *An act for the better regulating the practice of law* (UK), 37 Geo III, c 14 [English Act].

⁴ The practice of judicial supervision continued in the newly independent US on the basis that the separation of powers doctrine required it. The Supreme Courts of most states continue to regulate lawyers directly or through delegated committees.

The 1797 Act made it lawful for “persons now admitted to practice in the law, and practicing at the bar of any of His Majesty’s courts in this province” to form into the Law Society of Upper Canada (LSUC) to secure for the province “a learned and honorable body.”⁵ The primary purpose of the Act is found in the statement that “no person other than present practitioners . . . shall be permitted to practice at the bar of any of the courts in this province . . . unless previously admitted into the society and standing in the books of the said society for and during the space of five years.” Self-regulation came to Upper Canada’s frontier legal profession long before it emerged elsewhere in the Empire because its influential leaders convinced the lawyer laden legislature to implement a “closed shop” regulatory regime.

To ensure the monopoly enjoyed by the new law society and the lawyers it regulated, one further step was required. The 1785 ordinance affirmed the right of any qualified British barrister to practice in Upper Canada. Interfering with this right would not have been politic. So the 1797 Act provided that any person admitted to practice “at the bar of any of his Majesty’s courts in England, Scotland or Ireland shall . . . on producing sufficient evidence . . . of good character and conduct to the judges of king’s bench” be admitted to practice “in this province, so as such person shall within one month from such admission, enter himself of the said society, and conform to all the rules and regulations thereof.”

The doors to the shop had been firmly closed. The privilege of self-regulation was bestowed on lawyers already practicing in Upper Canada. In the event more qualified lawyers from England, Scotland or Ireland were attracted to the wilds of British North America, they could practice law only if admitted to the LSUC and subject to its rules and regulations within one month. Self-interest had played a central role in the establishment of Canada’s first self-governing law society.⁶ A major theme in this paper is that self-interest continues to exert a powerful influence over how the legal profession governs itself.

⁵ The historian of the LSUC notes that the reference to “a learned and honorable body” was more aspirational than descriptive; see Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997* (Toronto: University of Toronto Press, 1997) at 16.

⁶ Provincial and territorial law societies tenaciously held on to their control over practicing privileges. It was not until 2002 that the Federation of Law Societies of Canada accepted the report of a task force calling for full mobility of Canadian lawyers. Eight law societies signed the National Mobility Agreement on December 9, 2002.

It was some time before Upper Canada's innovation was followed elsewhere in British North America.⁷ When Quebec's lawyers felt threatened by an influx of unqualified practitioners in 1785, they obtained an ordinance empowering the chief justice – not the legal profession – to maintain standards and call an appropriate number of properly qualified lawyers to the bar. The colony of New Brunswick attracted the cream of Loyalist lawyers when it was founded in 1785. New Brunswick's Law Society proudly points out it was learned and honorable from the very beginning. Unlike Upper Canada's first law society, it did need to have its status conferred by statute.⁸ Nova Scotia passed a legal profession statute in 1811, but it did not create a law society. It was declaratory of the common law and maintained judicial control over lawyers.⁹

Not only did Upper Canada's experiment with a self-regulating legal profession not inspire imitation elsewhere in North America, its very existence was not noticed in the United Kingdom. In 1830 the Privy Council declared that "in the colonies there are no Inns of Court [and so] advocates and attorneys have always been admitted ... by the judges and by the judges alone."¹⁰ Despite this pronouncement from on high, in 1833 a committee of the LSUC proclaimed the Society "to every extent an Inns of Court similar to one of the Inns of Court in the Mother Country." This was colonial exaggeration, but the LSUC did present superficial similarities to

⁷ It was not until the mid-nineteenth century that judges and legislatures begin to transfer the authority to self-govern to legal organizations

⁸ A law society was formed in New Brunswick in 1825. But supervision over the legal profession remained in judicial hands until 1851, when the Supreme Court handed over professional admission to the Barristers' Society; see David Bell, *Law Society of New Brunswick : A Historical Sketch* (Fredericton: Barreau du Nouveau-Brunswick, 1999).

⁹ Nova Scotia's legal profession statute was occasioned by the arrival of a lawyer from Bermuda who was a member of the English bar. Barristers did not exist in Nova Scotia at the time; attorneys pleaded in the courts and were the functional equivalent of English barristers. The new arrival insisted he should take precedence ahead of all other lawyers in the colony because he was a member of the English bar. His claim "caused consternation and resentment" among Halifax lawyers. It is a measure of the influence exerted by colonial lawyers that to prevent a recurrence of the "outrage," legislation was introduced transforming advocates into barristers. The legal profession act was a temporary measure, it expired in 1825. Soon thereafter the Society of Nova Scotia Barristers was established. See Barry Cahill, "2011: A 200-Year Odyssey of Regulating Nova Scotia's Legal Profession" (2013) 29:2 *The Society Record* 18.

¹⁰ *In Re The Justices of the Court of Common Pleas at Antigua* (1830), 1 Knapp 267, 12 ER 321 (PC).

the hallowed Inns of Court because of its use of the titles “treasurer” and “bencher” for its governing officials.¹¹

Throughout the nineteenth century the need for and importance of the legal profession grew. The self-regulating status enjoyed by the lawyers of Upper Canada, Canada West and, finally, Ontario became a major factor in the growing influence they exerted in the province. Eventually the legal profession across Canada recognized the benefits of self-governance and obtained the status for themselves. As Canada was transformed from isolated agrarian communities into mercantile and then industrial communities, the legal profession also underwent profound changes. The first lawyers were sole practitioners, but as their practices grew, many realized the advantages gained by pooling resources and establishing small partnerships. The successful partnerships then grew into large national and, in some cases, eventually multi-national firms. Throughout all these changes, the self-governing structure of the legal profession remained essentially the same.

2. *The Public Interest*

Upper Canada’s 1797 Act includes only two references to the public interest. It states that the creation of the LSUC will secure to the province a learned and honorable body “to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said province.” The Act did not create legal professionals to assist the public – they had been present in the colony in one form or another since its founding – but it bestowed on these lawyers the privilege of self-regulation. How they used the privilege would determine whether lawyerly self-regulation was in the public interest. The Act called upon lawyers to be a learned and honorable body, and late eighteenth century logic presumed honorable men would practice their profession honorably. To provide some oversight, the activities of the benchers were made subject to “inspection” by the judges of the province, “as visitors of the said society.”¹²

The Act also mandated that the attorney general and solicitor general of the province were to be benchers of the Society. Throughout its long history the quasi-judicial office of attorney general has played an important

¹¹ John White, Upper Canada’s first Attorney General and the Law Society’s first Treasurer, studied at one of the Inns (Inner Temple) and it is likely the structure of the LSUC was designed with the Inns of Court in mind.

¹² English Act, *supra* note 3.

role as guardian of the public interest.¹³ By installing the senior and junior law officers of the Crown as benchers, the legislature acknowledged that the activities of the LSUC could engage the interest of the Crown and the public in general.

An express purpose of the 1797 Act was to “support and maintain the constitution.” The “constitution” to which the Act refers was the colony’s attachment to the British Crown. A bitter war against republican revolutionaries had just concluded. It is not surprising that the legislature considered it in the public interest to commit the legal profession to supporting and maintaining the bond between Upper Canada and Great Britain. If the 1797 Act was designed to transplant into Upper Canadian soil the model of the venerable Inns of Court, it would be in keeping with the desire of the ruling elite to tie the colony to British institutions as a defence against creeping cultural influences from the republic to the south.

By the middle of the nineteenth century, the essential characteristics of self-governing professions were established:

- a unique combination of knowledge and skills;
- a professed commitment to duty above self-interest or personal gain: and
- independence from external interference in the affairs of the profession.¹⁴

These “characteristics” were primarily identified by the self-governing professions themselves. The self-sacrifice the characteristics hinted at did not deter other professional and occupational bodies from seeking the benefits perceived to come with professional status. As a result, the “essential characteristics” of self-regulation began to be overshadowed by two additional factors – the prestige of being “a learned profession” and the market advantage of exclusive use of a professional title and right to practise.¹⁵ As an increasing number of professions lobbied for self-regulating status, the true intent of the status came under scrutiny. Was it

¹³ *Gouriet v Union of Post Office Workers*, [1977] 3 ALL ER 7, [1978] AC 435 at 442.

¹⁴ Robert Reader, *Drafting the proposed Biologists Act: A discussion paper* (Ontario: Ministry of Forests and the Association on Professional Biologists, 2002), online: Association Of Professional Biology <<http://www.apbbc.bc.ca/htdocs/BiologistsActAPBDiscussionPaper.pdf#search=roberta%20reader>>.

¹⁵ Robert Schultze, “What Does It Mean To Be a Self-governing Regulated Profession?” 4 J Prop Tax Assessment & Admin 41 at 42.

to provide professional benefit or public protection? Were the public interest and the rights of individuals adequately protected by the self-governing model?

The debate continued well into the twentieth century and was addressed in 1968 by Ontario's influential Royal Commission Inquiry into Civil Rights (the McRuer Report). The inquiry noted that self-governing status "is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupational status."¹⁶ The Commission questioned why "powers to self-govern, with all the possible monopolistic attributes" had been extended to some of the twenty-two self-governing professions and occupations then in existence in Ontario. The McRuer Report helped usher in the modern Canadian approach to self-governing professions.¹⁷ Self-governing status is now recognized as a privilege; one that brings with it significant professional benefits. To justify its self-governing status, a profession must demonstrate how the self-interest inherent in self-regulation is outweighed by the benefits the public derives from it.

3. Conflation and Confusion

To those who assert that the legal profession is motivated more by self-interest than public interest, the profession argues it shares with the public a crucial common interest – an independent bar. The profession insists it is of the utmost public interest that regulation of the profession be free from state interference because the independence of lawyers protects individuals "from the state."¹⁸ If members of the public are left with the perception that lawyers are subject to the control of the state, they will have no confidence in the ability of lawyers to resolutely pursue legal proceedings against the state. Lawyers should not only act independently, but manifestly and undoubtedly be seen to do so.¹⁹

¹⁶ James Chalmers McRuer, *Ontario Royal Commission Inquiry into Civil Rights, Volume 4* (Toronto: Queen's Printer 1968) at 1162.

¹⁷ Saskatchewan Provincial Secretary's Department. *Discussion paper: Towards the development of a professions' policy for Saskatchewan*, (Regina: Office of the Provincial Secretary, 1990).

¹⁸ Proponents of this argument suggest the uniqueness of the role of the lawyer may explain why the provinces selected self-regulation as the mode for administrative control over the supply of legal services throughout the community; see *Canada (AG) v Law Society of British Columbia*, [1982] 2 SCR 307 at 335-36 [*Law Society of British Columbia*]. For a withering attack on this theory, see W Wesley Pue, "In Pursuit of a Better Myth: Lawyer's Histories and Histories of Lawyers" (1995) 33 *Alta L Rev* 730 at 756-58.

¹⁹ *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256 at 259 [*McCarthy*].

The website of the Federation of Law Societies of Canada²⁰ notes that Canadian law societies serve the public interest and this includes speaking up in defence of core values related to the governance of the legal profession. “Maintaining an independent legal profession” is identified by the Federation as an issue which the Federation is called upon to speak about “in court, in public and in the halls of Parliament and government departments.” The website continues by declaring that a central feature of Canada’s legal system is the public’s right to obtain legal advice by a legal profession independent of the government. It concludes, “For that reason, our laws provide for the self-regulation of the legal profession.”

The Federation’s statement that the law provides for a self-regulating legal profession because a central feature of Canada’s legal system is the public’s right to obtain independent legal advice confuses argument with explanation. There is no gainsaying that a central feature of Canada’s legal system is the right of an individual to retain independent legal advice and access independent legal advice when necessary to obtain a fair trial, but the Federation’s assertion that the right to independent legal assistance is why the law provides for a self-regulating legal profession is open to serious question.

In the absence of evidence that society benefits from professional self-regulation, treating self-regulation as essential because it is synonymous with professional independence is nothing more than a tautology.²¹ Moreover, assertions that the public derives benefit from a self-regulating legal profession because of the lawyerly independence it offers conflate “independence” and “self-regulation.” In 2007 the LSUC established a Task Force on the Rule of Law and the Independence of the Bar. It found, “many lawyers believe the concept of independence refers to the ability of the legal profession to regulate its own affairs.”²² This is a fundamental misunderstanding. The right of an individual to obtain independent legal advice and the self-governance of lawyers are distinct concepts.

The myth that self-regulation and independence are synonymous is said to arise from the medieval origins of lawyers as autonomous, self-

²⁰ The Federation of Law Societies of Canada is the national coordinating body for the country’s 14 provincial and territorial law societies that govern over 100,000 lawyers and 4,000 Quebec notaries.

²¹ Archibald Cox, “The Conditions of Independence for the Legal Profession” in *The Lawyer’s Professional Independence: Present Threats/Future Challenges*, (Chicago: American Bar Association, 1984) at 53 [*Present Threats/Future Challenges*].

²² *In the Public Interest: the Report and Research Papers of the LSUC Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Law Society of Upper Canada, 2007) at 7 [Task Force Report].

governing guilds, entrusted with responsibility to protect the rights of individuals against encroachment by the state or other citizens – that is, “to act as a bulwark against both public and private tyranny.”²³ Canadian adherents to this view assert that there is a long tradition in Canada, inherited from the UK, of lawyers being both independent and self-regulating. This tradition is said to constitute part of Canada’s “unwritten constitution.”²⁴ The profession’s romantic self-image has not, however, stood the test of serious historical research.²⁵ By the late seventeenth century the Inns no longer played a major role in educating and governing lawyers.²⁶ Nevertheless lawyers and legal organizations have long embraced heritage and traditions, even those based on myths. And the gap between myth and reality has not stood in the way of the legal profession insisting that independence and self-regulation, if not synonymous, are at least in a symbiotic relationship.

The independence of the bar is a principle of fundamental justice; a self-regulating legal profession is not. Effective access to legal services provided by an independent legal professional is a right recognized by international law;²⁷ and the right to effective representation through independent counsel is constitutionally guaranteed in Canada by a number of provisions of the *Charter of Rights and Freedoms*,²⁸ particularly sections 7 (right to counsel where required for a fair trial²⁹) and 10 (right to retain and instruct counsel without delay and the right to be informed of that right). But these are rights guaranteed to individuals in need of legal assistance, not to the lawyers providing the assistance.

²³ Roderick A Macdonald, “Let Our Future Not Be Behind Us: The Legal Profession in Changing Times” (2001) 64 Sask L Rev 1.

²⁴ GD Finlayson, “Self-Government of the Legal Profession – Can It Continue?” (1985) Adv Soc’y J 11 at 15.

²⁵ Philip Gerard, “The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities” in Task Force Report, *supra* note 24 at 45.

²⁶ Pue, *supra* note 18 at 730.

²⁷ See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, principle 16. Other relevant international instruments include: Council of Europe, *Recommendation No R 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer*; and the African Commission on Human and Peoples’ Rights, *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, s c(b)4(a). International law provides safeguards aimed at ensuring the independence of individual lawyers as well as of the legal profession as a whole.

²⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

²⁹ *R v Rowbotham* (1988), 41 CCC (3d) 1 (Ont CA).

The Supreme Court of Canada has identified the independence of the bar from the state and other extraneous influences to be “an essential part of our legal system.”³⁰ It is “one of the hallmarks of a free society.”³¹ Canada’s highest court has also declared that there must be an independent legal profession “free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source.”³² There is no doubt lawyers serve a crucial public interest when they are prepared to defy state authority or other influences in the name of individual rights, creatively advocate solutions to complex problems, and contribute to the maintenance of long-term legal values. It does not follow from these principles, however, that lawyers can never be subject to state regulation. There are only constitutional implications if the regulation interferes with the right of an individual to obtain independent legal assistance.

Those who argue that the state must never regulate members of the legal profession find support in the following words of Estey J:

The independence of the bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. *Consequently, regulation of these members of the law profession by the state must ... be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law.*³³

The British Columbia Court of Appeal recently relied on these words to find that the independence of the bar is a principle of fundamental justice for the purposes of section 7 of the *Charter*. As a result of this conclusion, the Court found that federal proceeds of crime and terrorist financing legislation does not conform with the *Charter* – it requires lawyers, on pain of punishment, to provide Canada’s financial intelligence unit with access to information about clients.³⁴ It interferes with the independence of the bar by forcing a lawyer to act contrary to the best interests of both herself and her client.

³⁰ *Lavallee, Rackel & Heintz v Canada (Attorney General); R v Fink*, 2002 SCC 61 at 68, [2002] 3 SCR 209.

³¹ *Law Society of British Columbia*, *supra* note 18 at 336.

³² *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 887 [Pearlman]; *Finney v Barreau du Quebec*, 2004 SCC 36, [2004] 2 SCR 17; *Omineca Enterprises Ltd v British Columbia (Minister of Forests)* (1993), 85 BCLR (2d) 85 at para 53 (CA).

³³ *Law Society of British Columbia*, *supra* note 18 at 335-36 [emphasis added].

³⁴ *The Federation of Law Societies of Canada v Attorney General of Canada* [2013] BCJ No 632, 2013 BCCA 147.

There is nothing in the words of Estey J or the decision of the BC Court of Appeal suggesting that a self-regulating legal profession is a constitutional requirement. The words of Estey J point out that regulation of the legal profession by the state must not interfere, in the political sense, with the delivery of legal services to individual citizens. The BC Court of Appeal did not strike down the federal legislation under consideration because it violated or infringed the self-regulating status of the legal profession, but because it interfered with the independence of the bar by forcing the lawyer to act contrary to the best interests of his client.

A recent LSUC disciplinary hearing illustrates the continuing tendency of the legal community to conflate self-regulation and independence. As a result of a lengthy and bitterly contested regulatory trial,³⁵ it was alleged defence counsel had engaged in incivility amounting to professional misconduct.³⁶ While the trial judge had occasionally criticized the conduct of both counsel, he did not find either to be in contempt, impose costs against defence counsel personally, or characterize defence counsel's conduct as lacking in civility.

Defence counsel argued that since the trial judge had already considered his conduct, the LSUC should not "re-litigate" the issue. In rejecting this argument, the hearing panel emphasized that civility in the courtroom is a shared responsibility of the bench and bar. The judiciary has responsibility as part of its inherent jurisdiction to control proceedings before it,³⁷ while the law society has authority to address incivility because "it is a self-regulating" profession.

³⁵ *Law Society of Upper Canada v Joseph Groia*, 2012 ONLSP 94 (available on CanLII) [*Groia*], appeal allowed in part at 2012 ONLSP 94 (CanLII) at para 76 [*Groia* appeal] Groia's client was the defendant in *Ontario Securities Act* proceedings arising from the infamous collapse of the Bre-X mine. The disciplinary proceedings against sparked intense debate in the litigation bar. Many experienced and respected advocates argued that lawyers need to vigorously defend a client and the Law Society proceedings against Groia would discourage fearless advocacy because it failed to give sufficient consideration to "civility chill," the risk that lawyers may avoid zealous advocacy out of concern that it will be interpreted — and sanctioned — by the Law Society as incivility.

³⁶ Rules 4.01(6) and 6.03 of the LSUC *Rules of Professional Conduct* require the "fearless advocate" to be "courteous, civil and act in good faith." The Ontario Court of Appeal opined that these rules create a civility duty on lawyers in "crystal clear" language; see *R v Felderhof* (2003), 17 CR 20 (Ont CA) at para 96. Not everyone agrees; see e.g. Donald Bain, "Problems with the Prevailing Approach to the Tension between Zealous Advocacy and Incivility" (2013) 4 J Crim L and Criminology at 301.

³⁷ Trial judges have a "primary" duty to actively intervene and prevent incivility; see Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim Rev 97. But, as Bain points out,

[T]he privilege of self-regulation is an important aspect of the maintenance of an independent bar. An independent bar is necessary to the functioning of a free and democratic society. For these reasons, the judiciary in this province has no authority to discipline a lawyer for professional misconduct. This exclusive authority rests with the Law Society.

...

This authority ensures the independence of the bar by allowing the profession to govern itself and to demonstrate to the public that the profession regulates licensees' conduct and enforces their adherence to the Rules of Professional Conduct.

The importance of an independent bar to the functioning of a free and democratic society is beyond dispute. But the characterization of self-regulation as an “important aspect of the maintenance of an independent bar” is not. The legal profession’s authority to self-govern does not “ensure” the independence of the bar. A legal profession can be independent without being self-regulated.

The right to retain independent legal services does not include a right to representation by a lawyer who is a member of a self-regulating legal profession. While the LSUC’s Independence Task Force noted that many lawyers believe the concept of independence permits the legal profession to regulate its own affairs, conduct its own discipline, and determine its own entrance and licensing standards, the most the Task Force was prepared to say was that “self-regulation *may be consistent* with the independence of the bar.” It stressed its report was focussed on the relationship between lawyers and clients and on the protection of the public interest that depends on that relationship and not on the definition of lawyerly independence.³⁸

To assist in the preparation of its report, the task force commissioned a research paper on the constitutional status of self-regulation.³⁹ The paper begins by recognizing the constitutional right to retain an independent lawyer to argue without fear on one’s behalf and obtain access to an independent legal representative where it is necessary to ensure a fair trial, but distinguishes between “independence” in this sense and the “autonomy”

when trial judges fail to discharge this duty, counsel suffer the consequences. As a result of Ontario establishing a *Civility Complaints Protocol* in 2009, judges and justice of the peace may directly refer an allegation of uncivil misconduct by a lawyer to the LSUC for investigation and potential discipline.

³⁸ Task Force Report, *supra* note 22 at 7.

³⁹ Patrick Monahan, “The Independence of the Bar as a Constitutional Principle” in Task Force Report, *ibid* at 136.

of a self-governing profession. The paper then asks whether there “is any basis for concluding that the self-government of the profession is constitutionally protected?” The paper notes judicial comments in⁴⁰ and out of court⁴¹ proclaiming that the self-governing status of the bar represents “a conventional constitutional requirement designed to maintain a free society.” But after taking into account the significant external controls to which the profession is already subject and the decision of the Supreme Court of Canada in *Canada (Attorney General) v Law Society of British Columbia*,⁴² the paper concludes lawyerly self-governance is neither constitutionally required nor absolute.

In *Law Society of British Columbia*, the Court found that unlike the constitutional right to retain an independent lawyer, the legal profession’s privilege of self-regulation rests on a “less secure matrix” of legislative policy considerations. It is for the legislature to determine “the administrative technique to be employed in the execution of the policy of its statutes.” There are many reasons why a province may decide to alter the means of regulating the ethical, moral and financial aspects of a profession within its boundaries. Since conferring exclusive self-regulation on lawyers was a policy choice, the legislature may adopt another regulatory regime as long as it does not interfere with the ability of lawyers to provide independent services.

According to US legal historian Robert Gordon, “[N]o word in the lexicon of professionalism is more commonly invoked – and less commonly defined – than ‘independence.’”⁴³ After noting that there is not “a consensus” among all lawyers as to the scope and content of independence, the LSUC’s Task Force referred to “four understandings” of lawyerly independence identified by Gordon:

1. Independence from outside regulation – the legal profession should have autonomy in the regulation of its own practices.
2. Independence from client control – lawyers should have autonomy to decide which clients and causes to represent and how to conduct that representation.

⁴⁰ *Labelle v Law Society of Upper Canada et al*, (2001), 52 OR (3d) 398 at paras 30 and 37 (Sup Ct); the appeal from this decision was dismissed at (2001), 56 OR (3d) 413 (CA) with a statutory interpretation *caveat*.

⁴¹ Finlayson, *supra* note 24.

⁴² *Supra* note 18 at 335-36.

⁴³ Robert Gordon, “The Independence of Lawyers” (1988) 68 BUL Rev 1 at 2-6.

3. Independence from political control – lawyers should be able to assert and pursue client interests free of external controls, especially influence and pressure from government.
4. Independence to pursue public purposes – lawyers may provide services and technical skills for hire but their personal and political convictions cannot be purchased or coerced – a part of the lawyer's professional persona must be set aside for dedication to public purposes.

Equating the independence of the legal profession with its “autonomy in the regulation of its own practices”⁴⁴ is problematic in a Canadian context because it fails to take into account the crucial distinction between the constitutional right of the individual to retain an independent lawyer and the statutory privilege of professional self-regulation. Gordon's second understanding of independence as “independence from client control” is important because it recognizes independence requires more than independence from the state; lawyers must be independent officers of the court and not allow clients or others to obstruct or interfere with their legal and ethical obligations.⁴⁵

Gordon's fourth understanding of independence requires that “a part of the lawyer's professional *persona* be set aside for dedication to public purposes.” This understanding has been criticised as encouraging lawyers to shrink from the role of “zealous advocate” and embrace the role of “public interest counsellor.” Alice Woolley argues that in order to determine the appropriate role of lawyers in Canada, the “dominant cultural understanding” of the legal profession should be considered. To do this, the ethos of the profession must be identified.⁴⁶ One of the “public

⁴⁴ The legal profession does not have “exclusive autonomy” in the regulation of its own practices; it is subject to the supervision of state supreme courts or their delegate committees.

⁴⁵ Gordon's second understanding of independence, “to decide which client ... to represent,” is at odds with the English “Taxi Rank” principle requiring barristers to accept a retainer from any client seeking to retain his or her services, in a court in which he/she regularly appears and for the lawyer's standard fee. This principle ensures there is always a lawyer available to represent someone (no matter how odious) in need of counsel. In England the principle is considered consistent with the ethical obligations and traditions of the bar.

⁴⁶ Not for the zealous advocate model championed by Woolley are the public interest morality arguments advanced by Gordon. She points out that a Canadian lawyer may cross-examine an honest person to make that person appear dishonest, provided the lawyer does so respectfully and without lying to the court. The lawyer may also make legal arguments in court that the lawyer thinks would, if accepted, make Canadian law less just, less fair or less coherent. Doing these things is not morally uncomplicated, but

purposes” Woolley takes issue with is the proposition that the legal profession should act as a “mediating force” between the interests of private clients and the public purposes of the legal order. The paradigm case is when a lawyer persuades a client not to take advantage of an arguably applicable legal loophole on the ground that it would undermine the policies of the statute and result in unjustified harm to innocent parties.⁴⁷ Woolley argues that if this role of the lawyer as “public interest counsellor” is accepted, there are major policy implications for both the independence of the bar and the regulatory regime under which it operates.

Woolley maintains that the “zealous advocacy” model 1) is accepted in Canadian legal culture; 2) is consistent with the principles and structure of Canadian law; and 3) is morally justified. Lawyers should be zealous advocates within the bounds of legality because the most important purpose of a system of laws cannot be achieved unless lawyers embrace that role. Lawyers have no power to achieve for clients more than the law allows or do more for clients than they could lawfully do for themselves if they had the knowledge and skill of the lawyer. Woolley asserts that within legal boundaries, lawyers zealously advocate on behalf of their clients and have no right to substitute their judgements for those of their clients. The land is ruled by law, not lawyers.

Woolley also points out that the constitutional right to retain an independent lawyer is not for the *lawyer's* benefit; it is the *client's* right to have access to a lawyer obliged to act as a zealous advocate. Looked at from this perspective, lawyerly independence is necessary because lawyers can be zealous advocates within the bounds of legality only if they are free from external pressure that might lead them to abandon their zealous advocacy for clients. When a self-regulating legal profession enacts rules against incivility, it exerts external pressure on the members of the profession that might lead them to abandon their zealous advocacy for clients.

4. Expanding the Definition of the Public Interest

In 1994 the LSUC adopted a role statement, long on generalities and short on detail.⁴⁸ It acknowledged that the LSUC exists to govern the profession in the public interest. And it recognized that this required the Society to

according to Woolley it is both consistent with and is sometimes required by the lawyer's role as perceived by Canadian lawyers.

⁴⁷ David Wilkins, “Who Should Regulate Lawyers?” (1992) 105 Harv L Rev 799 at 860.

⁴⁸ Law Society of Upper Canada, *Minutes of Convocation: Research and Planning Committee Report to Convocations* (1994).

ensure Ontario lawyers meet high standards and upheld the “independence, integrity and honour” of the legal profession for the purpose of “advancing the cause of justice and the rule of law.” Missing from the statement was any reference to a number of issues looming large in public criticism of the profession: the high cost of legal services; the growth of unconstitutional court delays; and an opaque disciplinary process.

Reducing the high cost of legal services was in the public interest because it would improve access to justice, but it was not in the interest of the profession because it would reduce the fees lawyers could charge for their services. Reversing the backlog of cases was in the public interest because it would reduce the number of cases judicially stayed for unreasonable delay and avoid injustice and inconvenience to court users, but it was not in the interest of the profession because it would require lawyers to become more efficient and abandon life-long practices. Opening up the discipline process to more public scrutiny would be in the public interest because it would introduce the disinfecting effect of sunlight to a process that took place behind closed doors, but it was not in the interest of the profession because it would add to public suspicion about the honesty and ethics of lawyers.

The legislature decided to address the public interest issues omitted from the LSUC’s role statement. The *Law Society Act (LSA)* was amended to require the Society to act “so as to facilitate access to justice” and “in a timely, open and efficient manner.” The *LSA* now provides that the functions of the LSUC are to ensure all persons who practise law or provide legal services in Ontario meet standards of learning, professional conduct appropriate for the legal services they provide, and standards of learning, professional competence, and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practice in Ontario and persons who provide legal services in Ontario. The LSUC is statutorily required when carrying out its functions and powers to have regard to the following principles: 1) its duty to maintain and advance the cause of justice and the rule of law; 2) its duty to act so as to facilitate access to justice for the people of Ontario; 3) its duty to protect the public interest; 4) its duty to act in a timely, open and efficient manner, and 5) standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.⁴⁹

⁴⁹ Section 4.2 of *The Law Society Act*, RSO 1990, c L8 as amended. When exercising discretion conferred by the *LSA*, the discretion must be exercised consistently with the purposes underlying its grant; see *Ontario (Public Safety and Security) v Criminal Lawyers Association*, 2010 SCC 23 at para 46, [2010] 1 SCR 815.

In the modern era the LSUC has stated the content and scope of its public interest mandate in a wide variety of documents. Governing lawyers in the public interest has been interpreted in reports to Convocation as exercising regulatory authority in a timely and efficient manner,⁵⁰ instituting best practices and assuring accountability,⁵¹ and providing a hearing process that is fair, transparent and efficient.⁵² The material of the LSUC indicates that regulating in the public interest includes a mandate to integrate equity and diversity values and principles into the Society's activities,⁵³ ensure accessibility of services,⁵⁴ and to advise clients of French language rights.⁵⁵

The LSUC's 2005 Tribunals Task Force used traditional language in reporting to Convocation that self-regulation is essential to safeguard the public's access to justice and to an independent profession and to protect the public from state interference. But it also noted that the value and strength of this principle is undermined where a professional regulator's operations are seen to interfere with the best interests of the consumers. The task force went further and observed that the manner in which the Law Society discharges its conduct, capacity and competence responsibilities is critically important to how the public perceives it.⁵⁶

5. Is Self-Regulation the Best Way to Protect the Public Interest?

The need for the delivery of legal services to be regulated is not seriously open to question. An unregulated market for any professional service harms consumers and the public more generally. Most consumers have a knowledge deficit preventing them from determining the legal services

⁵⁰ Investigations Task Force, Law Society of Upper Canada, *Final Report to Convocation* (Toronto: The Law Society of Upper Canada, 2006) at paras 6-8, online: <http://www.lsuc.on.ca/media/convmay2907_governance.pdf>.

⁵¹ Governance Task Force, Law Society of Upper Canada, *Second Report to Convocation* (Toronto: The Law Society of Upper Canada, 2007) at paras 2-4, online: <http://www.lsuc.on.ca/media/convmay06_investigations.pdf>.

⁵² Tribunals Committee, Law Society of Upper Canada, *Report to Convocation* (Toronto: The Law Society of Upper Canada, 2012) at 130, online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=214789848>>.

⁵³ Law Society of Upper Canada, "Equity and Diversity Resources", online: <<http://www.lsuc.on.ca/with.aspx?id=2147487013>>.

⁵⁴ Law Society of Upper Canada, "Accessible Customer Service", online: <<http://www.lsuc.on.ca/with.aspx?id=2147486355>>.

⁵⁵ Law Society of Upper Canada, "Advising Your Clients About Access to Legal Services in French", online: <<http://www.lsuc.on.ca/with.aspx?id=2147497430>>.

⁵⁶ Tribunals Task Force, *Report to Convocation – Final Report*, (26 May 2005), online: <<http://www.lsuc.on.ca/media/convmay05tribunals.pdf>>.

they need and the quality of service they receive.⁵⁷ One important goal of regulation is to enforce minimum quality standards so the knowledge deficit does not result in consumers falling victim to incompetent, unscrupulous or dishonest lawyers. A lack of minimum quality service standards can also redound to the detriment of third parties. Low cost “slapdash” legal work might meet the needs of the client and lawyer but result in significant harm to third parties (the beneficiaries of a will for example).⁵⁸

The following part of the paper does not question the need for regulation of the legal profession, but examines from a public interest perspective the advantages and limitations of a self-regulating legal profession.⁵⁹ Many of the arguments advanced by both sides in the debate do not rise above the level of vague generalities lacking in evidence-based support. But this is not surprising given the strong feelings the debate generates. Generally speaking, those involved in the debate take zero sum positions and do not consider more nuanced positions. They insist the legal profession should remain exclusively self-governing or it should not.⁶⁰

The McRuer Report observed that the “traditional justification” for granting powers of self-regulation to a profession is that the members of the profession are best qualified to ensure that proper standards of competence and ethics are set and maintained. There is a clear public interest in the creation and observance of such standards. While indicating that this public interest “may have been served by the respective professional and occupational bodies which have brought to their task an

⁵⁷ Michael J Trebilcock, Carolyn J Tuohy and Alan D Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture and Law in Ontario Prepared for the Professional Organization Committee* (Toronto: Ministry of the Attorney General, 1979).

⁵⁸ Noel Semple, *Access to Justice through Regulatory Reform* (National Family Law Program, 2012) at 12 [Semple, *Regulatory Reform*].

⁵⁹ The arguments for and against self-regulation have been advanced many times in many ways. Two contrasting examples are Harry Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?” (1995) 33 *Alta L Rev* 800; and Roy Millen, “The Independence of the Bar: An Unwritten Constitutional Principle” (2005) 84 *Can Bar Rev* 107.

⁶⁰ This approach fails to acknowledge that other entities exercise forms of regulation over lawyers. Criminal courts become involved when lawyers are charged for alleged crimes committed in the course of delivering legal services. Civil courts are available to clients who wish to sue their lawyers for professional malpractice and negligence. Judges can also become involved if a lawyer’s conduct amounts to contempt. In 2001 the Ontario Securities Commission established its authority to reprimand a solicitor for misconduct in connection with his representation of a client in *Wilder v Ontario Securities Commission* (2001), 53 OR (3d) 519 (CA).

awareness of their responsibility to the public they serve,” the report observed there is a “real risk” the power may be exercised in the interests of the profession rather than that of the people. The report concluded this risk requires adequate safeguards to ensure that injury to the public interest does not ensue.

Resistance by lawyers to outside regulation is frequently based on the claim that external controls will disrupt lawyer/client relations by undermining their basis of trust and authority and unduly interfere with the professional’s capacity for independent decision making. Such claims, however, should neither immunize the profession from scrutiny of its exercise of self-regulatory authority nor shelter the profession from public discussion about lawyerly self-regulation. The key question must always be whether the public interest is best served by continued self-regulation or whether freedom from external accountability simply “serves the profession at the expense of the public.”⁶¹

Proponents of self-regulation argue that there is a co-relation between a self-regulating legal profession and progressive reforms in law and society. Were it not for self-governance, the argument rather self-importantly concludes, the legal profession would be “a mere trade or business” rather than a pillar in our liberal social order. This suggests that where independent and self-regulating lawyers exist “liberal constitutions bloom.”⁶² Once more, a tight nexus is drawn between independence and self-regulation. Lawyers also frequently link the preservation of democracy with the ability of an independent legal profession to protect the rights of individuals against state power. It can be said with some justification that the rule of law in its modern form exists in no small measure thanks to the influence of an independent bar. The question remains: Must self-regulation be present for lawyers to be independent?

Most proponents of lawyerly self-governance now acknowledge that the regulation of the licensing system for lawyers is a matter of public policy emanating from the legislature, but they argue that since the legislature has seen fit to delegate its authority to the legal profession; it

⁶¹ Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2000).

⁶² Those who advance this notion of lawyers as guardians of democracy and the rule of law forget or ignore situations where the legal profession did not “cover itself with glory.” Cogent examples include the events surrounding the Winnipeg General Strike, the removal of Japanese-Canadians from the Pacific Coast and the invocation of the *War Measures Act*; see Philip Girard, “The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities” in Task Force Report, *supra* note 22 at 45.

must respect the self-governing status of the profession.⁶³ Government ought not prescribe in detail the structures, processes and policies of the profession, since government has recognized the need for regulators with special legal expertise and sensitivity to the conditions of practicing law. While the profession may be ultimately accountable to the government for the ways in which it discharges its legislative mandate; it must have the authority to make the decisions for which it is accountable.

Proponents of self-regulation consistently maintain that the law society's exclusive authority to discipline lawyers is integral to the independence of the bar. They argue that only lawyers have the knowledge required to devise professional conduct rules and assess other lawyers' compliance with or deviation from those rules. Discipline hearings are efficient because lawyers are able to "cut to the chase" and will not be misled by irrelevancies that could sidetrack lay regulators. The Hon George Finlayson put it succinctly: "[N]o one knows better than a fellow lawyer whether or not a brother lawyer has become a transgressor."

Monnin CJM made the point in stronger language:

Our Legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. *It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct.*

Professional misconduct ... is conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well respected brethren in the group – persons of integrity and good reputation amongst the membership. *No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.*⁶⁴

The LSUC panel in the case of *Law Society of Upper Canada v Joseph Groia* adopted a similar view and concluded that disciplinary panels are *uniquely* positioned "to determine when incivility crosses the line."⁶⁵ The panel did not, however, provide a bright line to assist counsel in ensuring they do not cross it. Its decision is replete with vague language about "overzealous advocacy" and "excessive personal attacks" against opposing counsel. The judgment of the Law Society Appeal Panel more helpfully concluded that acceptable advocacy crosses the line into uncivil conduct

⁶³ *Pearlman*, *supra* note 32.

⁶⁴ *Law Society of Manitoba v Salvino* (1983), 23 Man R (2d) 293 at para 17 [*Salvino*].

⁶⁵ *Groia*, *supra* note 35 at para 79.

when it includes “repeated personal attacks on the integrity of opposing counsel” and alleges “deliberate wrongdoing” that does not have a reasonable basis is not otherwise justified by the context. The appellant’s position that his obligation of civility had to yield to his primary duty of zealous advocacy on behalf of his client was misplaced.⁶⁶

Self-regulation proponents emphasise that it is in the interest of the public for lawyers to be governed by a code of conduct. It is also in the public interest for an autonomous law society to have power to discipline its members. When lawyers are in charge of their own regulation, they bear the cost through their fees. The public purse does not have to contribute to the cost of regulatory bureaucracy. In addition, when the public is victimized by a wayward lawyer, mandatory insurance and reimbursement efficiently ensure that the profession shoulders the cost of the loss.

Proponents of self-governance point out that the public interest is served by an independent and impartial judiciary. The bar is a breeding ground for judges. It is as independent and self-governing lawyers that judges develop the characteristics of independence and impartiality they take to the bench. Furthermore, just as a free and democratic society needs an independent judiciary to maintain the rule of law, society also needs an independent legal profession to serve as a linchpin to secure the public good.⁶⁷

Supporters of self-regulation insist that lawyers are able to finely calibrate their responsibilities and impose penalties more appropriately than government regulators. Consequently, the legal profession can develop alternate dispute resolution mechanisms. These mechanisms are capable of addressing real and specific client complaints. They constitute restorative responses which more effectively serve the public interest than punitive measures. It is argued that in order to both protect the public and promote its reputation, the legal profession “funnels in” conduct that would otherwise go unchecked.

Perhaps the most aspirational and least quantifiable argument advanced by proponents of self-regulation is that “good people will rise to the occasion.” Bestow a sacred trust on members of a profession to regulate the profession and they tend to act altruistically in the public good. Consequently, the members maintain high standards and engage in moral reasoning. History has shown that self-regulating lawyers enhance public access to justice through *pro bono* representation and reduced legal fees. If

⁶⁶ Groia appeal, *supra* note 35.

⁶⁷ Wilkins, *supra* note 47 at 858, 863.

self-regulation were abolished, it would alienate the profession from its traditional commitments.

Opponents of lawyerly self-regulation point out there is no right to retain a lawyer who is a member of a self-regulating legal profession. Self-governance is a privilege conferred on the profession by the legislature; it requires a commitment by the profession to promote and protect the public interest.⁶⁸ But do the benefits obtained by the legal profession outweigh the commitment it makes to the public? These benefits include greater autonomy and control,⁶⁹ professional prestige, and financial rewards. Self-government allows a profession 1) to decide who will be permitted to earn his/her living by practising the profession; 2) to limit the number of people permitted to engage in the profession; 3) to exclude persons from engaging in the profession even though they meet reasonable standards if they do not meet prescribed standards set by the profession; and 4) to set excessively high standards that produce specialists but leave a vacuum with respect to areas of the profession where the services of the specialist are not required. These benefits are buttressed by market conduct regulations (such as compensation fund contributions and mandatory purchase of professional liability insurance) and business structure regulations (such as restrictions on publicly traded corporations offering legal services). All of these factors increase the cost of legal services to the public.

Critics of a self-regulating legal profession insist it ignores the reality of the practice of law in the modern era. Practice at the bar is no longer a “calling.” It is primarily driven by business considerations.⁷⁰ The Hon Stephen Goudge of the Court of Appeal of Ontario has expressed concern over the dominance of business structures in the practice of law in large firms.⁷¹ In the “frantic scramble to do law as business,” will lawyers increasingly see anything but the narrowest aspects of professionalism a luxury? As a result, will minimal compliance with the rules of professionalism to escape the discipline process become the prevailing standard of conduct?

⁶⁸ Ryan, *supra* note 1 at para 36.

⁶⁹ Under professional self-regulation, the regulatory body is able to set entry requirements and standards for practicing the profession, rather than having government impose requirements. A recognized regulatory body also gives a profession greater access to government for lobbying purposes.

⁷⁰ Christopher Moore, “Megafirm: A Chronology for the Large Law Firm in Canada” in Constance Backhouse and W Wesley Pue, eds, *The Promise and Perils of Law in Canadian History* (Toronto: Irwin Law, 2009) 103 at 125.

⁷¹ Stephen T Goudge, “Looking Back and Looking Forward on Learning in Professionalism” (2010) *Can Legal Ed Ann Rev* 109 at 114.

A key concern resting at the heart of opposition to professional self-regulation is the conflict of interest it presents. The interests of the profession in providing the public with legal services will not always equate with the interests of the public in accessing those services. The profession prohibits individual lawyers from acting in a conflict of interest, but ignores its own conflict of interest. Perception is reality when it comes to public confidence in institutions. Even if there is no actual conflict when lawyers judge lawyers in discipline proceedings, the public is unlikely to see it that way. If the legal profession is truly one of the guardians of the rule of law, then it is crucial for public confidence in the rule of law that the regulatory decisions of the legal profession be seen as free of the taint of impartiality.

Another aspect of the “conflict” argument is that while lawyers are required by their codes of conduct to report the misconduct of other lawyers, they seldom do. Whether this springs from a misguided sense of professional loyalty or an unwillingness to use their expertise against a fellow professional, the result is the same: a corrupt or incompetent lawyer is allowed to continue victimizing the public. Those who advance the “conflict” argument against self-regulation assert that too few disciplinary proceedings are instituted and when they are brought forward, they result in lenient treatment. Still others argue the complaint processes run by law societies are not consumer friendly and fail to address the issues of greatest concern to the public, such as excessive fees. Moreover, when people pursue their complaints there is a tendency for the disciplinary system to occupy the field and crowd out more stringent remedial avenues (police investigations as an example). The consequence is that discipline is a sop, funnelling complaints away. The delinquent lawyer escapes punishment or receives minimal discipline.⁷²

Free market economists are opposed to professional self-regulation models because they allow the profession to establish an anti-competitive environment by limiting access to the supply of services. This drives up the cost paid by the public. Competition is also dampened by requiring the public to use lawyers for the provision of services that could safely be provided by non-lawyers or paralegals. Extensive research has also shown a fundamental “lack of a consumer orientation” on the part of lawyers, which the profession has done little to improve.⁷³

⁷² Joan Brockman and Colin McEwen, “Self-Regulation in the Legal Profession: Funnel In, Funnel Out, or Funnel Away” (1990) 5 CJLS 1.

⁷³ Robert Evans and Michael Trebilcock, *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (Toronto: Butterworths, 1982).

In December 2007 the Competition Bureau of Canada released a report on self-regulating professions in Canada.⁷⁴ It is critical of the legal profession's self-regulating bodies and finds they act contrary to the interests of consumers and the public interest. The report notes that professions given self-regulating authority "have potentially conflicting concerns and interests – their own and those of the public". The conflicting concerns and interests referred to by the Competition Bureau were exemplified by the debate over multidisciplinary practices,⁷⁵ in which the profession showed itself resistant to change and discussion of the public interest was missing. The opponents of change claimed that the issue threatened the "core values" of the profession (i.e. maintaining independence) and that market forces are irrelevant when ethics are at stake. This was pointed to by critics of self-regulation as proof that the profession cannot be trusted to regulate itself in the public interest.⁷⁶

A follow up report by the Bureau in 2009 noted some progress had been made. Reciprocal agreements had been entered into among law societies to improve the mobility of lawyers across the country. The Bureau also acknowledged that there had been significant pro-competitive developments concerning the advertising of legal services.⁷⁷ While applauding the progress, the Bureau reported it was, "also evident that more can be done by the professions themselves ... to strike the right balance between competition and regulation."

The Bureau opined that the level of consideration given by self-regulating professions to competition issues in the development and review of their regulations is not always comprehensive. Moreover, the competitive impact of professional restrictions often depends on the manner in which they are interpreted and enforced. Restrictions that appear to be designed to protect the public interest may be applied in a manner that unnecessarily restricts competition. The Bureau concluded that to ensure Canadians have access to innovative, low-cost and high-quality

⁷⁴ Competition Bureau, *Self-regulated professions – balancing competition and regulation* (2007), online: Competition Bureau of Canada <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>>.

⁷⁵ Jack Giles, "Why Multi-Disciplinary Practices Should be Controlled by Lawyers" (2000) 58:5 *The Advocate* 695.

⁷⁶ Paul D Paton, "Between a Rock and a Hard Place: The Future of Self-Regulation – Canada between the United States and the English/Australian Experience" (2008) *J Prof'l Lawyer* 87 at 112.

⁷⁷ In 2009 the Federation of Law Societies of Canada established marketing rules in its *Model Code of Professional Conduct*; see Federation of Law Societies of Canada, *Model Code of Professional Conduct*, online: FLSC <flsc.ca/_documents/CODEModelCLOct2014.pdf>, taking into consideration recommendations made in the Bureau's 2007 Report.

professional services, it is essential self-regulating professions and government authorities insist that professional restrictions are developed *and* applied in a manner that favours competition.

The critics of self-governance are not impressed with the arguments arrayed against them. Without a reason for why society should value a profession that is self-regulating, the mere assertion that professions in general are thought to have this power is of little consequence. It is true that an independent bar buttresses the rule of law by protecting citizens from the executive branch of government. But the critics of self-governance⁷⁸ point out that lawyers are obliged to perform this role, whether or not they are self-regulating. The privilege does not protect the independence of lawyers from the influences and pressures exerted by clients, colleagues or others with an interest in persuading lawyers to favour one part of the legal framework over another. David Wilkins observes that to exercise independent judgment and to act on the basis of what that judgement appears to require, lawyers must resist both public *and* client pressures. Gordon argues it is clients and not the state which are most likely to push lawyers away from a public interest orientation.⁷⁹ Global and domestic corporations wield great influence. For many lawyers, the corporate employer is the economic master and claims of independence on the part of individual lawyers or law firms are difficult to accept. Therefore, it is argued, the legislature should establish regulatory regimes that support an independent bar in the broadest sense.

The argument that judges are schooled in principles of independence and self-regulation while they are lawyers may carry some weight in England, where the high courts are primarily populated by barristers. But it rests on weak foundations in Ontario, where lawyers with no courtroom experience are often appointed to the judiciary. Many academic lawyers have made excellent judges without being inculcated in traditions of independence and self-regulation gained at the bar.

Do lawyers make the most effective regulators? Regulatory bodies are a common feature of modern life and many skilled regulators without legal training are available. They can provide professionalism, rationality, accessibility and efficiency. While their cost would not be “internalized” by the profession, they may provide greater value for the regulatory dollar. And in any event, the assertion that the profession “internalizes” the costs of the law society is open to serious question. The profession passes on to its clients the fees and other costs it pays the law society.

⁷⁸ Monahan, *supra* note 39 at 136.

⁷⁹ Gordon, *supra* note 43.

Critics of self-regulation take issue with the argument that self-regulation of the legal profession is essential for democracy and the rule of law to flourish. They note that self-government by the legal profession is far from a universal phenomenon and democracy has emerged in jurisdictions without the assistance of self-regulating legal professions. Moreover, jurisdictions with self-regulating legal professions do not necessarily have a democratic society. It is argued that demand for self-regulation comes from the profession, not the general public. It is a form of regulatory imperialism.

Concern that the public will lose confidence in the legal profession if self-regulation is abolished is dismissed by opponents as self-serving and devoid of empirical support. It is argued that benchers from large and locally influential law firms are rarely representative of a cross section of an increasingly diversified and fragmented profession, let alone society. It is difficult to imagine how their conception of the public interest could capture the increasingly complex reality of the public interest.

6. *The Death of Self-Regulation?*

Self-regulating legal professions were the norm throughout the common law world for more than a century. Then came a tsunami⁸⁰ which affected most of the Commonwealth and left Canada the “last bastion of self-regulation.”⁸¹ The impetus for change in England and Wales was a growing national consensus that the primary self-regulatory authorities of the legal professions⁸² had abandoned their public interest mandate in favour of acting as lobbying organizations for lawyers. After a decade of controversy and debate, the professions were stripped of their exclusive authority to govern themselves and a legislated co-regulatory regime was imposed.

The architect of the change, Sir David Clementi, was determined to ensure that any new regulatory framework would be consistent with professional principles and precepts contained in codes and standards governing lawyers. He acknowledged that a confident, strong and effective bar is essential to maintaining the rule of law because it protects both citizens and commerce against any arbitrary use of state authority and unlawful acts by organizations and individuals. But Sir David stressed that

⁸⁰ Richard F Devlin and Porter Hefferan, “The End(s) of Self Regulation” (2008) 43 *Alta L Rev* 169.

⁸¹ Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Toronto: Lexis Nexis, 2011) at 4.

⁸² The regulation of lawyers was made more difficult in England and Wales by the existence of five legal professions with five separate regulating bodies.

no matter what regulatory framework governs lawyers, they have a duty to act with independence in the interests of justice. He stressed that independence is primarily an “attitude” – an ethical duty and habit of mind rather than “a structural condition.”⁸³

Sir David’s final report (the Clementi Report)⁸⁴ identified five core functions of regulation:

- 1) entry standards and training;
- 2) rule-making;
- 3) monitoring and enforcement;
- 4) complaints; and
- 5) discipline.

His report emphasised that any regulatory arrangement set up to perform these core functions should promote the public and consumer interest, encourage competition, inspire innovation, and be transparent. In response to the Clementi Report, the *Legal Services Act 2007*⁸⁵ was introduced. The press release announcing the legislation heralded it as a set of “radical reforms which will see services in the ... legal sector undergo major changes to bring them in line with other professional services in the 21st century.”⁸⁶

The 2007 Act has four major components:

- 1) the creation of a new Legal Services Board (LSB) to act as a single, independent and publicly accountable regulator⁸⁷ with the

⁸³ Peter M Brown makes a similar point in “The Decline of Professional Independence” in *Present Threats/Future Challenges*, *supra* note 21, 23 at 25, arguing that the decline of legal professionalism in the US reflects attitudes and lack of vision on the part of a significant portion of lawyers who see the practice of law as principally a source of revenue.

⁸⁴ Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report 2004*, (Department for Constitutional Affairs The Future of Legal Services: Putting Consumers First, 2005), online: The National Archives <<http://webarchive.nationalarchives.gov.uk>> [Clementi Report].

⁸⁵ *Legal Services Act, 2007* (UK), c 29. See Judith L Maute, “Revolutionary Changes to the English Legal Profession or Much Ado about Nothing?” (2006) 17:4 The Prof’l Lawyer 1.

⁸⁶ See e.g. “Legal Services Act given Royal Assent” (30 October 2007), online: Post Online UK <<http://www.postonline.co.uk/post/news/1269709/legal-services-act-royal-assent>>

⁸⁷ The Board’s chair was appointed on April 23, 2008 and nine members were appointed on July 17, 2008. The Board became fully operational on January 1, 2010.

power to enforce high standards, “replacing the maze of regulators with overlapping powers;”

- 2) the simplification of a complex web of conduits for consumer complaints and lawyer discipline, by establishing a single and fully independent Office for Legal Complaints, “to remove complaints handling from the legal professions and restore consumer confidence;”
- 3) specific authorization for the establishment of alternative business structures by lawyers and non-lawyers together; and
- 4) the articulation of “regulatory objectives” to guide all parts of the system.

The “regulatory objectives” established under the legislation demonstrate the confidence of English lawmakers that exclusive self-governance is not a pre-requisite to the independence of the legal profession. The major concerns of the objectives are protecting and promoting the public interest and consumer welfare, but the independence of the bar is also identified as an important objective. The goal of the new system is to support the constitutional principle of the rule of law and encourage independent, strong, diverse and effective legal professions.

The regulation of lawyers in Australia first came under attack in the 1980s and led to far greater government involvement in the regulation of the legal profession.⁸⁸ In the state of Victoria, decades of criticism about the handling of public complaints against lawyers led the government to impose a co-regulation complaints regime in 1997. The new regime shared the investigation of complaints between the government’s ombudsman and the lawyers’ professional bodies. But in July 2003, after highly publicized clashes between the ombudsman and the Law Institute of Victoria (the solicitors’ governing body), a new independent board took control of the regulation of lawyers. A Legal Services Commissioner was also appointed to oversee complaints investigations.⁸⁹

In Queensland, the state ombudsman looked into the doubling of complaints against lawyers between 2001 and 2002 and found many allegations of gross over-billing and fraud. He concluded the law society was nothing “but a post box” that received complaints, forwarded them to the impugned lawyer, and then sent back the lawyer’s response to the

⁸⁸ Law Council of Australia, *Submissions to the Standing Committee of the Attorneys-General: Towards National Practice* (2001) at 4.

⁸⁹ *Legal Profession Act 2004* (Vic).

complainant. In 2004, both Queensland and New South Wales created the position of Legal Services Commissioner to take the job of complaints away from the legal profession. The Tasmanian government went further and stripped its law society of not only the right to investigate complaints, but also the responsibility for issuing practice certificates, supervising trust accounts and developing practice rules.

The traumatic changes that took place in England and Australia can be seen as a “perfect storm” that forced governments to act, but this interpretation fails to appreciate the context in which the events arose. For a sustained period of time, legal professions around the common law world had been the subject of consumer complaints combined with pressure for greater accountability and “broader conceptions about modes of delivery.” Rather than respond positively to demands for freer trade, consumer protection and the reduction of anti-competitive restrictions, the legal professions answered with the uncompromising rhetoric of “core values and independence.”⁹⁰ As a result, privileges taken for granted were taken away.

7. *Canada Reacts – Too Little, Too Late?*

The developments in England, Australia and elsewhere in the Commonwealth were initially greeted with consternation by Canadian lawyers.⁹¹ As time passed, however, the fear that similar steps would be immediately taken in Canada subsided. Nevertheless concerns continue to be expressed that the regulatory sea changes happening elsewhere might eventually wash up on Canadian shores.⁹² Those who advocate the superiority of the Canadian regulatory model insist it has survived because of a fundamental difference between it and the models found wanting elsewhere. In other jurisdictions, law societies (for solicitors) and bar councils (for barristers) had dual regulatory and representative roles. They served both to regulate and to promote the interests of their profession. In Canada, separate organizations represent the interests of the profession (the Canadian Bar Association and trial lawyers’ associations) and the public interest (law societies).⁹³

⁹⁰ Paton, *supra* note 76 at 89.

⁹¹ Lee Akazaki, “The End of Law Societies?” (2010) 35:6 Briefly Speaking 6.

⁹² See e.g. Paul D Paton, “Self-regulation takes a beating abroad — is Canada different?” (2008) Lawyers Weekly, online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=732>>; Thomas Conway, “Conference: contemplating changes to regulation”, *Law Society Gazette*, online: <<http://www.lawsocietygazette.ca/treasurers-blog/contemplating-changes-regulation>>.

⁹³ Malcolm Mercer, “Interesting Things Happening in a Small Country – Self-Regulation and Principled Pragmatism” *Slaw Magazine* (2014), online: <<http://www.slaw.ca/2014/10/13>>.

Despite developments overseas and a number of embarrassing public scandals at home, political appetite to introduce a new regulatory regime for the legal profession has been lacking in Canada. Some law societies have wisely adopted modest pro-active reforms designed to show they are not adverse to change, as long as the change does not fundamentally threaten their self-governing status.⁹⁴ While foreign jurisdictions took significant self-governing authority away from their legal professions, Canadian provinces and territories continue to promote the concept as the best way to regulate the changing legal environment. In 1998 Ontario's *LSA*⁹⁵ was amended to grant the LSUC authority to regulate multidisciplinary practices involving legal services.⁹⁶ Eight years later, the *Access to Justice Act*⁹⁷ granted the LSUC responsibility for regulating paralegals. This responsibility was granted notwithstanding a contrary recommendation by the Hon Peter Cory, a highly respected former Justice of the Supreme Court of Canada.⁹⁸ Cory pointed out the consumer benefits that would flow from increased competition in the legal services marketplace by qualified and lower priced paralegals.

The *LSA* was again amended on December 10, 2013. Compared with the measures taken elsewhere to strip law societies and bar councils of their disciplinary power in the interests of public confidence, the changes made in Ontario were minor alterations to the *status quo*. One of the goals of the amendments is to strengthen the hearing and appeals process for alleged cases of professional misconduct by making them "more transparent, fair and cost-effective."⁹⁹ The amendments do this by creating a new "independent" body called the Law Society Tribunal within the LSUC. It is comprised of a hearing panel and appeals division. In its *Hearing Process Report*,¹⁰⁰ the LSUC's Tribunals Committee stressed the new tribunal will provide a fair process to address regulatory conduct, capacity and competence issues. While recognizing the independence of

⁹⁴ Richard Devlin and Albert Cheng, "Re-calibrating, Re-visioning and Re-thinking Self-regulation in Canada" (2010) 17:3 Int'l J Legal Prof 233 at 234.

⁹⁵ *Supra* note 49.

⁹⁶ The Law Society of Upper Canada, *Rules of Professional Conduct*, r 6.

⁹⁷ SO 2006, c21, sched c.

⁹⁸ Peter Cory, *An Analysis of a Framework for Regulation Paralegal Practice in Ontario* (2000), online: Law Society of Upper Canada <<http://www.lsuc.on.ca/media/analysiscorysreport.pdf>>.

⁹⁹ Thomas G Conway, Treasurer of the LSUC in "Bill 'modernizes' regulation of Ontario's legal profession" *Canadian Lawyer & Law Times* (11 December 2013), online: Canadian Lawyer Magazine <<http://www.canadianlawyermag.com/legalfeeds/date/2013/12/11.html>>.

¹⁰⁰ Tribunals Committee, *Hearing Process Report* (Law Society of Upper Canada) at 130-31.

the tribunal would be essential to its effectiveness, the Committee stated that this would be “best fostered, enhanced and implemented” through the appointment of a non-bencher full-time lawyer as a chair. Whether this will increase public confidence in the process remains to be seen.

The primary governance responsibilities of Canadian law societies are to 1) prescribe qualifications for membership; 2) provide initial professional education to membership candidates and continuing legal education to members; 3) determine whether candidates for membership have met the requirements for membership; 4) set practice standards; 5) administer compensation funds and professional liability insurance plans; and 6) handle complaints against lawyers. It is not surprising that the public is skeptical of the ability of a governing body of professional legal service providers to develop and implement policy protecting the consumers of legal services. Many sole practitioners and small firm lawyers are themselves skeptical of the ability of their governing bodies to avoid “capture” by large national and multi-national firms. These firms provide legal services almost exclusively to corporate clients and it must be difficult for benchers drawn from their ranks to appreciate the perspectives of members of the public with more basic needs. The campaign literature circulated during bencher elections is telling. Few candidates address ways in which the public interest can be better protected by the law society. Appeals to the interests of the legal profession predominate.

The key to a law society that enjoys greater public confidence is a restructured law society in which there is a greater public voice. This does not mean the law society need be or should be controlled by government. Lawyerly independence from government and other external influences is as important now as it has ever been. Clients are constitutionally entitled to independent legal representation, but as Sir David Clementi recognized, independence is not necessarily dependant on organizational structure.

There is little evidence of significant public opposition to law societies determining the entry and practice standards of the profession. There is also little public criticism of the law society’s initial and continuing legal education mandate, its responsibility for law office trust accounts, and its role in bar insurance plans. While experts have noted it is “somewhat unusual” for a Canadian independent administrative agency to have rulemaking authority,¹⁰¹ this authority has been in the hands of law societies for many years. What requires closer examination is the ability of law societies to facilitate access to justice in the public interest and to

¹⁰¹ Deborah L Rhode and Alice Woolley, “Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada” (2012) 80 *Fordham L Rev.*

maintain and advance the cause of justice and the rule of law in the context of disciplinary proceedings.

8. *Unmet Needs and a Crisis in Public Confidence*

The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to service.¹⁰²

Legal services regulation is necessary to protect the public but a cogent argument can be made that the present form of North America's "Cadillac" regulation model impedes public access to justice. The cost of obtaining a law degree, a licence to practice, mandatory insurance and continuing legal education are all built into the fees charged to the consumers of legal services. As a result, upwards to 80 per cent of all legal needs which low- and middle-income Americans experience is confronted without the assistance of a legal professional.¹⁰³ There is no reason to believe that the situation is significantly different in Canada. The primary reason for this unmet legal need is the cost of lawyers.¹⁰⁴ The average hourly rate for Canadian lawyers in firms of less than five is between \$256 and \$350 per hour, depending on seniority.¹⁰⁵ But once a case goes to litigation, it becomes cost-prohibitive for all but high-income individuals. In short, lack of access to affordable legal services is a major part of Canada's access to justice problem. People also lack legal services they do not like the legal services available in the market or do not appreciate the legal dimensions of their life experiences.¹⁰⁶

Holding the legal profession responsible for facilitating access to justice has not produced innovative and bold steps to restructure legal service delivery models. Noel Semple suggests it is a distinctive feature of Anglo-North American legal service regulation that lawyers are insulated from non-lawyer influences. Greater use of paralegals,¹⁰⁷ fee-sharing or

¹⁰² Chief Justice Beverly McLachlin, "The Challenges We Face" (Presented at the Empire Club of Canada, 8 March 2007), online: Supreme Court of Canada <<http://www.scc.csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-en.aspx>>.

¹⁰³ Herbert M Kritzer, "Examining the Real Demand for Legal Services" (2010) 37 *Fordham Urb LJ* 255.

¹⁰⁴ Noel Semple, "Access to Justice: Is Legal Service Regulation Blocking the Path?" (30 July 2013), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303987> [Semple, "Legal Service Regulation"]. Semple notes some people believe they can obtain a better outcome without a lawyer. There are also people who avoid hiring lawyers simply because they do not like or trust them.

¹⁰⁵ Robert Todd, "The Going Rate" (2012) *Canadian Lawyer*.

¹⁰⁶ Semple, "Legal Service Regulation," *supra* note 104.

¹⁰⁷ Semple suggests that paralegals have been blocked from family law work they would be qualified to perform because of resistance from the family law bar. Lawyers in

other arrangements to reduce the cost of legal services are frustrated because of the reluctance of the legal profession to share its work with non-lawyers. Alternative Business Structures (ABS)¹⁰⁸ that see lawyers working with non-lawyers to provide comprehensive “consumer-friendly” services are a legal services delivery innovation that the legal profession in Ontario has not welcomed with open arms.

As the demand for ABSs advanced across the common law world, similar arguments were made for and against the concept. Its supporters insist it is in the public interest because competition is good and monopoly is bad in a liberal and democratic society. This basic premise rests on a number of economic rationales.¹⁰⁹ At their heart is the proposition that legal business structures beyond the traditional model generate price competition and, consequently, reduce the cost of legal services. They are also conducive to improved consumer convenience and timeliness. The arguments mounted by the legal profession against ABSs are fundamentally based on the “core values of the profession,” including independence, self-regulation, loyalty, and the avoidance of conflicts of interest.¹¹⁰

The outcome of the ABS debate has profound implications for lawyerly self-regulation. Paul Paton persuasively argues that if only lawyers can offer legal services then the case for regulation of lawyers by lawyers is easier to defend. If non-lawyers are involved in the delivery of legal services, it is no longer obvious that self-regulation is the only defensible governance regime. Soon after its creation, the English LSB sought input on how it should structure the licensing process to allow lawyers to practice in ABSs owned and controlled by non-lawyers. The

Ontario who provide certificates of title for the purpose of real estate title insurance are prohibited by regulation from being employed by the insurance company; see *Title Insurance Licences O 69/07*, Regulation Pursuant to the *Insurance Act* RSO 1990, c 18. Paton has criticized this as an effort to protect real estate lawyers from competition; see Paul D Paton, *A Review of the Law Society Act, Regulation 666 and the Commercial Activities of the Law Society of Upper Canada*, (Kingston, Ontario: First Canadian Title, 2007).

¹⁰⁸ ABSs deliver legal services to the public though means other than the traditional lawyer owned practice that provides only legal services. This can include multidisciplinary practices (MDPs), which provide legal and other professional services, law firms owned by or receiving investment from non-lawyers, or companies that provide basic legal services in non-traditional ways, such as in grocery stores (*Tesco* in England and recently *Wal-Mart* in Canada).

¹⁰⁹ Richard Devlin and Ora Morison, “Ethics and Politics of Alternative Business Structures” (2012) 91:3 *Can Bar Rev* 483 at 494.

¹¹⁰ Paul D Paton, “Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America” (2010) 78 *Fordham L Rev* 2193 at 2202.

LSB argued that “the potential benefits to consumers from a liberalised legal services market-place include better value, improved information, increased choice, greater innovation, more flexible service delivery and new service combinations”.¹¹¹

In response to the adoption of ABSs elsewhere, the LSUC established a “Futures” Task Force in 1997 to consider the economic circumstances of the legal profession and the needs of the legal services marketplace. The related Multi-Disciplinary Practice (MDP) issue formed part of its deliberations. The Task Force noted that the public interest benefits of allowing lawyers to practice with other professionals included increased consumer convenience and increased competitiveness. But much of the discussion about MDPs focused on the professional interest of lawyers rather than other professions (e.g. accountants) to control MDPs. The Final Report of the Task Force attributed the push for MDPs primarily to “the Big Five” accounting firms and recommended MDPs controlled by lawyers and limited to offering only legal services. This led to few MDPs coming to Ontario. They have not significantly increased access to justice in the province.

In September 2012 the LSUC established a “Working Group on ABSs” to review whether new service models in other jurisdictions could improve the delivery of legal services in Ontario while protecting clients and the public interest.¹¹² In a comprehensive article on the likelihood that ABSs will become part of the solution to Ontario’s access to justice crisis, Richard Devlin and Ora Morison conclude that ABSs are likely to be permitted in Canada in the foreseeable future, but they caution that the challenge will be for Canada’s law societies to develop appropriate regulatory mechanisms to ensure that ABSs “do not solely benefit the commercial interests of lawyers and other entrepreneurs.”¹¹³

In discharging its disciplinary responsibilities, law societies are statutorily required to advance the cause of justice and the rule of law. But a fundamental problem they encounter in doing this is that the Society’s discipline process involves lawyers judging lawyers. This presents at least an appearance of conflict of interest in the eyes of the public. When

¹¹¹ Legal Services Board, *Wider Access, Better Value, Strong Protection* (London: Legal Services Board, 2009) at 19.

¹¹² The Law Society of Upper Canada, “Professional Regulation Committee: Report to Convocation” (27 June 2013) at 426, online: Law Society of Upper Canada. <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147495044>>.

¹¹³ Devlin and Morison, *supra* note 109 at 553; Malcolm Mercer, “Utopia, Dystopia and Alternative Business Structures” (November 2013) *Slaw* online: <<http://slaw.ca/2013/11/11/utopia-dystopia-and-alternative-business-structures>>.

Ontario recognized the problem of appearances of conflict of interest in the context of police investigating police, it created an all-civilian Special Investigation Unit (SIU) to investigate incidents where the police are involved in causing death or serious injury in the execution of their duty.

In *Wood v Shaeffer*¹¹⁴ the Supreme Court of Canada observed that the SIU was a legislative response to public inquiries and task force reports urging reform of the old approach of “police investigating police.” This approach did not satisfy the public demand for impartiality. Consequently, the legislature created the SIU to “maintain public confidence in the police and the justice system as a whole.” The Supreme Court emphasized the importance of an independent and transparent investigation to maintain public trust. Whether or not police investigations prior to the creation of the SIU were actually biased, the public did not perceive them to be impartial. Appearances matter; “justice should not only be done, but should manifestly and undoubtedly be seen to be done.”¹¹⁵ Law Society discipline processes involve an “old approach” – lawyers judging lawyers. They are not conducive to the appearance of impartiality and the building of public confidence.

Another fundamental problem with the LSUC’s discipline regime is that it does not apply to all components of the modern legal community. The ways in which legal services are delivered in the twenty-first century bear no resemblance to how they were delivered by single practitioners in the nineteenth century. But the LSUC continues to regulate individual lawyers and not law firms. In a recent article¹¹⁶ Adam Dodek identifies multiple reasons why law societies should regulate law firms. He considers the absence of law firm regulation the Achilles’ heel of self-regulation because it strikes at the heart of public confidence in self-regulation and respect for the rule of law.¹¹⁷ Dodek notes that concern about the lack of large firm regulatory oversight is not hypothetical.¹¹⁸

While Dodek proposes law society regulation over law firms as a means of improving public confidence in self-regulation, other critics point to fundamental flaws in the discipline process as reason to question the

¹¹⁴ 2013 SCC 71, [2013] 3 SCR 1053.

¹¹⁵ *McCarthy*, *supra* note 19 at 259.

¹¹⁶ Adam M Dodek, “Regulating Law Firms in Canada” (2011) 90 Can Bar Rev 381.

¹¹⁷ *Ibid* at 438. Nova Scotia and Alberta have a number of provisions recognizing the law firm as a relevant party in the regulation of lawyers.

¹¹⁸ *Ibid* at 391. Examples Dodek refers to include Lang Michener; Blake Cassels Graydon; McCarthy Tetrault; Davis & Company; Borden Ladner Gervais; and Buchwald Asper Henteleff.

very concept of lawyerly self-regulation. In a seminal article,¹¹⁹ Harry Arthurs argues that disciplinary attention is usually focused on marginal members of the profession who have engaged in obviously immoral conduct or violated the regulatory requirements imposed by the law society. Since the current disciplinary process is paid for and beholden to the legal profession, it is underfunded and understaffed. It operates reactively on the basis of complaints, rather than actively seeking out problematic behaviour before it is too late. While the process permits spot audits and the commencing of an investigation without a complaint, this is not standard operating procedure.

Other critics of law society discipline process stress that most lawyers who get disbarred are guilty of misappropriation of client funds or other obvious wrongdoing, while few are disciplined for incompetence or ambiguous types of professional misconduct. Lawyers in solo practice or small partnerships run afoul of their law society more frequently than lawyers in large firms. This may be because they engage in high-risk practices without the support and control offered by a large firm or, more disconcertingly, because professional status influences investigative decisions. Woolley points out that in 2009 most lawyers brought before the law society practiced alone or in a firm of fewer than ten lawyers.¹²⁰

The most recent controversy embroiling Ontario's disciplinary process involves an alleged lack of referrals to the police when the Law Society encounters evidence of criminal conduct by one of its members. In a three-part series¹²¹ the *Toronto Star* analysed every discipline case involving a lawyer sanctioned by the LSUC between 2003 and 2013 and divided the cases into categories reflecting criminal terminology (theft, fraud, breach of trust, and so on). This led the newspaper to conclude that 236 cases involved criminal conduct. The newspaper then made extensive attempts to determine how many of these cases resulted in lawyers facing criminal charges and found charges for 41 of the lawyers disciplined by the Law Society – fewer than one in five. Of these, reports of jail sentences were only found for 12.

¹¹⁹ Arthurs, *supra* note 59.

¹²⁰ Alice Woolley, "Regulation in Practice: The 'Ethical Economy' of Lawyer Regulation in Canada and a Case Study in Lawyer Deviance" (2012) 15:2 *Legal Ethics* 243.

¹²¹ Kenyon Wallace, Rachel Mendleson and Dale Brazao, "Broken Trust" *Toronto Star* (5 May 2014) 12. For the LSUC's rejoinder to the *Star*'s "unbalanced and misleading" coverage see "For the Record: Toronto Star Coverage", online: Law Society of Upper Canada <www.lsuc.on.ca/with.aspx?id=2147498667>.

These statistics are yet another blow to public confidence in the discipline process. They perpetuate common prejudices against the profession and stoke suspicion that the rule of law does not apply to lawyers. In response to the articles, the LSUC pointed out that its process is directed at discipline breaches and not criminal conduct. Moreover, it opined that it cannot report suspected criminal conduct to the police because of section 49.12 of the *LSA*, which states:

49.12 (1) A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

This section was amended in 1998 to permit disclosure if there are reasonable grounds for believing that if it is not made, there is a significant risk of harm to the person who was the subject of the audit, investigation, review, search, seizure or proceeding or to another person, and making the disclosure is likely to reduce the risk.¹²² The LSUC remains of the view that because solicitor/client privilege is sacrosanct it cannot report members of the Society to law enforcement agencies. As the newspaper points out, however, law societies in a number of other provinces can report evidence of suspected criminal conduct by their members to the police. In Nova Scotia, for example, the *Legal Profession Act*¹²³ provides that the Barristers' Society may disclose to law enforcement authorities any information about possible criminal activity on the part of a member of the Society obtained during an investigation. If the LSUC is correct and the legislature has placed the Society in a reporting straitjacket, the blame rests with the legislature and not the Society, but many members of the public will fall back to their default position and "blame the lawyers."

The critics of the current law society discipline processes argue that they are badly in need of reform for numerous other reasons. They fail to effectively respond to the issues of greatest concern to the public, such as overbilling and negligence, and focus on the profession's "outliers," of which uncivil advocates may be an example. While the processes are defended on the basis that only lawyers have the knowledge required to assess the conduct of other lawyers, the actual cases brought forward for hearing are usually straightforward and do not involve technical legal issues.

¹²² 1998, c 21, s 21; 2006, c 21, Sched C, s 47. The section was also amended to allow the Society to apply to the Superior Court of Justice for an order authorizing the disclosure to a public authority of any information that a bencher, officer, employee, agent or representative of the Society would otherwise be prohibited from disclosing.

¹²³ SNS 2004, c 28.

Contrary to Monnin CJM's assertion in *Law Society of Manitoba v Salvino*,¹²⁴ legislatures throughout the common law world have recently found it neither "ridiculous" nor "lacking in common sense" for an independent body to hear and dispose of complaints of professional misconduct. They concluded that the public does not have confidence in a regulatory system where lawyers judge lawyers. The English *Legal Services Act 2007* created a Legal Services Consumer Panel as an independent arm of the LSB. It is made up of eight lay members approved by the Lord Chancellor. The panel started work on November 1, 2009.

Critics of current discipline processes claim they are primarily about public relations. Arthurs argues that it "reflects a tendency to allocate scarce resources of staff time, public credibility and internal political consensus to those disciplinary problems with the least risk of adverse consequences." He asserts law society discipline is symbolic, ideological and creates the appearance of responsibility and accountability, but not the reality. Professional culture is not determined, he concludes, by self-regulation but by three crucial factors: 1) the personal characteristics of the lawyer; 2) the professional circumstances of his or her practice; and 3) the "ethical economy" of the profession.¹²⁵

9. Conclusion

Lawyers in other common law jurisdictions complacently stood by in the face of public and government demands for change. It was not an effective strategy. Far-reaching reforms abolishing lawyerly self-regulation and establishing disciplinary procedures independent of the legal profession were the result. This was done to place checks on professional self-interest and respond to consumer concerns. Public demands for similar reform to provincial and territorial self-governing regulatory regimes in Canada may only be a matter of time.¹²⁶

International experience suggests lawyers can maintain the most important aspects of their independence without self-governing regulatory status. Independence is an ethical issue based on compulsory adherence to professional values and principles. The primary question the legislature must ask in deciding the best regulatory regime for the legal profession is, what regime will best serve the public interest? The public interest may best be served by law societies continuing to govern a number of important regulatory functions, while another agency independent of the legal

¹²⁴ *Supra* note 64.

¹²⁵ Arthurs, *supra* note 60.

¹²⁶ Canadian Bar Association Legal Futures Initiatives, *The Future of Legal Services in Canada: Trends and Issues* (Ottawa: Canadian Bar Association, 2013).

profession and government addresses issues relating to access to justice and discipline complaints against lawyers. These are the areas where perceptions of independence from regulatory self-interest and the presence of transparent adjudicative impartiality are crucial to maintaining public confidence in the legal profession and the administration of justice.