

Between a Rock and a Hard Place: The Future of Self-Regulation—Canada between the United States and the English/Australian Experience

Paul D. Paton*

Introduction—Self-Regulation and the Public Interest across Borders

Professional self-regulation is a remarkable privilege, as well as an enormous conceit. In the conventional sense, three deceptively simple elements are key to the concept of self-regulation: setting standards, monitoring compliance with standards, and instituting mechanisms for enforcing standards.¹ For the legal profession in the province of Ontario, Canada, as well as for its counterparts in the United States, England and Australia, self-regulation has moved well beyond this functional conception and is instead closely linked to the preservation of independence of the bar, as part of the “self-conscious ambition of the legal profession to act as a bulwark against both public and private tyranny.”² It has also been described as a key component of the bar’s service as an “institutional safeguard lying between the ordinary citizen and the power of government.”³ The Preamble to the American Bar Association’s Model Rules of Professional Conduct, for example, identifies self-regulation as helping to “maintain the legal profession’s independence from government domination” and thus to preserving government under the rule of

*Associate Professor, University of the Pacific McGeorge School of Law, formerly Assistant Professor, Faculty of Law, Queen's University. I acknowledge with thanks the research assistance of Yashoda Ranganathan, Queen's Law '08, comments from Prof. Laurel Terry, and tremendous editorial support from Art Garwin.

1. Christine Parker, Colin Scott, Nicola Lacey & John Braithwaite, *Introduction* in Christine Parker et al., *REGULATING LAW* 1, 1-12 (Oxford University Press 2004); *see also* J. Black, *Critical Reflections on Regulation* 27 *AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY* 1 (2002); J. Black, *Decentering Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulating World*, 54 *CURRENT LEGAL PROBLEMS* 103 (2001); *see also* Anthony Ogus, *Rethinking Self-Regulation*, 15 *OXFORD J. LEGAL STUDIES* 97 (1995).

2. Roderick A. Macdonald, *Let Our Future Not Be Behind Us: The Legal Profession in Changing Times*, 64 *SASK. L. REV.* 1 (2001).

3. David W. Scott, QC, *Law Society of Upper Canada Report to Convocation of the Futures Task Force Working Group on Multi-Discipline Partnerships*, September 1998; *see also* Chief Justice of Ontario Advisory Committee on Professionalism Working Group on the Definition of Professionalism, *Defining Professionalism* in Law Society of Upper Canada, *Professionalism: A Century of Perspectives*, *THE GAZETTE* 29, 33 (2002).

law. In addition, self-regulation provides protection for individuals engaging with the justice system, “for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”⁴ This “relative autonomy” of the profession carries with it responsibility for ensuring that regulations are created in light of the public interest and not simply to further the bar’s self-interest alone.

As Robert Gordon has noted, resistance by the Bar to regulation from outside the profession “has usually been based [...] on the claim that external controls are likely to disrupt professional/client relations by undermining their basis of trust and authority and unduly interfere with the professional’s capacity for independent decision making.”⁵ Despite the important values underlying self-regulation, the assertion of such claims by the legal profession ought not to simply immunize the profession from scrutiny of its exercise of self-regulatory authority. Nor should it shelter the profession from consideration of whether that self-regulation should continue. The key question is whether the public interest is best served by continued self-regulation of the legal profession, and whether freedom from external accountability simply “serves the profession at the expense of the public.”⁶

The story unfolding in Ontario, following recent dramatic changes to regulation of the legal profession in both England and Australia, sends important signals and challenges to American lawyers and others concerned about increasing encroachment upon traditional self-regulatory authority of the bar in the name of the “public interest.” In many respects, recent developments in England and Australia serve as talismans for the future of self-regulation of the legal profession in Ontario. In England, more than a decade of discussion and debate resulted in legislation adopted on October 30, 2007, removing the authority of the traditional self-regulatory professional bodies.⁷ In Australia, concerns over the rights of consumers and regulation in the public interest have led to the effective end

4. MODEL RULES OF PROF’L CONDUCT PREAMBLE [11] (ABA 2007).

5. Robert W. Gordon, *Can Lawyers’ Professional Values Be Saved? Are They Worth Saving?* cited in Chief Justice of Ontario Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, *Elements of Professionalism* (October 2001), available at <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf> [last accessed January 16, 2008]; see also Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 STAN. L. REV. 1427 (2002); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

6. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 143 (Oxford Univ. Press 2000).

7. The *Legal Services Bill* was introduced on 24 May 2006, available at <http://www.official-documents.gov.uk/document/cm68/6839/6839.pdf> [last accessed January 16, 2008]; after a tortured journey through the House of Commons and the House of Lords it was finally passed as the *Legal Services Act 2007* on 30 October 2007: *Legal Services Act 2007* c. 29 (U.K.), available at http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf; also <http://www.justice.gov.uk/publications/legal-servicesbill.htm>; http://www.publications.parliament.uk/pa/pabills/200607/legal_services.htm [last accessed January 16, 2008]. See also the history detailed in Judith L. Maute, *Revolutionary Changes to the English Legal Profession or Much Ado about Nothing?* 17(4) THE PROFESSIONAL LAWYER 1 (2006) [hereinafter Maute].

of lawyer self-regulation, replaced by a co-regulatory system that institutes a series of more independent disciplinary agencies and that separates regulatory from representative functions. The American experience in the aftermath of *Sarbanes-Oxley* and the fight over the implementation of Section 307 also sends ominous signals to Canadian lawyers about the possible replacement of self-regulation with regulation of lawyer conduct by government agency.⁸

English and Australian models, as well as American ones, have a potentially important influence on Canada, as Canadian legislators, regulators and judges look to international precedent and comparative examples for guidance and instruction.⁹ In both England and Australia, scandals over the lack of an appropriate Law Society or Bar response to consumer complaints, combined with pressure for greater accountability and broader conceptions about modes of delivery for legal services provision, freer trade and consumer protection led to moves designed both to separate standard setting from disciplinary functions, and to reduce or remove anticompetitive restrictions cloaked in the rhetoric of “core values” and “independence of the profession.” In the United States, greater concern for accountability and transparency in corporate governance, as well as the perception that the Bar had failed to act to protect the consumer interest, animated Congress to direct the Securities and Exchange Commission to enact rules for lawyers practicing before the Commission. In all three, it took a confluence of forces and events—scandal, strong political leadership, and intense public scrutiny of lawyer conduct—to produce dramatic change.

In light of these developments, the key to preserving self-regulation by and for the legal profession appears to lie in a broader conception of service in the public interest, and in a recasting of the roles to be played by other regulatory bodies

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Detailed considerations of Section 307 include Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299 (2004); Roger C. Cramton, George M. Cohen, & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004) [hereinafter Cramton et al., *Legal and Ethical Duties of Lawyers*]; A. P. Carlton, *Letter re: Implementation of Standards of Professional Conduct for Attorneys*, Dec. 18, 2002, available at <http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm> at 12 [ABA Submission]; Richard Painter, *Re: Proposed Rules pursuant to Section 307 of the Sarbanes-Oxley Act of 2002 under File Number 33-8150.wp*, Dec. 12, 2002, available at <http://www.sec.gov/rules/proposed/s74502/rwpainter1.htm>; William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947 (2005) [hereinafter Simon, *Introduction*]; and Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005).

9. For a discussion of the importance of international examples in Canadian jurisprudence and Canadian legal thinking, see Anne Warner LaForest, *Domestic Application of International Law in Charter Cases: Are We There Yet?*, 37 U.B.C. L. REV. 157 (2004); Stephen J. Toope, *Canada and International Law*, 27 PROCEEDINGS OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 33, 35-36 (1998); and Stephen J. Toope, *The Use of Metaphor: International Law and the Supreme Court*, (2001) CAN. BAR. REV. 534; Ed Morgan, *In the Penal Colony: Internationalism and the Canadian Constitution*, 49 U.Toronto L.J. 447 (1999). See also the recent Supreme Court discussion in *R. v. Hape*, [2007] S.C.J. No. 26 (June 7, 2007).

or agencies in conjunction with self-regulatory bodies. In that respect, situating the Canadian experience between the American and the English/Australian ones provides both important lessons and an opportunity to begin openly and willingly engaging in meaningful scrutiny leading to collaborative reform.

After providing a brief summary of developments in England, in Australia and in the United States, this article proceeds to describe the present regulatory structure of the legal profession in Ontario. It also briefly reviews the response of the Law Society of Upper Canada, the body responsible for regulation of the legal profession in the province, to two particular challenges during the period 1998-2006. These serve to illustrate where the legal profession can do better, and more, to both protect the public interest and to preserve its self-regulatory autonomy.¹⁰ In the end, juxtaposing developments in Canada against the experience of the legal profession elsewhere can help in assessing signals about the future, in responding to questions about whether the privilege of self-regulation is threatened, and in discerning how the profession globally might retain what it considers to be a critical part of its independent identity.

The Canadian Experience in International Context—An Introduction

Recent developments in England and Australia, as well as in the United States, have all been seen in Canada as indicators of governments becoming “less inclined to bow to lawyers’ traditional role as governors of their own profession.”¹¹ This section introduces these signposts and changes as markers against which recent Canadian experience can be evaluated.

In 1998, amendment of the *Law Society Act*¹² by the Ontario provincial government granted the Law Society of Upper Canada specific responsibility for regulating multidisciplinary practices that involve legal services.¹³ The next significant amendment to the *Law Society Act* came in October 2006, when the government’s *Access to Justice Act* further broadened the self-regulatory authority of the Law Society by granting the Law Society responsibility for regulating paralegals in the

10. These three cases have been explored at greater length in Paul D. Paton, *Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era*, 84(3) CANADIAN BAR REVIEW [Special Edition on Ethics] 531 (2005); Paul D. Paton, *What Happens After ‘Happily Ever After’? Regulatory Resistance and Rule-Making after Canadian and American Bar Association Resolutions on Multidisciplinary Practice*, 36(2) UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW 259 (2003); Paul D. Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 NEW ENG. J. INT’L & COMP. L. 361 (2003).

11. Janice Mucalov, *Walking the tightrope*, 13(6) CBA NATIONAL (October 2004) 16, 17.

12. *Law Society Act*, R.S.O. 1990 c. L-8 (1990), as amended.

13. The Law Society of Upper Canada is generally hereinafter referred to as the Law Society of Upper Canada or the “Law Society.” Specific reference will be made in full to the Law Societies that govern other jurisdictions (e.g., the Law Society of British Columbia or the Law Society of England and Wales), as these are separate institutions or organizations.

province.¹⁴ Between those two events, the environment for self-regulation changed fundamentally. Legislators, regulators, and others in Canada and internationally were increasingly focused on the tension between the role of the individual lawyer regarding responsibility to client interests, on the one hand, and as protector of the public interest, on the other.¹⁵ In England, Australia and the United States, this led to dramatic change.

In England, legislation adopted on October 30, 2007 implementing a regulatory model and structures more closely tied to government and removing self-regulatory authority for lawyers included an even more radical step: specific authorization for the establishment of alternative business structures for the delivery of legal services by lawyers and nonlawyers together.¹⁶ The perception that the Law Society of England and Wales, the English profession's primary self-regulatory authority, had abandoned its mandate to regulate the legal profession in the public interest in favor of acting as a lobbying group for lawyers provided the impetus for reform.¹⁷ This followed devastating academic critique years earlier that the profession "did not appear concerned with consumer complaints about lawyers at all."¹⁸ After more than a decade of tumult within the profession and after close examination by both Conservative and Labour governments of the relationship between self-regulatory authority of the legal profession and the public interest, the end result has been a fundamental transformation of the self-regulatory model.¹⁹

In Australia, while co-regulatory systems involving government, the legal profession and the courts had existed for some time, the extent to which government or the legal profession was involved varied significantly from state to state. Recent reforms resulted in far greater government involvement in regulation of the legal profession.²⁰ New legislation in both Queensland and in New South Wales

14. *Access to Justice Act*, S.O. 2006, c.21, Sched. C (2006).

15. See Reiner H. Kraakman, *Gatekeepers: Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1985); also Reiner H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls* 93 YALE L.J. 857 (1984); Bonnie Fish, *Pointing the Finger at Professionals* in Poonam Puri & Jeffrey Larsen, *CORPORATE GOVERNANCE AND SECURITIES REGULATION IN THE 21ST CENTURY* 97, 99-102 (Butterworths 2004); John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW 1403, 1403-05 (2002).

16. See *supra* note 7.

17. Report of the Review of the Regulatory Framework for Legal Services in England and Wales, Final Report (December 2004) ("Clementi Report"), available at <http://www.legal-services-review.org.uk/content/report/index.htm> [last accessed January 16, 2008].

18. CHRISTINE PARKER, *JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE* (OXFORD UNIV. PRESS 1999) at 13-14, citing RICHARD ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (Basil Blackwell 1988).

19. *Legal Services Act*, 2007 (October 30, 2007), *supra* note 7; see also RICHARD ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (Oxford Univ. Press 2004); Richard Abel, *Between Market and State: The Legal Profession in Turmoil*, 52(3) MODERN L. REV. 285 (1989).

20. Law Council of Australia, *Submission to the Standing Committee of the Attorneys-General: Towards National Practice* (October 2001) at 4; see also Law Council of Australia, *Framework*

in 2004 created the position of a Legal Services Commissioner independent from the professional bodies to ensure unbiased disciplinary proceedings in appearance and in fact. Significant curtailment of the Law Society's regulatory authority was the end result, as these changes bifurcated the profession's ability to grant entry from its ability to discipline. This has been interpreted as the effective end of self-regulation, prompted by the failure of the Australian Law Societies to consider and respond to the public interest adequately.²¹

Similar concerns about professional self-regulation have prompted considerable and well-documented change in the United States.²² In the wake of the Enron scandal and other corporate scandals in the United States that led to the adoption of the *Sarbanes-Oxley Act* of 2002, Congress and the Securities and Exchange Commission (SEC) implemented measures to grant direct responsibility to the SEC for the regulation of lawyer conduct for all lawyers "appearing and practicing before the Commission." A series of measures proposed by SEC staff in late 2002, most particularly a proposal that lawyers be obligated to engage in "noisy withdrawal" and report on client misconduct directly to the SEC in certain circumstances, would have transformed the self-regulatory relationship even further. *Sarbanes-Oxley* also marked a fundamental shift in expectations for all professional "gatekeepers" in corporate governance, most notably auditors, and it unceremoniously ended self-regulation of the accounting profession in the United States.²³

It is therefore a curious contrast that the response of the Ontario provincial government thus far has been to further devolve self-regulatory responsibility to the legal profession itself. Still, the Law Society is concerned about the potential for a changed approach in light of these international developments. In the fall of 2007, the head of the Law Society expressed his fears about legislative initiatives that "could encroach on our ability to regulate ourselves."²⁴ He noted that as the

for a National Legal Services Market: National Legal Profession Reforms (September 2005) at 2; and Australia, New South Wales, Law Reform Commission Report 99 (2000)—Complaints Against Lawyers: An Interim Report available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r99toc> [hereinafter Report 99].

21. Brad Wright, *The Indispensable OBA*, BRIEFLY SPEAKING 23 (May-June 2007).

22. See authorities cited in note 8, *supra*. See also *Report of the American Bar Association Task Force on Corporate Responsibility* (2003), available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf; Jonathan D. Glater, *A Legal Uproar Over Proposals to Regulate the Profession*, NEW YORK TIMES (17 December 2002); Stephanie Francis Cahill, *Corporate-Fraud Law Forces Lawyers to be Whistle-Blowers*, 1 No. 29 ABA J. E-Report 1 (2 August 2002); Richard B. Schmitt, *Lawyers Pressed to Report Fraud Under New Law*, WALL STREET JOURNAL, (25 July 2002), B1; Karl A. Groskaufmanis, *Climbing 'Up the Ladder': Corporate Counsel and the SEC's Reporting Requirement for Lawyers*, 89 CORNELL L. REV. 511 (2004).

23. See the discussion of the future of accountant self-regulation in Canada and the United States in Paul D. Paton, *Rethinking the Role of the Auditor: Resolving the Audit/Tax Services Debate*, 32(1) QUEEN'S LAW JOURNAL 135 (2006). In contrast to U.S. developments after Enron, the Canadian accounting profession has maintained its self-regulatory authority and autonomy.

24. Gavin MacKenzie, *Public Perception An Important Issue to the Law Society and Ontario's Lawyers*, ONTARIO LAWYERS' GAZETTE (Fall/Winter 2007) 3 at 5.

practice of law “becomes more diverse and complex, other regulatory organizations are asserting authority over lawyers’ activities,” referring specifically to “incursions on the independence of the American bar through the Sarbanes-Oxley Act, and the loss of self-regulation in England and Wales, as well as in Australia.”²⁵ During April 2007 elections for Law Society benchers (governors elected by and from amongst the profession), two incumbents made specific reference in their candidate statements to concerns about the loss of self-regulatory authority by the legal profession in England and Australia as an election issue. Their naked fears about the loss of self-regulatory authority in Ontario were remarkable given the responsibility the Law Society bears for regulating the legal profession in the *public* interest.²⁶

The fears of the Law Society are well warranted, though, as increasing pressure from other quarters inside and outside Canada shape the debate going forward. On December 11, 2007, the Competition Bureau of Canada released a report on self-regulated professions in Canada, taking direct aim at measures imposed by the legal profession’s self-regulatory bodies that it found contrary to the interests of consumers and the public interest.²⁷ Its report noted that organizations given self-regulating powers “have potentially conflicting concerns and interests—their own and those of the public. This is all the more reason to ensure that competition, from which both professionals and consumers benefit, is protected.”²⁸ While the head of the Law Society criticized the Competition Bureau for adopting a “disappointingly narrow view of the public interest,”²⁹ the Bureau’s plan to review in 2009 how the professions have addressed its recommendations to lessen anti-competitive barriers and to change regulatory approaches means that this is a debate that will not take place within just the Canadian legal profession itself. It will engage government in ways that echo the English, Australian, and American experiences.

Despite differences in regulatory approach, there are a sufficient number of common features to justify comparing developments in these four countries. Self-regulatory models in common law jurisdictions in Canada and Australia evolved from the English model under which, traditionally, a Law Society exercises authority delegated from government and governs admission, standards, conduct and enforcement of professional discipline. This differs from the approach familiar to U.S. lawyers where, under U.S. constitutional doctrine, the courts have inherent and primary regulatory power over lawyers, admission to the Bar is a judicial

25. *Id.*

26. Candidate Statements of William J. Simpson, QC, LSM (former president of the Ontario Bar Association), and Laurie Pawlitza (Chair, Professional Development, Competence and Admissions), available at http://www.lsuc.on.ca/media/bencher_votersguide2007.pdf at 49, 93.

27. Competition Bureau of Canada, “Self-regulated professions—balancing competition and regulation,” (11 December 2007), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html>.

28. *Id.*, at vii.

29. Michael Rappaport, *Competition bureau’s study draws tepid reaction from legal community*, THE LAWYERS’ WEEKLY (11 January 2008) at 18.

function, and members of the Bar are officers of the court.³⁰ However, although the regulation of the profession in the United States differs in structure and form from regulation in Canada, “as a practical matter, American courts have delegated much of their regulatory authority to the organized Bar.”³¹ Questions about the fundamental relationship between regulation of the profession and the public interest are ones engaged deeply across all four jurisdictions. Should government delegate self-regulatory authority to a profession whose response to significant change has been perceived as an effort to retrench? How is the public interest being served? What institutional change is necessary? Will such change threaten or enhance the traditional self-regulatory authority of the legal profession?

Academic experts in the United States, in particular, have critically examined the process and results of self-regulation in the legal profession for nearly twenty-five years.³² In 1989, for example, the American Bar Association tasked its Commission on Evaluation of Disciplinary Enforcement to “provide a model for responsible regulation in the 21st century.”³³ The Commission’s report was released in 1992, the same year as David Wilkins’s touchstone article posited that a system of multiple controls over lawyer regulation—including both disciplinary agency action under the supervision of state supreme courts and regulation by other agency actors—could be both efficient and compatible with a proper understanding of professional independence.³⁴ Others have engaged in critical examination of assumptions of self-regulatory approaches in lawyer regulation in the United States, creating a wealth of scholarship through which to assess the significant functional change that has emerged over the period.³⁵ Much of that change was the

30. See, e.g., *In re Attorney Discipline System*, 967 P.2d 49, 54-55 (Cal. 1998); *In re Application of Lavine*, 41 P.2d 161, 162-63 (Cal. 1935); *State ex rel. Florida Bar v. Murrell* 74 So.2d 221, 224, 226 (Fla. 1954).

31. RHODE, *supra* note 6, at 145.

32. Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 657 (2006).

33. American Bar Association Center on Professional Responsibility, *Lawyer Regulation for a New Century—Report of the Commission on Evaluation of Disciplinary Enforcement*, February 1992 (“McKay Report”), available at http://www.abanet.org/cpr/reports/mckay_report.html [last accessed January 16, 2008].

34. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); see also David B. Wilkins, *Afterword: How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465 (1996).

35. A sampling of considerations of self-regulatory models and structures in the United States generally includes RHODE, *supra* note 6; Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998); Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833 (2001); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio’s Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65 (1999); Benjamin Hoorn Barton, *Why Do We Regulate Lawyers? : An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L. J. 429 (2001); Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25 (1999); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1

result of such scrutiny. In the United States, legislators, administrative agencies, federal courts and malpractice insurance companies have come to play an increasing role in professional governance.³⁶ This transformation has been accompanied by heightened scrutiny of assertions by the American bar to present self-regulation as a societal value, particularly since 1998.³⁷ Indeed, and as but one example, a Yale scholar argued forcefully in 2005 that “whatever value self-regulation may have had historically, the legal profession and clients would benefit from abandoning it for a private contracting model.”³⁸ The impact of responses in the United States is felt well beyond U.S. borders, particularly so for Canadians in an increasingly integrated North American market, though it is with England and Australia that Canada’s legal profession shares a closer heritage.

England and Australia—The End of Self-Regulation?

Reforms in England and Australia have been cast as part of a “global tsunami against self-regulation.”³⁹ Seen as evidence of “widespread rejection of self regulation as a defensible model of governance,” these reforms have been used to justify the prediction that Canada may “soon be the only country in the Commonwealth

(1999); James W. Jones, *Future Structure and Regulation of Law Practice: An Iconoclast’s Perspective*, 44 ARIZ. L. REV. 537 (2002); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829 (2002); Ted Schneyer, *Introduction: The Future Structure and Regulation of Law Practice*, 44 ARIZ. L. REV. 521 (2002); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977 (2003); Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Regulation: Reflections on the LLP Campaign*, 39 S. TEXAS L. REV. 359 (1998); Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747 (2001) [hereinafter Crystal]; Paul R. Tremblay, *Shared Norms, Bad Lawyers and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659 (2002); Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOKLYN L. REV. 931 (1993); Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

36. Rhode, *supra* note 21, at 657; *see also* RHODE, *supra* note 6. Other critical examinations include Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW’S CENTURY 287 (Bryant W. Garth ed., Cornell Univ. Press 2002); Richard L. Abel, AMERICAN LAWYERS 142-157 (Oxford Univ. Press 1989) (in particular Chapter 7—Self-Regulation); *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal System* 4-5 (Robert L. Nelson, Raymond M. Trubek, & Rayman L. Solomon, eds., 1992) (a series of essays on new paradigms for conceiving of professionalism in the U.S. legal profession).

37. RHODE, *supra* note 6, at 143-144; *see also* Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality and Corporate Law Practice*, 54 BUFF. L. REV. 1067 (2007) (commenting on tensions between “high ideals of professionalism, the ideology of libertarianism, and the realities of commercialism in law practice.”).

38. Jonathan Macey, *Occupation Code 54110: Lawyers, Self-Regulation and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1082 (2005).

39. Richard F. Devlin & Porter Heffernan, *The End(s) of Self Regulation*, 43 ALTA. L. REV. (2008) [forthcoming] [hereinafter Devlin & Heffernan].

where the profession remains self-governing.”⁴⁰ At a minimum, developments in England and Australia point towards a separation of the regulatory and disciplinary functions of the legal regulator, and closer ties between government and those bodies responsible for lawyer regulation.

England and Wales

In England, the *Legal Services Act 2007* implements a set of “radical reforms which will see services in the £20 billion legal sector undergo major changes to bring them in line with other professional services in the 21st century.”⁴¹ There are four main components to the legislation. First, the Act establishes a new Legal Services Board (LSB) to serve as a “single, independent and publicly accountable regulator with the power to enforce high standards in the legal sector, replacing the maze of regulators with overlapping powers.”⁴² Second, the Act simplifies a previously complex web of conduits for consumer complaints and lawyer discipline, establishing a single and fully independent Office for Legal Complaints (OLC) “to remove complaints handling from the legal professions and restore consumer confidence.”⁴³ Third, the Act provides specific authorization for the establishment of alternative business structures (ABS) for the delivery of legal services by lawyers and nonlawyers together, a radical shift and to a great degree an amended version of the multidisciplinary practice or MDP model rejected in North America.⁴⁴ Fourth, the Act articulates a set of “regulatory objectives” for the regulation of legal services designed to guide all parts of the system.

Those “regulatory objectives” place consumer welfare and the public interest as preeminent concerns in the first section of the Act, as follows:

- (1) In this Act a reference to the “regulatory objectives” is a reference to the objectives of—
 - a) protecting and promoting the public interest;
 - b) supporting the constitutional principle of the rule of law;
 - c) improving access to justice;
 - d) protecting and promoting the interests of consumers;
 - e) promoting competition in the provision of services [..];
 - f) encouraging an independent, strong, diverse and effective legal profession;

40. *Id.* at 23, 27.

41. *Legal Services Act 2007*, *supra* note 7; Department of Justice (U.K.), *Legal Services Act given royal assent*, Oct. 30, 2007, available at <http://www.justice.gov.uk/news/newsrelease301007a.htm> [hereinafter *Legal Services Act Press Release*].

42. *Id.*

43. *Id.*

44. See Maute, *supra* note 7. A comparative history of the multidisciplinary practice debate in Canada and the United States is found in Paton, *What Happens After Happily Ever After?*, *supra* note 10. In July 2000, the ABA House of Delegates approved Resolution 10-F rejecting any nonlawyer ownership of a multidisciplinary practice offering legal services, or any sharing of fees with nonlawyers: available at <http://www.abanet.org/cpr/mdp/mdprecom10f.html>.

- g) increasing public understanding of the citizen's legal rights and duties;
- h) promoting and maintaining adherence to the professional principles [defined in section 1(3) of the Act].

The Act is thus revolutionary in both approach and substance, replacing a regulatory framework for legal services in England and Wales that a Parliamentary report concluded in 2003 was “outdated, inflexible, over-complex and insufficiently accountable or transparent.”⁴⁵ While the three substantive elements—OLC, LSB and ASB—merit particular attention as possible templates for reform, the history of deliberations leading up to the adoption of the Act is of equal importance: it confirms that government will and can step in to end self-regulation of the legal profession when the legal profession no longer exercises that self-regulatory authority to serve the public interest.

The process immediately leading up to the Act began in March 2001. The Office of Fair Trading (OFT) published a report by the Director General of Fair Trading following a review of restrictions on competition in professions.⁴⁶ The OFT report concluded that many of the restrictions on the provision of legal services were not justified by professional rules but were essentially anti-competitive in nature. On multidisciplinary practices, for example, the OFT concluded that rules preventing the establishment of fully integrated MDPs restricted competition and failed to serve the consumer interest.⁴⁷ The OFT recommended that competition law apply to all professions in the interest of consumers of those services. The OFT then allowed a one year period after the release of its report in which the professions could take action to remedy the restrictions set out in its report.

On July 30, 2002, the Department of Constitutional Affairs published a consultation paper entitled “In the Public Interest?” as its response to the OFT report.⁴⁸ The government announced that in addition to ensuring that the professions were properly subject to competition, it had decided to undertake a more fulsome review of the regulatory framework for legal services. It noted that the review was required because of the “changing nature of the legal services market” and because the “complex and fragmented” regulatory framework did not “always deliver to

45. Department of Constitutional Affairs (U.K.), *Competition and Regulation in the Legal Services Market*, July 2003, available at <http://www.dca.gov.uk/consult/general/oftreptconc.htm> at ¶ 70 [hereinafter *Competition and Regulation in the Legal Services Market*].

46. OFT, *Competition in Professions* (March 2001), available at http://www.of.gov.uk/shared_of/reports/professional_bodies/oft328.pdf. The OFT is the UK government's consumer and competition authority, see <http://www.of.gov.uk/about/>. Its Canadian equivalent is the Competition Bureau, see <http://www.competitionbureau.gc.ca/>; its U.S. counterpart is the U.S. Federal Trade Commission's Bureau of Competition, whose self-described mandate is “seeking out and challenging anticompetitive conduct in the marketplace”, see <http://www.ftc.gov/bc/index.shtml>.

47. OFT, *Competition in Professions*, *supra* note 46, at ¶¶ 29-32.

48. Department of Constitutional Affairs (U.K.), *In the Public Interest?: A Consultation Following the Office of Fair Trading's Report on Competition in Professions* (July 2002), available at <http://www.dca.gov.uk/consult/general/oftrept.htm>.

the public effective redress for bad service.”⁴⁹ A paper entitled “Competition and Regulation in the Legal Services Market” followed in July 2003.⁵⁰ Together with an attached economic evaluation of the regulatory system for legal services, the paper concluded that the regulatory status quo was unsustainable.⁵¹ The report supported in principle the opening of the legal services market to new business entities such as multidisciplinary practice. The report also identified twenty-two regulators of legal services providers in the then-current “regulatory maze,” a framework it found did not meet the demands of either the marketplace or the needs of consumers in the areas of complaints handling, or general expectations about accountability and transparency.⁵² As the report concluded:

the fact that the regulatory framework for legal services represents one of the last examples of a self-regulatory system in which primary accountability in most important respects is to the regulated providers through their trade associations rather than the public, is one reason for a review. Government has therefore decided that a thorough and independent investigation without reservation is needed.⁵³

This July 2003 report was not in fact the beginning of the story, even though it was the immediate trigger for the process leading up to the adoption of the Act. Reforms were over twenty years in the making. In 1983, the failure of the Law Society to act effectively when a solicitor and member of the Law Society Council, Glanville Davies, had vastly overcharged a client, first brought significant attention to the problems with self-regulation. The resulting scandal put the weaknesses and bias inherent in the Law Society’s procedures for dealing with complaints firmly in the public eye.⁵⁴ Through the balance of the 1980s, the focus of the neo-conservative government of Prime Minister Margaret Thatcher on freedom and competition in the marketplace influenced the passage of the *Administration of Justice Act* in 1985 ending solicitors’ monopoly over conveyancing, and opening questions about the monopoly of barristers over appearances in court.⁵⁵ Traditional practice fiefdoms were being broken down in the name of public and consumer interest, despite resistance from legal professionals. Greater pressure for change mounted.

Three government Green Papers on reform of the legal profession in 1989 considered how best to ensure quality and cost-effectiveness of legal services

49. *Competition and Regulation in the Legal Services Market*, *supra* note 45, at ¶ 18-20.

50. *Id.*

51. *Id.* The “Scoping Study” economic evaluation is Annex B to the Report. *See* the Scoping Study Executive Summary, available at <http://www.dca.gov.uk/consult/general/oftss/pp3-9.pdf>; *see also* Scoping Study, at 85.

52. *Id.* at ¶ 71.

53. *Id.*

54. ROBIN C.A. WHITE, *THE ENGLISH LEGAL SYSTEM IN ACTION*, 3d ed. 392 (Oxford Univ. Press 1999).

55. *Id.* at 395.

provided to the public by increasing freedom and competition in the market.⁵⁶ The main paper proposed that government treat the legal profession as it would any other industry, and conceived of the legal client as a customer whose interests should be protected by the market and by the state.⁵⁷ The paper further suggested that self-government or self-regulation should be narrowly defined and monitored by a new committee comprised mainly of lay people appointed by the government.⁵⁸ The second Green Paper proposed opening the right to convey property to financial institutions, and the third suggested the introduction of a restricted form of contingency fee. Both were aimed at increasing competition in the legal services market and thereby improving client service.

The bar and the judiciary responded with indignant opposition, perceiving the Green Papers as a “direct assault” on the independence of the English legal system.⁵⁹ The Law Society took a more measured approach, but still had misgivings about the apparent intrusion of government into its regulatory territory. The government backed away from the more radical proposals for reform and the resulting *Courts and Legal Services Act of 1990*⁶⁰ was a comparatively “modest measure.”⁶¹ In terms of encroachment on traditional self-regulatory authority, the Act’s most significant initiative was the creation of the office of the Legal Services Ombudsman (LSO). The legislation empowered the LSO to investigate the handling of complaints by professional bodies about practitioners, but only after complaints had gone through a firm’s internal processes and the appropriate professional body.⁶²

Though the nature of the reforms implemented was comparatively modest, the 1989 Green Papers had a more significant impact on perceptions of the self-regulatory authority of the legal profession. The assumption that barristers and solicitors and their representative bodies were “best placed to speak for the public interest no longer had any constitutional standing or, as the rapturous press support

56. Green papers generally represent the first consideration by the British government of concepts for new legislation. They are generally followed by a period of debate and deliberation, then by the more formal White Papers, which lead to the introduction of legislation. The Lord Chancellor’s Department, *The Work and Organization of the Legal Profession*, Cm. 570 (1989); *see also* *Contingency Fees*, Cm. 571 (1989) and *Conveyancing by Authorised Practitioners*, Cm. 572 (1989). The first debate in Parliament on the Green Papers, 23 March 1989, is at <http://www.publications.parliament.uk/pa/cm198889/cmhansrd/1989-03-23/Debate-3.html>, Column 1282; *see also* Roger Smith, *The Green Papers and Legal Services*, 52(4) *MODERN LAW REV.* (1989) 527; RICHARD ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* 37 (Oxford Univ. Press 2003).

57. MICHAEL BURRAGE, *REVOLUTION AND THE MAKING OF THE CONTEMPORARY LEGAL PROFESSION* 558 (Oxford Univ. Press, 2006) [hereinafter BURRAGE].

58. *Id.*

59. Maute, *supra* note 7, at 7.

60. *Courts and Legal Services Act 1990* c. 41 (U.K.), available at http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900041_en_1.

61. BURRAGE, *supra* note 57, at 561.

62. *Courts and Legal Services Act 1990*, *supra* note 60 at ss 22(5); Maute, *supra* note 7, at 8.

for the Green Papers indicated, any public credibility.”⁶³ The fact that the move for reform did not end with the change from a Conservative to a Labour government is the surest indication of a cultural change in approach. Indeed, it was a Labour government that initiated the recent wave of reports leading to the adoption of the 2007 Act.

On July 24, 2003, Secretary of State Lord Falconer appointed Sir David Clementi to conduct an independent review of the regulatory framework of the legal profession in the U.K. The Terms of Reference required Clementi to report by December 31, 2004 and

To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.

To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.⁶⁴

In announcing the Clementi review, Lord Falconer also announced that the government favored “allowing new types of businesses such as multi-disciplinary practices giving “one stop” services and corporations wider access to the market but will leave it to the review to recommend how best to regulate them to safeguard the independence of the professions and consumers’ interests.”⁶⁵ The stage was thus set for what would be nothing short of revolutionary reform. The idea that alternative business structures could be used for the delivery of legal services was no longer a question of “if,” but “how.”

Clementi released a consultation paper on March 8, 2004.⁶⁶ It focused on five key issues that all had an underlying consumer or public interest focus: complaints handling and discipline; unregulated legal service providers; new business structures for legal services provision; responsiveness of existing regulatory structures; and professionalism and self-regulation.⁶⁷ Clementi noted that the form of regulation of legal services in England and Wales had moved towards co-regulation (exercised by government and the legal professional bodies) and away from pure self-regulation, though the system overall remained one based on a combination of self-, co-, and state regulation. Incremental changes had resulted in a lack of cohesion and consistency.⁶⁸ In response, Clementi articulated a set of objectives

63. BURRAGE, *supra* note 57, at 563; *see also* Abel, *supra* note 56 at 35-38.

64. *See* Department of Constitutional Affairs (U.K.), “Wide-ranging review aims to open up competition,” 24 July 2003 (DCA Press Release 310/03).

65. *Id.*

66. Sir David Clementi, *Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales* (March 2004) available at <http://www.legal-services-review.org.uk/content/consult/review.htm> [hereinafter Clementi Consultation Report].

67. *See also* the helpful summary in Maute, *supra* note 7, at 10.

68. Clementi Consultation Report, *supra* note 66, at ¶ 7.

and principles of a regulatory framework for legal services to provide a strategic approach and the cohesion the system lacked.⁶⁹ While notable for its consumer interest focus, the consultation report elsewhere clearly identifies that Clementi was both aware of and sensitive to arguments by the legal profession that principles identified by the legal profession were uniquely important, and that the provision of legal services was not simply to be treated as the offerings of just any other industry. He nevertheless signaled that change was in order.

The architecture of regulatory models consequently became the primary focus for implementing this change. Clementi sought to answer whether professional bodies could serve both to provide representative and lobbying functions and still provide appropriate regulatory oversight as his central question. Clementi described representative functions as including “providing services and support for members”; regulatory functions included “setting the parameters within which members work.” Clementi noted the inherent conflict between the regulatory and disciplinary function, which should serve the public interest, and the representative function, which is centered on serving the interests of the profession. In response, he presented three possible models for reform, ranging from a complete separation of functions and all regulation controlled by an independent body, on one end, to the mere introduction of an oversight agency with responsibility for monitoring self-regulation, on the other.⁷⁰ All three models required the creation of an outside regulatory body; the status quo was simply not an option.

Clementi sought feedback on the combination or separation of representative from regulatory functions; delegation of powers from government to a new regulator; the appointments process for any new organization or agency; and other accountability mechanisms.⁷¹ He also made reference to the need to harmonize domestic regulatory processes with international obligations, including General Agreement on Trade in Services requirements.⁷² Two hundred and sixty five responses broadly supported in principle some sort of regulatory reform. The Bar Council, the Law Society and the Office of Fair Trading (OFT), representing barristers, solicitors, and the government competition authority respectively, all favored some variation of Clementi’s proposal for segregation of the representative and regulatory functions, with regulation subject to oversight by the Legal Services Board Clementi proposed. OFT supported a stricter and more intrusive version of the LSB than the professional bodies.⁷³

Clementi’s Final Report, published in December 2004, concluded that the current system gave insufficient regard to the needs of the consumer; that the structures of the main professional bodies were inappropriate for their regulatory tasks; that oversight regulatory arrangements for professional bodies were overly

69. *Id.* at ¶ 8-9.

70. *Id.* at Chapter B.

71. *Id.* See Questions B1-B6.

72. *Id.* at Chapter B, ¶ 31.

73. Maute, *supra* note 7, at n.139.

complex and inconsistent; and that clear underlying objectives both existed and needed to be more clearly articulated. He also found that the complaints system was inefficient and had failed to secure consumer confidence.⁷⁴ He recommended the creation of a Legal Services Board (LSB) into which government would vest all regulatory powers. The LSB would then delegate front-line regulatory functions to recognized professional bodies as long as they handled their responsibilities appropriately and separated their regulatory from their representative functions.⁷⁵ He also recommended the establishment of an Office of Legal Complaints to serve as a single source body for handling all consumer complaints against legal services providers. The OLC would be under the authority and general supervision of the LSB, but would handle complaints independently.⁷⁶ Finally, Clementi provided extensive commentary and recommendations about alternative forms of service delivery, opening the door immediately to Legal Disciplinary Practices (LDPs), bringing together barristers, solicitors, conveyancers and other legal professionals to offer legal services to third parties. Accountants, human resource professionals and others could support the delivery of legal services but not provide services directly to clients. Non-lawyers could be managers but not partners in LDPs. Clementi also left open the possibility that Multidisciplinary Practices could be potentially viable “if at subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.”⁷⁷

Clementi was sanguine about the prospects for his recommendations to be implemented in light of professional intransigence:

Reform will not be easy. Whilst there is pressure for change, from consumer groups and also from many lawyers, reform will be resisted by other lawyers who are comfortable with the system as it is. Lawyers who are opposed to the reforms in this Review will either argue that I am mistaken and have failed to understand the special characteristics that set the law apart, or call for further research and consultation, kicking reform into the long grass. Changes will require significant political commitment, partly to meet the expected criticism from some lawyers and partly because reform will need primary legislation, which requires scarce Parliamentary time. I hope that Ministers, and subsequently Parliament, will conclude that reform is necessary. In my view it is long overdue.⁷⁸

Clementi’s caution about resistance to change was well warranted. From the December 2004 tabling of his report, it was another year and a half until

74. Sir David Clementi, *Report of the Review of the Regulatory Framework for Legal Services in England and Wales, Final Report*, (December 2004) available at <http://www.legal-services-review.org.uk/content/report/index.htm> [hereinafter Clementi Final Report].

75. *Id.*, Chapter B at ¶¶ 70-71.

76. *Id.*, Chapter C.

77. *Id.*, Chapter F, and in particular ¶ 104 (MDPs).

78. *Id.*, *Foreword* at ¶¶ 33-34.

legislation was introduced in the House of Commons as a draft Legal Services Bill in May 2006. The final version did not receive Royal Assent until the end of October 2007, after a tortured path through both the House of Commons and the House of Lords.⁷⁹ This was despite the fact that the government broadly accepted Clementi's recommendations and incorporated a number of amendments into a previous version of a draft Bill prior to first introducing it in the House of Lords.⁸⁰ Despite these attempts at pre-emptive change, the Lords then defeated the government on a number of other amendments, including one which required the appointment of the Chair of the LSB to be made by the Lord Chancellor only with the concurrence of the Lord Chief Justice; this was seen as a way of bolstering the independence of the legal profession from the government. A further Lords amendment had the Bill specify that the LSB must "respect the principle that the primary responsibility for regulation rests with the professional bodies." Both of these illustrated the sort of pressure that Clementi worried about, and mitigated against the effort to take self-regulatory authority away from the legal profession and place it in more independent bodies.⁸¹ The government was able to succeed in having all of these amendments overturned before the Bill became law.

In the end, the 1983 mishandling of lawyer discipline and the 2001 signal from the government's competition watchdog served to propel forward the most significant overhaul of regulation of legal services in a generation, even if it took until the end of 2007 to accomplish. The final result is a move away from self-regulation towards something even closer to government regulation than a conventional co-regulatory scheme. The Law Society of England and Wales had repeatedly restructured its complaints handling process in response to pressure from government and consumer groups, claiming with each change increased independence for the complaints division from the rest of the Law Society.⁸² The new legislation in essence deemed that generation of reform insufficient and instituted a strict bifurcation between regulatory and representative roles. The new legislation also radically overhauled the manner in which legal services could be delivered, and entrenched a consumer welfare perspective as the primary focus.

Further, the creation of the Legal Services Board responds directly to the perception that the Law Society of England and Wales had forsaken its duty to regulate the legal profession in the public interest in favor of acting as a lobbying group for lawyers instead. Legal Services Minister Bridget Prentice confirmed this

79. The history of the debate and all amendments is set out on the UK Parliament website at http://www.publications.parliament.uk/pa/pabills/200607/legal_services.htm. A prior version was introduced in the House of Lords in November 2006.

80. See the detailed discussion in Maute, *supra* note 7, at 12-13.

81. Catherine Fairbairn, *Legal Services Bill [HL] Committee Stage Report*, House of Commons Library Research Paper 07/61, 11 July 2007, at 2-3, available at <http://www.parliament.uk/commons/lib/research/rp2007/rp07.061.pdf>.

82. See Legal Services Ombudsman and Legal Services Commissioner, *Legal Services Reform—A perspective*, (June 2007), available at http://www.olso.org/publications/legal_services_reform_2007.asp at 8, cited in Devlin & Heffernan, *supra* note 39, at 25.

in emphasizing that the Board would be “required to separate their regulation side from their representation one to remove conflict of interest.”⁸³

These developments in England mirror changes adopted in Australia and detailed further below, and signal a trend about which Canadian regulators and legislators should be well aware. Curiously, the stage might be set in Canada for a parallel experience given the genesis of the English reforms in the Office of Fair Trading report in 2001. In early 2007 the Competition Bureau of Canada completed a preliminary report on regulated professional groups in Canada, including the legal profession, with a consultation period concluded in early July 2007. As noted above, the final report and recommendations were released in December 2007, only to be summarily dismissed by the Law Society of Upper Canada.⁸⁴ The influence of the English experience in this regard alone is therefore relevant and timely, and may suggest a pattern to be repeated in the Canadian context.

Australia

Increasing public distrust of the legal profession and greater focus on the rights of the consumer in a market-based economy also prompted significant change in Australia. Reforms unfolding for over a decade have resulted in the effective end of self-regulation by the legal profession, replaced with a co-regulatory system that separates regulatory from representative functions and creates a series of more independent disciplinary agencies operating closer to government than to the profession. Because the legal profession is regulated at the state rather than the federal level, changes have not been entirely uniform, though they are broadly similar. Three states provide for an independent body to administer complaints against lawyers, while the Law Society retains some degree of authority to establish ethics rules and practice standards against which lawyer conduct will be judged. Significant lay involvement in the regulatory process is an important feature.⁸⁵ The end result is a system more focused on regulating in the public interest.⁸⁶

The origins of reform lay largely in efforts to provide a national market for legal services, though consumer scandal and consumer protection were integrally linked. Pure self-regulation of the legal profession in Australia was replaced long ago by co-regulatory systems involving government, the legal profession and the courts.⁸⁷ The extent to which government or the legal profession has been involved

83. Legal Services Act Press Release, *supra* note 41.

84. See the discussion of the Competition Bureau of Canada December 2007 report, *supra*.

85. CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE 168 (Oxford Univ. Press 1999); see also Steve Mark, New South Wales Legal Commissioner, *Is State Regulation of the Legal Profession Inevitable?*, Oct. 4, 2003, available at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_heron; Devlin & Heffernan, *supra* note 39, at 24.

86. Law Council of Australia, Submission to the Standing Committee of the Attorneys-General: Towards National Practice (October 2001) at 4; see also Law Council of Australia, *Framework for a National Legal Services Market: National Legal Profession Reforms* at 2 (Sept. 2005).

87. LAW COUNCIL OF AUSTRALIA, SUBMISSION TO THE STANDING COMMITTEE OF THE ATTORNEYS-GENERAL: TOWARDS NATIONAL PRACTICE 4 (October 2001).

in the regulation of legal services has varied significantly from state to state. In addition, the Supreme Court in each state exercised some regulatory functions through its own inherent jurisdiction. In some states the jurisdiction of the Supreme Court over regulation had been specifically recognized in legislation, while in other states it had not.⁸⁸ That patchwork of state regulatory regimes was felt to impede interstate competitiveness and frustrate clients with interstate and national interests.⁸⁹ Nationalization of legal practice standards aligned with the global effort to remove barriers to trade and would arguably increase the competitiveness of Australian lawyers and law firms nationally and internationally.⁹⁰ Further, the development of national standards would improve client service and client protection.⁹¹

National *Model Laws* developed in 2002 addressed admission to practice; legal profession rules; alternative business structures; complaints and discipline; and rules concerning foreign lawyers practicing in Australia, among other matters. The *Model Laws* were not intended to replace existing state regulatory structures, but instead to set standards that existing state structures could aspire to meet.⁹² Soon afterward, New South Wales, Queensland and Victoria released legislation aimed at implementing the Model Laws.

The development of the *Model Laws* coincided, however, with a public-relations scandal that involved the Queensland Law Society. The mishandling of client complaints and money caused increasing public distrust of the legal profession in Queensland through the 1990s and into the early 2000s. In one case, a lawyer's misappropriation of six million dollars from a client had placed the Law Society's indemnity fund in jeopardy. Around the same time, complaints had been lodged against a Brisbane law firm over suspect billing practices, complaints not dealt with effectively by the Law Society's complaints mechanism.⁹³ Legislation provided for the appointment of a legal ombudsman, but the ombudsman's role was limited to monitoring the work of the profession in answering complaints.⁹⁴

In response, by January 2004 the Queensland government implemented a new Legal Services Commission, removing complaints handling from the Law Society. Commissioned reports agreed that the Law Society's complaints mechanism "operated as little more than a postal service—conveying the complaint to the solicitor

88. *Id.*

89. *Id.* at 3.

90. *Id.* at 3, LAW COUNCIL OF AUSTRALIA, FRAMEWORK FOR A NATIONAL LEGAL SERVICES MARKET: NATIONAL LEGAL PROFESSION MODEL REFORMS 1 (Sept. 2005).

91. *Id.* at 1.

92. Law Council of Australia, *National Practice—The Model Laws Project*, available at <http://www.lawcouncil.asn.au/natpractice/modellawproject.html>; see also Law Council of Australia, *National Practice—National Legal Profession Bill and Model Regulations*, available at <http://www.lawcouncil.asn.au/natpractice/currentstatus.html>; Linda Haller, *Imperfect Practice under the Legal Profession Act 2004(Qld)*, 23 U. QUEENSLAND L.J. 411, 417 (2003) [hereinafter Haller].

93. Reid Mortensen & Linda Haller, *Legal Profession Reform in Queensland*, 23 U. QUEENSLAND L.J. 280, 281 (2004) [hereinafter Mortensen & Haller].

94. Report 99, *supra* note 20 at ¶ 7.19.

in question, and relaying the solicitor's response to the complainant."⁹⁵ This was cause enough for reform.

The Model Laws were thus implemented in the Queensland *Legal Profession Act of 2004* with the notable exception of a two-tier disciplinary system rather than the single tier envisioned under the Model Laws. The Act tied admission and the ability to practice to the issuance of practicing certificates. The authority to issue, place conditions upon, suspend or revoke practicing certificates remained the responsibility of the profession, thus preserving a modicum of self-regulatory authority. Critically, though, the Act removed disciplinary powers from the Law Society. The Legal Services Commissioner became the single entry point for complaints. The Act structured the Commissioner to be independent from professional bodies, in an effort to ensure an unbiased proceeding in appearance and in fact.⁹⁶ The *Legal Profession Act of 2007*, effective on September 21, 2007, further refined these reforms.⁹⁷

The New South Wales experience paralleled developments in Queensland. The NSW Law Reform Commission responded to public complaints by recommending a fundamental change in lawyer discipline. Four reports in the 1980s led to legislation in 1987 introducing lay involvement into professional discipline councils. The 1987 Legal Profession Act set up two separate bodies to address the need for discipline for professional misconduct, on the one hand, and poor professional performance (short of professional misconduct) on the other.⁹⁸ A further report in 1993 revealed that despite these changes, the complaints system continued to deal poorly with client complaints. It concluded that there continued to be "delays, inadequate investigations, a perception that the system lacked independence, and a failure to provide consumer redress or to address ethical issues and professional standards."⁹⁹ The NSW Law Reform Commission recommended a more consumer-oriented approach; this resulted in the introduction of a Legal Services Commissioner in the *Legal Profession Act of 1993*.¹⁰⁰

That Act set up a co-regulatory system under which the Law Society and Bar Councils conducted most investigations, while the Office of the Legal Services Commission, an independent statutory agency, supervised and monitored

95. Mortensen & Haller, *supra* note 93 at 281.

96. Haller, *supra* note 92 at 417.

97. See Queensland, Legal Profession Act 2004 [repealed]; Queensland, Legal Profession Act 2007, available at <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/L/LegalProA07.pdf>; *Legal Profession Act to impact administrative practices*, The University of Queensland, available at <http://www.law.uq.edu.au/legal-profession-act-to-impact-administrative-practices>.

98. Austl. New South Wales, Law Reform Commission, Report 70 (1993): *Scrutiny of the Legal Profession: Complaints Against Lawyers*, available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R70TOC>.

99. Report 99, *supra* note 20 at ¶ 1.4.

100. See the Legal Profession Act 2004 (NSW-Austl), Part 7.3, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/ for a present description of the powers of the Legal Services Commissioner.

the professional bodies. A quasi-judicial administrative tribunal heard complaints about lawyers.¹⁰¹ Further investigation by the NSW Law Reform Commission in the later 1990s into systems of regulation revealed a significant split between the profession and consumers about whether this structure appropriately served the desired goals. The Office of the Legal Services Commission and the Bar Councils supported continued co-regulation. The Law Society argued that involvement by the profession was important for ensuring that some measure of independence from government remained. Consumer groups and clients opposed continued co-regulation, however. They submitted that the involvement of the profession in complaints proceedings against lawyers, however well-intentioned and fair, would always be suspect because of the inherent conflict of interest given the Law Society and Bar Councils' representative roles.¹⁰²

New legislation in 2004 in NSW closely followed the Model Laws and implemented a new single entry point for complaints: the Legal Services Commissioner. The Commissioner is independent from the professional bodies to ensure an unbiased proceeding in appearance and in fact. The separation of standard-setting from discipline has been viewed as the effective end of self-regulation even though the Law Societies still maintain significant regulatory responsibility.¹⁰³

Finally, while both Queensland and NSW incorporate elements of oversight into their regulatory schemes, the state of Victoria has adopted a model with even more power than the new regulatory structure in England and Wales. A Legal Services Board has ultimate authority for all aspects of regulation of the legal profession. While the Law Institute (the Victorian equivalent of a Law Society) is still engaged in setting standards and rules of practice, those standards and rules are still subject to approval of the Board. The Chair of the Board sits as Legal Services Commissioner and has authority over the complaints and discipline process. The Commissioner has the ability to delegate certain investigatory duties for complaints back to the Law Institute, but retains responsibility for deciding each case. The Law Institute thus has few regulatory powers, closely supervised by and exercised at the pleasure of the independent regulator.¹⁰⁴ The Victoria approach is thus the regulatory regime closest to a truly independent model, though the others in Australia have headed towards independence and further away from pure self-regulation.

Regulation of the Legal Profession in Canada—A Primer

There are two competing claims about the provenance of the regulatory structure and governance of the legal profession in Canada. The difference is key to

101. Report 99, *supra* note 20 at ¶ 7.7.

102. Report 99, *supra* note 20 at ¶ 7.13.

103. Wright, *supra* note 21.

104. Devlin & Heffernan *supra* note 39, at 57-58; *see also* Legal Services Board (Victoria), *About the Board*, available at <http://www.lsb.vic.gov.au/about.asp>; Legal Services Commissioner (Victoria), *Our Approach*, available at <http://lsc.vic.gov.au/OurApproach.htm>.

situating and understanding the profession's self-regulatory authority. One view posits that government granted or delegated authority to a "Law Society" established under provincial or territorial statute. Under this approach, self-regulation flows from government and government can therefore take self-regulation away. The other view frames self-regulation as having begun organically within the profession itself, only later formalized by government. As a consequence, the profession is fully independent, and elected governments therefore cannot override or withdraw this self-regulatory authority. Law Societies and bar leaders have vigorously asserted this second view.

The governance model in all provinces except Quebec is derived from the practices of the legal profession in England in place at the time when the British colonies in Canada were settled.¹⁰⁵ It also draws upon subsequent English developments and practices in the United States. A royal ordinance or local statute in the British colonies conferred the right to practice on those who had qualified in other British jurisdictions or who met local qualification standards. When this "body of local practitioners" had been established, it was "accorded responsibility for regulating admission and for other functions relating to professional privileges and liabilities. At the same time, some regulatory control was also asserted from three other sources: the courts, the executive (represented initially by the governor) and the nascent legislatures."¹⁰⁶ After colonial governments had already enacted controls to determine who was qualified to practice law, law societies formed and governments transferred self-governing authority to them gradually.¹⁰⁷

The other version of the story, argued most strongly by a former Law Society of Upper Canada head and a Justice of the Ontario Court of Appeal, asserts that the profession "grew independently of government and exercises responsibility of its own making" and is not exercising powers delegated to it by government.¹⁰⁸ In a history commissioned by the Law Society of Upper Canada itself, Christopher Moore notes that the Law Society of Upper Canada was something new, emerging

105. Law in the province of Quebec is based on the French civil law. Regulation of lawyers and notaries is structured differently than in the English common law provinces and is not addressed further here.

106. DAVID A. A. STAGER & HARRY W. ARTHURS, *LAWYERS IN CANADA* (Ottawa: Ministry of Supply and Services, 1990) at 33 [hereinafter STAGER & ARTHURS, *LAWYERS IN CANADA*]. See also MICHAEL J. TREBILCOCK, CAROLYN J. TUOHY & ALAN D. WOLFSON, *PROFESSIONAL REGULATION* (Ontario Government Printer 1979); see also Carolyn J. Tuohy & Alan Wolfson, *Self-Regulation: Who Qualifies?* in *THE PROFESSIONS AND PUBLIC POLICY* (Philip Slayton & Michael J. Trebilcock eds., University of Toronto Press 1978); Carolyn J. Tuohy, *Private Government, Property and Professionalism*, 9 *CANADIAN JOURNAL OF POLITICAL SCIENCE* 668 (1976); Carolyn J. Tuohy, *Public Accountability of Professional Groups: The Legal Profession in Ontario*, in ROBERT G. EVANS & MICHAEL J. TREBILCOCK, *LAWYERS AND THE CONSUMER INTEREST* (Butterworths 1982) [hereinafter Tuohy, *Public Accountability*]; F.C. DeCoste, *Towards a Comprehensive Theory of Professional Responsibility*, 50 *UN.B.L.J.* 109 (2001).

107. STAGER & ARTHURS, *LAWYERS IN CANADA*, *supra* note 106, at 34.

108. G.D. Finlayson, *Self-Government of the Legal Profession—Can It Continue?* *ADVOCATES' SOCIETY JOURNAL* 11, 15 (February 1985).

from a 1797 meeting of ten lawyers that had “declared the legal profession’s authority to govern itself and [...] had established the organization with which to do so.”¹⁰⁹ According to Moore, these lawyers created something unrecognized elsewhere in the British Empire, for as late as 1830, the Privy Council had declared that in every British colony, lawyers were governed by the chief justice. “What the lawyers did [...] was unorthodox and virtually without precedent. Anyone steeped in the jealously guarded traditions of the English common law should have found the whole transaction repugnant.”¹¹⁰

However, even Moore’s account acknowledges that this meeting of lawyers to form the Law Society followed the passage of “an act for the better regulating the practice of the law” in 1797 by the House of Assembly and Legislative Council of Upper Canada. The Act’s recitals acknowledged the value of forming a society of lawyers and provided authorization for the formation of the Law Society of Upper Canada, specifying the date and location for the first meeting, authorizing the creation of rules for the Society’s own governance, determining membership and granting a monopoly over legal practice in Ontario.¹¹¹ Accordingly, the better view is that government is the original source of self-regulatory authority, although direct responsibility for governing in the public interest has been transferred to the provincial law societies under provincial legislation.¹¹² The provincial statute governing the Law Society thus provides important signals for understanding the role of the public and the public interest in decision making about the legal profession in the province.

The Law Society of Upper Canada, which governs lawyers in Ontario, Canada’s most populous province and arguably its most significant commercial jurisdiction, has argued that it has “exclusive and exhaustive powers over the regulation of professional conduct of lawyers” in the province.¹¹³ The Law Society is granted powers and duties to regulate the conduct of lawyers and to govern the legal profession in Ontario under the *Law Society Act*.¹¹⁴ The statute requires the Law Society to regulate “in the public interest,” though the direction to do so was far less overt than might have been expected until very recently. In October 2006, the provincial government amended the legislation to provide that in carrying out its functions, duties and powers, the Law Society “shall have regard” to certain enumerated principles, including a “duty to maintain and advance the cause of justice

109. CHRISTOPHER MOORE, *THE LAW SOCIETY OF UPPER CANADA AND ONTARIO’S LAWYERS, 1797-1997* (University of Toronto Press 1997) at 15.

110. *Id.*, at 16-17.

111. *Id.* at 14-15.

112. In further support of this position, see in particular Carolyn J. Tuohy, *Public Accountability*, *supra* at 106; also W. Wesley Pue, *Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada*, in *GLIMPSES OF CANADIAN LEGAL HISTORY* 237, 246-248. (Dale Gibson and W. Wesley Pue, eds., Winnipeg: Legal Research Institute of University of Manitoba 1992).

113. *Wilder v. Ontario Securities Commission* (2000) 47 O.R. (3d) 361 at 367 (Div. Ct.). See also *Edwards v. Law Society of Upper Canada* [2001] 3 S.C.R. 562.

114. R.S.O. 1990, c. L-8 (1990).

and the rule of law”; a “duty to act so as to facilitate access to justice for the people of Ontario; a “duty to protect the public interest”; and a “duty to act in a timely, open and efficient manner.” The Law Society is accordingly statutorily empowered with responsibility for regulating lawyers in the public interest.¹¹⁵

The Law Society is headed by a governing council known as Convocation, which meets monthly. Convocation is composed of representatives known as Benchers. The majority of Benchers are lawyers elected by members of the legal profession in Ontario. Convocation is responsible for exercising the comprehensive regulatory authority granted to the Law Society by statute to pass bylaws that govern the profession, including legal education, licensing and practice.¹¹⁶ Benchers also serve on various Law Society committees and participate on panels that hear cases that concern the conduct, competence and discipline of lawyers. A Treasurer presides over Convocation and is the titular head of the Law Society. The Treasurer is elected each June for a one-year term by the benchers who are entitled to vote in Convocation.¹¹⁷

The Act grants to the Benchers the power to govern the affairs of the Law Society, and by extension the legal profession.¹¹⁸ The Minister of Justice, the Attorney General for Canada, the Solicitor General for Canada, every person who has held the office of elected bencher for at least sixteen years, the Attorney General for Ontario and all former attorneys general for Ontario are also benchers.

The Attorney General for Ontario has special responsibility for protecting the public interest: the statute provides that he or she “shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario.”¹¹⁹ Under the statute, the public is notionally further represented by the Society’s eight lay benchers, who are appointed by the Lieutenant Governor-in-Council (of the Ontario government). Lay benchers have all the responsibilities and duties of elected benchers, including active participation in the decision-making and disciplinary processes of the Law Society.¹²⁰ The Law Society trumpets that it was “the first professional body in Ontario to officially include public representation in its governing

115. Schedule C of the Access to Justice Act, S.O. 2006, c. 21 (Royal Assent October 19, 2006), section 7. The Law Society Act in Ontario does not contain the statement in the parallel British Columbia statute, which posits that the object and duty of the Law Society, inter alia, is also to “uphold and protect the interests of its members.” Legal Profession Act (B.C.) S.B.C. 1998, c.9, s. 3(b)(ii) (1998).

116. Law Society Act, *supra* note 12, s. 62.

117. Law Society Act, *id.*, s. 7, Law Society of Upper Canada By-Law 3.

118. Law Society Act, *id.*, s. 10. Consequential amendments as a result of the *Access to Justice Act* in October 2006 will add two benchers specifically elected from those who “provide legal services,” the label given to paralegals (or nonlawyers providing “legal services”), who under the new legislation will be regulated by the Law Society starting as of May 1, 2008.

119. Law Society Act, *id.*, s. 13(1).

120. Law Society Act, *id.*, s. 23. *See also* Law Society of Upper Canada, *Management and Convocation*, available at <http://www.lsuc.on.ca/about/a/management> [last accessed January 17, 2008].

Body.”¹²¹ Relying on these appointments to ensure public accountability is fraught with difficulty, even if their symbolic value is important.¹²² As Deborah Rhode has noted in discussing nonlawyer representatives on regulatory bodies: “[a]lmost never do they have the information, resources, leverage or accountability to consumer groups that would be necessary to check Bar control.”¹²³

Until early 2008, the Law Society’s Web site noted that its mandate is

to govern the legal profession in the public interest by: ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and upholding the independence, integrity and [honor] of the legal profession for the purpose of advancing the cause of justice and the rule of law.¹²⁴

This is less broad than the vision articulated by former Ontario Chief Justice McRuer in a 1968 Ontario government Royal Commission Inquiry into Civil Rights report that proposed greater public accountability for all professions. In it, McRuer wrote that the “granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest.”¹²⁵ The McRuer Commission was concerned with ensuring the accountability of professional bodies to the institutions of the state and that its work resulted in some substantive changes to that relationship.¹²⁶ Later efforts, however, to raise and address concerns about the accountability of professional bodies to a wide range of affected interests in Ontario resulted in no concrete changes that would make the professional regulatory bodies—including the Law Society—more responsive to the polity. In a study of regulation of the legal profession in Ontario in the early 1980s, Carolyn Tuohy argued that the “choice of public accountability mechanisms is a choice among relative imperfections,” but that the alternative, “allowing professional groups such as the legal profession to maintain the autonomy [that] they have traditionally enjoyed,” is even less appropriate.¹²⁷ Despite both McRuer’s efforts in the late 1960s and Tuohy’s in the late 1970s/early 1980s to press for substantive change, the regulation of the legal profession in Ontario and its governance structure and relationship with government have remained fundamentally unchanged.

121. *Id.*

122. See Carolyn J. Tuohy, *Public Accountability* *supra* note 106, at 111-113.

123. RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 6, at 146.

124. See Law Society of Upper Canada, *Law Society Mandate*, available at <http://www.lsuc.on.ca/about/a/about-the-society> [accessed January 16, 2008]. The page has since been amended to remove this paragraph. See also <http://www.lsuc.on.ca/news/b/olg/fallwinter-2005-vol-9-no-4/discipline-digest/>.

125. ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS, REPORT NO. 1, Honourable J. C. McRuer, Commissioner (Queen’s Printer 1968), cited in STAGER & ARTHURS, *LAWYERS IN CANADA*, *supra* note 106, at 31, 53. For a critique of McRuer, see John Willis, *The McRuer Report: Lawyers’ Values and Civil Servants’ Values*, 18 U.T.L.J. 351 (1968).

126. Tuohy, *Public Accountability*, *supra* note 106, at 105.

127. *Id.* at 135.

The Absence of Challenge and Change

Unlike the scandals animating reform in England, Australia, and the United States, the legal profession in Ontario has managed largely to skirt or avoid significant controversy of the order prompting reforms elsewhere. Even the 2007 disciplining of a former Law Society Treasurer for engaging in sexual relations with one of his matrimonial law clients, resulting in a two month suspension, failed to incite calls for reform.¹²⁸ The multidisciplinary practice debate, and failure to implement a crime-fraud exception in Ontario in the aftermath of corporate scandal can be interpreted as two illustrations of the profession acting in its own rather than in the public interest, but neither has prompted the kind of wholesale calls for regulatory reform animating change in England, Australia or the United States.

Space permits only a cursory summary of these two examples here.¹²⁹ The debate over multidisciplinary practices in Ontario was remarkable not only for its outcome but more importantly for its failure to take into consideration the public interest, or even public debate of the order of its American counterparts. The opponents of change cast the issue of MDPs as threatening the “core values” of the legal profession, the foundation upon which the legal profession operates and by which some have argued that democracy is protected.¹³⁰ Reliance on the rhetoric of “core values”—maintaining independence, protecting privilege and avoiding conflicts of interest—supported claims of critics that the profession cannot be trusted to regulate itself in the public interest. Such reliance placed the profession “in the position of arguing that market forces are irrelevant to the debate over ethics. They are not. [...] The profession would be much better served by fostering realistic debates that take into account a full range of values, including market values, rather than by using the rhetoric of core values as a kind of veto over change in rules of professional conduct.”¹³¹ That debate has to include an open, transparent process with opportunities for public participation.

Regrettably, the MDP debate in Ontario during the period lacked any of those characteristics. By adopting flawed processes, which included little or no direct

128. See Paul Paton, *Sex with Clients Debate Comes Back to Haunt Us*, *LAWYERS' WEEKLY* (February 1, 2008) (analyzing civil lawsuit launched against former Treasurer of the Law Society of Upper Canada by matrimonial law client with whom he had an affair; discipline from the Law Society itself resulting in a two month suspension from practice). Earlier cases involving sex with clients have not resulted in public outrage. See *Szarfer v. Chodos*, [1986] O.J. No. 256 (lawyer paid \$43,000 damages to client for using confidential information to initiate affair with client's spouse; received only a reprimand from the Law Society); *Nova Scotia Barrister's Society v. Pavey*, [2001] L.S.D.D. No. 3 (lawyer suspended for 18 months for having sexual relations with client he knew had substance abuse problems).

129. See the articles referenced in note 10, *supra*, for lengthier assessments.

130. Jack Giles, QC, *Why Multi-Disciplinary Practices Should be Controlled by Lawyers*, 58(5) *THE ADVOCATE* (September 2000).

131. Crystal, *supra* note 35 at 774.

public input, the Law Society of Upper Canada excluded views that might have allowed for better policy decisions. The Law Society demonstrated a willingness to ignore its own academic experts and the available constitutional analysis, both of which supported a more open MDP regime than what the Law Society eventually put in place. Further, the Law Society ignored the available economic analysis of consumer needs to arrive at predestined policy conclusions. The Law Society exacerbated its credibility problem by embarking on an aggressive political campaign to ensure that the Canadian Bar Association's consideration of policy regarding MDPs did not embarrass the Ontario regulator by arriving at a result contrary to Ontario's own about what would best serve the public interest.

The MDP debate in Ontario, held entirely within the profession, became a direct illustration of the perils of a "professional community that is too inward-looking, that is content to regulate itself without checks from the outside," prone to "pernicious norms" and resistant to change.¹³² Lawyers were content to determine what constituted the public interest and to proceed in a fashion that was blatantly self-serving and exclusionary.

By-Law 25, entitled *Multi-Discipline Practices*, was adopted on April 30, 1999.¹³³ It enshrined a doubly restrictive approach, combining elements of regulatory models adopted in Washington, DC and New South Wales, Australia. Of the five practice models that Convocation considered for adoption (fully integrated MDPs; maintenance of the "status quo" with the practice of law in partnerships only; MDP services, provided lawyers maintain effective control of the partnership—the New South Wales model;¹³⁴ MDPs offering primarily legal services with no specific provisions for control—the DC model¹³⁵; and MDPs offering legal services only, provided that the partnership is in the effective control of lawyers), only the last

132. W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1953, 1955 (2002).

133. Law Society of Upper Canada, By-Law 25, *Multi-Discipline Practices*, (30 April 1999) [hereinafter By-Law 25] was later amended three times in 1999 (May 28, June 25, and December 10), twice in 2001 (April 26 and May 24) and once in 2002 (October 31) but the changes are not substantial for the purposes of this discussion. The bylaw was revoked on May 1, 2007 as part of housekeeping amendments necessitated by the October 2006 amendments to the Law Society Act. See Law Society of Upper Canada, By-Law Review Committee, Report to Convocation, April 26, 2007, available at http://www.lsuc.on.ca/media/convapr07_bylaw_review.pdf [last accessed January 17, 2008]; see the new By-Law 7 (Business Entities) Part III—Multi-Discipline Practices, available at <http://www.lsuc.on.ca/regulation/a/by-laws/bylaw7> [last accessed January 18, 2008] [hereinafter By-law 7]. The prior numbering was in place during the period until 2003 and is therefore retained for this discussion.

134. Law Society of New South Wales, *Professional Conduct and Practice Rules*, Rule 40.1, available at http://www.lawsociety.com.au/uploads/filelibrary/1025501574834_0.5077010227973097.pdf [last accessed January 17, 2008].

135. District of Columbia Bar, *District of Columbia Rules of Professional Conduct*, Rule 5.4(b), available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_five/rule05_04.cfm.

option was considered to be in the public interest.¹³⁶ For the first time in Ontario, By-Law 25 regulated the conduct of law firms rather than that of individual lawyers. It allowed lawyer members of the Law Society to enter into association with a non-lawyer only if that person was “of good character,” practiced a “profession, trade or occupation that supports or supplements the practice of law”; agreed that the lawyer partner would have “effective control” over that person’s activities insofar as they were providing services to clients of the partnership or association; and would comply with the Law Society’s rules, regulations and policies.¹³⁷ Unlike other bylaws that governed its members, By-Law 25 required an application by a lawyer member of the Society to be filed with the Law Society and approved before entering into the MDP. The rules reinforce the second-class status of any non-lawyer professional in a multidisciplinary partnership or association and impose a primacy on Law Society rules over those of any other profession or trade similarly regulated by government in the public interest.

The outcome was not surprising, given the work of the Law Society’s Task Force and its bias against significant change. The Task Force’s discussion in its final report under the heading “MDPs, the Role of the Lawyer, and the Public Interest” begins as follows:

The Law Society’s study was premised on the belief that the legal profession should *not* embrace MDPs, whatever the commercial attractions, until a demonstrable and legitimate demand outweighs the risks to the profession in the public interest. The focus must be on the preservation of a strong and independent legal profession.¹³⁸

For all of the concern expressed about the public interest, at no time did the Task Force or its academic experts consult with the public. In stark contrast to the American Bar Association hearings on MDPs, there were no open hearings, no posting of testimony or submissions, no soliciting of views or invitations to groups such as the Canadian Federation of Independent Business (the most significant lobby group for small business in Canada), local chambers of commerce, members of Provincial Parliament or the public at large.

The sessions that the Task Force held with lawyers in business and practice highlighted that client demand for “one-stop shopping” developing internationally was in part responsible for the drive for MDPs; that a “team” approach was valuable and should result in reduced costs; and that if ethical questions were adequately addressed, MDPs would enhance the availability and delivery of legal services. The ethical concerns around whether and how a client received legal advice and indeed defining

136. Law Society of Upper Canada, Working Group on Multi-Discipline Partnerships, *The “Futures” Task Force—Final Report of the Working Group on Multi-Discipline Partnerships* 10 (25 September 1998), at 9.

137. By-Law 25, *supra* note 133, ss. 4(1)-(3) (defining “effective control”), 4(4) (defining “good character”).

138. Futures Task Force Final Report, *supra* note 136, at 6 [emphasis added].

what constitutes the practice of law were important, both for maintaining privilege (particularly in a criminal law context) and, astoundingly, for the rationale for affording the Law Society the privilege of self-regulation. As the summary put it:

The argument is that if there is no clear vision of what the solicitor–client relationship is and what the legal services are that the Law Society can regulate to the exclusion of others, then lawyers cannot sell [*sic*] the proposition that there is a public interest in having lawyers maintain independence.¹³⁹

The signal sent in both England and Australia about the need for a more open and competitive approach to legal services provision, echoed in the Competition Bureau of Canada December 2007 report, suggests that this may become an issue for the profession in Ontario yet again.

With respect to the question of the regulation of lawyer conduct in corporate contexts after Enron, the signal sent by the American Bar Association is important. The August 2003 amendments to Model Rules 1.6 and 1.13 to permit the “crime-fraud” exception to confidentiality requirements came after pressure from the ABA Task Force on Corporate Responsibility.¹⁴⁰ The ABA’s move to implement these reforms were criticized as a belated, cynical and self-serving effort to derail further federal regulation of lawyer conduct.¹⁴¹ However, to be fair, the changes to the Model Rules and the introduction of the crime-fraud exception to the confidentiality requirement simply regularized a situation already present in forty-one states. These states either permitted or required disclosure to prevent a client from perpetrating a fraud. The changes also reflected the existing situation in eighteen states in which disclosure was either permitted or required to rectify “substantial loss resulting from client crime or fraud in which the client used the lawyer’s services.”¹⁴² The Rules amendments do indeed serve as a “backstop [to address] extraordinary and deviant circumstances,” which can provide corporate counsel with the necessary tools required in those especially difficult circumstances in which their corporate client might not otherwise be moved.¹⁴³

In contrast, the Law Society of Upper Canada implemented changes to the Rules of Professional Conduct for Ontario lawyers enshrining an “up-the-ladder”

139. *Id.*, Appendix 9 at 178.

140. See *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility July 16, 2002*, 58 BUS. LAW 189 (2002).

141. Cramton et al., *Legal and Ethical Duties of Lawyers*, *supra* note 8, at 729-733; see also Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, In the Effort to Improve Corporate Lawyers’ Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1 (2003).

142. ABA Task Force on Corporate Responsibility, *Preliminary Report*, *supra* note 141, at 206.

143. Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 56 (2003); Kim, *supra* note 8, at 1040-1041.

reporting requirement, but no amendment to confidentiality rules.¹⁴⁴ The Report of the Law Society of Upper Canada's (LSUC's) Professional Regulation Committee that recommended the limited changes implemented in March 2004 rejected any change to confidentiality rules, despite the ABA August 2003 revisions:

In the Committee's view, the confidentiality standard is central to the integrity of the "up-the-ladder" reporting regime. If the openness and [candor] of the lawyer and client relationship is compromised, the lawyer is much less likely to become aware of improper conduct and to be in a position to counsel the client against it or [...] to address it.¹⁴⁵

This position remains contentious and debated in the U.S. academic literature.¹⁴⁶ More importantly, the Law Society changes took place with no debate and no discussion outside the profession, putting in question the authority and ability to determine how best the "public interest" might be served in such circumstances.

Yet neither case, nor any others, has thus far been sufficient to ground government intervention in the affairs of the Law Society in the manner that has been evidenced in England, Australia and the United States. This is not to say that the door has been closed; just that Canada has not yet seen the confluence of political will and outrage sufficient to prompt radical reform.

Conclusions—Between a Rock and a Hard Place?

Predictions of the demise of self-regulation in Canada are premature, but signs are present that should signal that change needs to be in the offing. The lessons from both England and Wales and from Australia, and to a degree from the United States, confirm that when the self-regulating profession fails to protect the public interest, or confuses it with the self-interest of the profession, the trust is lost and a re-evaluation of self-regulation is in order.

In 1993, the Supreme Court of Canada noted that protecting the public interest was a "paramount role" for a Law Society, and that "[t]he privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned."¹⁴⁷ In

144. LAW SOCIETY OF UPPER CANADA, AMENDMENTS TO RULES 2.02 AND 2.03 RE: ROLE OF LAWYERS IN CORPORATE GOVERNANCE, AS APPROVED BY CONVOCATION (Law Society of Upper Canada 2004), available at http://www.lsuc.on.ca/media/rule_amends_march2504.pdf; see also LAW SOCIETY OF UPPER CANADA, MINUTES OF CONVOCATION (Law Society of Upper Canada, 25 March 2004), available at http://www.lsuc.on.ca/media/convmar04_minutes.pdf.

145. Law Society of Upper Canada, *Proposed Amendments to the Rules of Professional Conduct Related to the Lawyer's Role in Corporate Governance* in PROFESSIONAL REGULATION COMMITTEE, REPORT TO CONVOCATION at ¶¶ 25-32 (Law Society of Upper Canada 2004), available at http://www.lsuc.on.ca/media/convmar04_prc_report.pdf.

146. Simon, "Introduction," *supra* note 8; Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382-383 (1989); Leslie C. Levin, *Testing the Radical 1 Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 122 (1994).

147. *Law Society of New Brunswick v. Ryan*, 1 S.C.R. 247 at ¶ 36. (2003).

1995, Professor Harry Arthurs argued that “self regulation is definitely deceased; it is pushing up the daisies; it has joined the choir invisible; it is bereft of life; it has met its maker; it is no more; it is bleeding demised.”¹⁴⁸ He later queried whether the legal profession in Canada could survive with its present regulatory structure given the pressures of the “new economy.”¹⁴⁹ Arthurs pointed to globalization and external influences as critical determinants of the way forward. In more than a decade since, the challenge to ensure that the public interest is protected has become more pronounced, and global influences more important.

In both England and Australia, scandals over lawyer self-discipline, concerns about competitiveness and a heightened focus on consumer welfare all led to a transformation of self-regulatory models. With the exception of the Australian state of Victoria, which has adopted a regulatory scheme virtually stripping the profession of direct involvement, a co-regulatory approach is now the norm. After years of scrutiny and fierce resistance by the profession itself, the end result is a separation of the representative and regulatory functions. The regulatory and disciplinary function has moved much closer to government, with an independent office or quasi-independent board or agency charged with responsibility for lawyer discipline and regulatory oversight.

Placing disciplinary matters in hands closer to government calls into question the independence of the legal profession. This raises important rule of law issues and concerns about government exercising coercive power inappropriately. Reforms in England, Australia and the United States have not given government complete control of the profession. Delegating responsibility to agencies operating at arms’ length and under strict, statutorily defined guidelines, should alleviate such concerns in the absence of the express abuse of government authority. A nuanced co-regulatory approach balancing the competing concerns of accountability with independence of the profession may ultimately serve to address the interests of both clients and the legal profession.

In both England and Australia, the status quo was no longer satisfying the public interest. Whether the 2007 reforms do so remains to be seen, but they represent a significant signal for Canadian regulators about what the future might hold. American legislators directed the Securities and Exchange Commission to regulate lawyer conduct when Congress no longer had confidence in the ability of state bars to do so. The former Chairman of the Ontario Securities Commission suggested in a November 2007 address at the University of Toronto that it would only take “one more scandal” in Canada to prompt legislators to consider doing the same.¹⁵⁰

148. Harry Arthurs, *The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?*, 33 ALTA. L. REV. 800, 809 (1995).

149. H. W. Arthurs & Robert Kreklewich, *Law, Legal Institutions and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J 1 (1996).

150. David Brown, former Chair, Ontario Securities Commission, address to University of Toronto Legal Ethics Bridge Week Panel on Ethics in Corporate Practice (November 2007) (notes of author).

Further, the transformation of regulatory and disciplinary models in both England and Australia were also tied to reforms and broader conceptions about delivery models for legal services provision. In England, alternative business structures have been specifically sanctioned as part of the 2007 reforms; in Australia, talk in 2007 is of the first law firm initial public offerings, or IPOs, with shares in incorporated law firms being offered for sale to non-lawyer investors, who are now permitted to share in law firm profits.¹⁵¹ The Multidisciplinary Practice model so fiercely resisted by the Law Society of Upper Canada is part of both Australian and English legal services landscapes. Globalization and trade in legal services formed part of the thinking behind national reform in Australia and in Sir David Clementi's consideration of influences driving reform of legal regulation in England. Freer trade and consumer protection are consistent themes throughout, animating moves to modernize legal services delivery and to force the reduction or removal of anticompetitive restrictions cloaked in the rhetoric of the independence of the profession.

In light of these developments, the key to preserving self-regulatory authority by and for the legal profession may lie in a more open debate and a broader conception of service in the public interest, accompanied by some form of co-regulation or a recasting of the roles to be played by other regulatory bodies or agencies in conjunction with self-regulatory bodies. The alternative is the usurping of the traditional self-regulatory authority, or its effective end.

Situating the Canadian experience between the American and the English/Australian ones thus provides both important lessons and an opportunity to begin openly and willingly engaging in meaningful scrutiny leading to reform, even where that reform may require releasing control and claims to paramount and pervasive independence from government. The lesson to date is that a legal profession that fails to act runs the risk of having solutions imposed upon it by government, to the detriment of both itself and to the broader public interest it is supposed to serve.

151. Richard Lloyd, *British Firms Watch Australia's Law Firm IPOs with Interest*, AMERICAN LAWYER, June 6, 2007, available at <http://www.law.com/jsp/article.jsp?id=1181034331105>.