

“IN THE PUBLIC INTEREST”: THREATS TO SELF-REGULATION OF THE
LEGAL PROFESSION IN ONTARIO, 1998-2006

A DISSERTATION
SUBMITTED TO THE SCHOOL OF LAW
AND THE COMMITTEE ON GRADUATE STUDIES
OF STANFORD UNIVERSITY
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF THE SCIENCE OF LAW

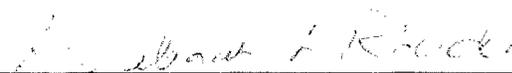
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FEBRUARY 2008

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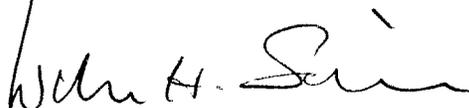
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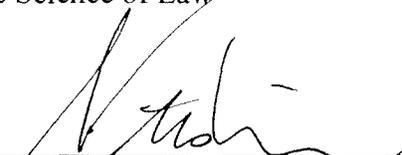
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“IN THE PUBLIC INTEREST”: THREATS TO SELF-REGULATION OF THE
LEGAL PROFESSION IN ONTARIO, 1998-2006

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ABSTRACT

Challenges during the period 1998-2006 to the traditional self-regulatory authority of the Law Society of Upper Canada, the body responsible for the regulation of legal services in the province of Ontario, Canada, have prompted a consistently defensive reaction focused on the preservation of the status quo rather than on the public interest. The purpose of this study is to explore that reaction and to determine whether the legal profession in Ontario continues to merit the privilege of self-regulation. It asks whether government should delegate self-regulatory authority to a profession whose response to significant change is to retrench, to ask how the public interest is being served, and to assess what institutional change is necessary. Three case studies about regulatory responses to events facing the profession serve to illustrate the issues and problems. These include the debate over the introduction of multidisciplinary practices (MDPs), the reaction to proposals for liberalized international trade in legal services at the General Agreement on Trade in Services (GATS), and the failure by the Law Society to respond adequately to ethical challenges facing corporate counsel in the post-Enron era.

The dissertation situates these Canadian examples in international context by analyzing them in light of recent developments in England and Australia that represent the effective end of self-regulation in those jurisdictions. Similarly, the study explores the three cases in the context of the direction by the United States Congress to the U.S. Securities and Exchange Commission to regulate lawyer conduct where there was a perceived failure of self-regulation in the public interest in the aftermath of Enron. The three cases are synthesized as cumulatively constructing a potential threat to self-regulatory authority, and as part of a pattern of change facing regulation of the legal profession in the public interest internationally.

Approved for publication:

By: Deborah L. Rhode

For School of Law

ABSTRACT

Challenges during the period 1998-2006 to the traditional self-regulatory authority of the Law Society of Upper Canada, the body responsible for the regulation of legal services in the province of Ontario, Canada, have prompted a consistently defensive reaction focused on the preservation of the status quo rather than on the public interest. The purpose of this study is to explore that reaction and to determine whether the legal profession in Ontario continues to merit the privilege of self-regulation. It asks whether government should delegate self-regulatory authority to a profession whose response to significant change is to retrench, to ask how the public interest is being served, and to assess what institutional change is necessary. Three case studies about regulatory responses to events facing the profession serve to illustrate the issues and problems. These include the debate over the introduction of multidisciplinary practices (MDPs), the reaction to proposals for liberalized international trade in legal services at the General Agreement on Trade in Services (GATS), and the failure by the Law Society to respond adequately to ethical challenges facing corporate counsel in the post-Enron era.

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ACKNOWLEDGEMENTS

Gulliver had no idea.

This enterprise has been more than a journey. It has taken me into a deeper exploration of issues of lawyer regulation, global transformation of a profession of which I am a proud member, and the exercising of a personal passion for responsible governance in the public interest. It has gnawed at me through a fundamental recasting of my own personal and professional lives. It has also afforded lessons of clarity and insight in ways I could never have imagined when I began at Stanford in early September 2001, days before the tragic events of September 11 changed the world as we knew it.

I have been blessed in ways I never expected, sometimes with challenges I never would have dreamed I might encounter.

A leave of absence from PricewaterhouseCoopers LLP (Canada) permitted me to become a Fellow of the Stanford Program in International Legal Studies (SPILS) and pursue the JSM at Stanford in 2001-02, a decade after I received my law degree from the University of Toronto. I remain grateful to Carl Steiss for the personal and professional encouragement I received when I first sought to pursue the chance to write on the multidisciplinary practice issues I encountered in my role leading the MDP initiative for PwC in Canada and serving as Canadian representative to the PwC global legal network. I also acknowledge with thanks the support of Larry Chapman, National Tax Practice Leader from 2002-2007, whose flexibility permitted my continuing in residence at Stanford in 2002-03 and the continuing association with this project thereafter.

I acknowledge with thanks the important financial support from the George S. Shultz Grants in Canadian Studies at the Stanford Institute for International Studies in 2002-03 and 2003-04.

Deborah Rhode's contribution to my work as an ethics scholar and teacher will remain with me long after this experience has ended. Co-authoring "Lawyers, Ethics and Enron" with Deborah in 2002 laid the foundation for a research agenda that I continue to pursue. After a decade in practice as law clerk to the Chief Justice of Ontario, partner in a major Canadian law firm, senior advisor to the Premier of Ontario, and then leader of a national legal services initiative for a major accounting firm, it was a curious and often difficult experience to become a student once again, but I had much to learn. Deborah's own efforts to encourage the profession to do better, and more, in the interests of justice serve to inspire many. I appreciate her having accepted the task of serving as my supervisor. My own experience as a professor of law since 2004 has been enriched by the lessons learned from our association.

Professors Bill Simon and George Fisher generously agreed to serve on the committee reviewing my work. It was a privilege to have the benefit of their scrutiny, support, ideas and insight.

Jonathan Greenberg, Director of International Studies at Stanford Law for the better part of the extended period of my candidacy, offered support, encouragement, and remarkable kindness throughout. A generation of SPILS Fellows is the better for having encountered him. Catherine Glaze and Kim Borg at Stanford Law helped facilitate necessary arrangements for leaves of absence between 2004 and 2006, and again after injury in early 2007, when life had plans other than the completion of this work. Tim Bowman, PT, of the Vaden Health Center and Chris, his associate, provided both the focus and support needed to start me on the road to physical recovery, and kept up my spirits through a difficult period.

Bringing this project to an end would simply not have happened without the love, support, and encouragement of my sister Dr. Katherine Paton, and many friends, only a few of whom I will mention here. Rilke was right: “Love consists in this: that two solitudes protect, and touch, and greet each other.” I have been protected, touched and greeted on this journey. Dr. Frank Hicks, RN, PhD, offered a critical eye, keen insight into the task, and the supportive analysis and manuscript review I needed at a crucial time. It is the direct result of his intervention that this work came to completion. I remain grateful for Cliff Fahey Jr.’s kindness and companionship through the challenges of the spring of 2007, and his continuing support and encouragement thereafter. Dr. Craig Kaiser, D.O., opened his spirit and his home to me, at times when his own bark was being tossed upon the waves. All gave me the gift of their steadfast belief in me. Dr. Kirk Nass, PhD, and Mike Gillespie, Esq. offered friendship, perspective, and culinary support. Swirl! Professor Bruce Pardy of the Faculty of Law at Queen’s University has been a wonderful colleague and friend.

I learned from my parents Douglas and Sonia the value of education, hard work, principled and ethical conduct, and concern for community. That I could complete a doctorate at one of the world’s leading institutions of learning is a tribute to those lessons and to their love.

I remain inspired by the generous spirit and teaching of the late Ronald St. John MacDonald.

PERMISSIONS

Portions of this dissertation have been adapted from material published during the project, inclusion of which is by permission:

Paul D. Paton, "Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era," (2005) 84 *Can. Bar Rev.* [Special Edition on Ethics] 533

Paul D. Paton, "What Happens After 'Happily Ever After'?": Regulatory Resistance and Rule-Making after Canadian and American Bar Association Resolutions on Multidisciplinary Practice," (2003) 36(2) *U.B.C. L. Rev.* 259

Paul D. Paton, "Legal Services and the GATS: Norms as Barriers to Trade," (2003) 9(2) *New England J. Intl. & Comp. L.* 361

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Chapter One

Introduction: Purpose, Significance and Overview

Professional self-regulation is a remarkable privilege, as well as an enormous conceit. Three elements are key to understanding the concept of self-regulation in a conventional sense: ordering of relationships in setting standards, engaging processes for monitoring compliance with standards, and putting in place mechanisms for enforcing standards.¹ For the legal profession in the province of Ontario, Canada, self-regulation has moved 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 identifies self-regulation as helping to “maintain the legal profession’s independence from government domination” and thus to preserving government under 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

¹ Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite, “Introduction” in Parker et al., *Regulating Law* (New York: Oxford University Press, 2004) at 1; 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* 54 (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”, (2002) *The Gazette* 29 at 33

to practice.”⁴ This “relative autonomy” of the profession carries with it responsibility for ensuring that “regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.” 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 these important values, the assertion of such claims by the legal profession ought not simply to immunize the profession from scrutiny of its exercise of self-regulatory authority or 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

Purpose of the Study

Challenges during the period 1998–2006 to the traditional self-regulatory authority of the Law Society of Upper Canada, the body responsible for the regulation of the legal profession in Ontario, have prompted a consistently defensive reaction focused

⁴ American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct (2007 Edition) (Chicago: ABA, 2007) at 3

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, online: <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>; 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 Boston U. L. Rev. 1 (1988)

⁶ Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession (New York: Oxford Univ. Press, 2000) at 143

on preservation of the status quo rather than on the public interest imperative.⁷ The purpose of this study is therefore to explore those reactions and to determine whether the legal profession in Ontario continues to merit the responsibility and privilege of self-regulation. Three case studies about regulatory responses to events facing the profession during the period under scrutiny serve to illustrate the issues and problems. The debate over the introduction of multidisciplinary practices, the visceral response to initial proposals for liberalized international trade in legal services at the General Agreement on Trade in Services (GATS), and the failure by the Law Society to recognize the unique ethical challenges that corporate counsel and others in corporate practice face in the post-Enron era, all amply serve to document both the transformation of the economic and political issues that face this self-regulating profession and to pose critically important questions about the future of its self-regulating authority.

The choice of the period 1998–2006 for study is deliberate: it coincides with a period of remarkable change. Each endpoint is marked by government legislation that deals with the Law Society’s self-regulatory authority in a significant way. In 1998, amendment of the *Law Society Act*⁸ by the Ontario provincial government granted the Law Society specific responsibility for regulating multidisciplinary practices that involve legal services. 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

⁷ The Law Society of Upper Canada is generally hereafter 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.

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

paralegals in the province.⁹ Between those two events, the environment for self-regulation has been fundamentally transformed. During the period in question, 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.¹⁰

Yet in Ontario, the provincial government paid little or no attention to the response or conduct of the Law Society itself as a regulator that acts in the public interest. Should government continue to delegate self-regulatory authority to a profession whose response to significant change during the period has been to retrench? How is the public interest being served? What institutional change is necessary? Will such change threaten the traditional self-regulatory authority of the profession? This study seeks to examine these questions in the context of selected significant developments during the period.

Background to and Significance of the Study -- Situating Canadian Developments in International Context

A 1996 article in Canada set the stage for this study's inquiry by asking whether the legal profession was equipped to confront its own transformation at the turn of the 21st century. Harry Arthurs, a leading Canadian ethics scholar, noted that the profession

⁹ *Access to Justice Act*, S.O. 2006, c.21, Sched. C

¹⁰ See Reiner Kraakman, "Gatekeepers: Anatomy of a Third-Party Enforcement Strategy," 2 J.L. Econ. & Org. 53 (1985); also Reiner 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 and Jeffrey Larsen, *Corporate Governance and Securities Regulation in the 21st Century* (Toronto: Butterworths, 2004) 97 at 99-102; John C. Coffee, Jr., "Understanding Enron: It's About the Gatekeepers, Stupid" 57 Bus. Law 1403 (2002) at 1403-05

was “experiencing growing internal political dissension at the very moment when it also confronts the profound and permanent external challenges of the new economy.” He questioned whether, given that dissension, the bar could survive as a unified profession with a single licensing structure, a single ethical code and a single “omnicompetent” governing body.¹¹ Events in the period since 1996 have made the confrontation more complex.¹² Globalization of legal services and law firms; multi-jurisdictional and multidisciplinary practice; concerns over regulation of paralegals and non-lawyer participation in the legal services market; and ensuring access to justice for low-income or indigent persons in the face of decreased government financial support were all topics of concern for lawyers in Ontario during the period.¹³ The legal profession also slowly began to realize the impact of the 2001-02 Enron scandal upon its own behavior and governance in the aftermath of the most significant reforms to corporate and securities

¹¹ H.W. Arthurs and Robert Kreklewich, “Law, Legal Institutions and the Legal Profession in the New Economy,” 34 Osgoode Hall L.J 1 (1996)

¹² A landmark study of the transformation of the legal profession in the United States situates the changes as having begun well in advance of this period: John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur, and Edward O. Laumann, Urban Lawyers: The New Social Structure of the Bar (Chicago: University of Chicago Press, 2005) (assessing forces of transformation and change in the Chicago bar over a 20-year period); Richard Abel, American Lawyers (New York: Oxford University Press, 1989)

¹³ On multidisciplinary practice, see also Gary A. Munneke and Ann L. Macnaughton, eds., Multidisciplinary Practice (American Bar Association, 2001) generally, and in particular Appendix Three (Federation of Law Societies of Canada, Multidisciplinary Partnerships: Report to Delegates) at 145; also Gary A. Munneke, “Lawyers, Accountants and the Battle to Own Professional Services,” 20 Pace L. Rev. 73 (1999); on globalization of legal services, see Jens Drolhammer and Michael Pfeifer, eds., The Internationalization of the Practice of Law (The Hague: Kluwer Law International, 2001); also Detlev F. Vagts, “The Impact of Globalization on the Legal Profession,” 2 *European Journal of Law Reform* 403 (2000); Carole Silver, “Globalization and the U.S. Market in Legal Services – Shifting Identities,” 31 *Law and Policy in International Business* 1093 (2000); on legal aid challenges in Canada, see Canadian Bar Association, “The Legal Aid Crisis: A Time for Action,” (December 1999) online: <<http://www.cba.org/CBA/Advocacy/pdf/Paper.pdf>>; Legal Aid Ontario, “The First Five Years (1999-2004)” (February 2004), online: <http://www.legalaid.on.ca/en/publications/reports/Accomplishments-Feb2004.asp>; F.H. Zemans & P.J. Monahan, From Crisis to Reform: A New Legal Aid Plan for Ontario (1997); J. McCamus, Report for Legal Aid in Ontario: A Blueprint of Publicly Funded Legal Services (1997); also Mary Jane Mossman, “From Crisis to Reform: Legal Aid Policy-Making in the 1990s,” 16 *Windsor Y.B. Access to Just.* 261(1998).

laws since the 1930s.¹⁴ Final Rules released in January 2003 by the Securities and Exchange Commission in the United States to implement Congressional directions about lawyer regulation threatened to usurp the ability of lawyers in both the United States and in Canada to regulate their own conduct, and to replace traditional approaches to self-governance with government agency supervision¹⁵. Concerns for accountability and transparency so key to corporate governance reforms made traditional arguments about the importance of self-regulation difficult to sustain. As a cautionary tale, self-regulation for the accounting profession in the United States all but disappeared in the desire to ensure accountability and professional governance in the public interest.¹⁶

This study's characterization of a deliberately oppositional reaction by the Law Society in Ontario to the challenge of recent developments is not simply conjecture or theoretical musing, or a response to developments in the United States alone. During April 2007 elections for Law Society benchers, or governors of the self-regulatory authority for lawyers in Ontario, 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. They expressed fear about the potential loss of self-regulatory authority in Ontario, precisely the topic this study engages.¹⁷ It is thus appropriate that the study in its final chapter situates recent developments in England and Australia as talismans for the future of self-regulation of

¹⁴ Roberta Romano, "The Sarbanes-Oxley Act and the Making of Quack Corporate Governance," 114 *Yale L. J.* 1521(2005) at 1523 n.2

¹⁵ See the discussion of U.S. reforms in Chapter Five.

¹⁶ Paul D. Paton, "Rethinking the Role of the Auditor: Resolving the Audit/Tax Services Debate," 32(1) *Queen's Law Journal* 135 (2006)

¹⁷ Candidate Statements of William J. Simpson, QC, LSM (former president of the Ontario Bar Association), and Laurie Pawlitza (Chair, Professional Development, Competence and Admissions), online: http://www.lsuc.on.ca/media/bencher_vote at 49 and 93

the legal profession in Ontario. English and Australian models, as well as American ones, have a potentially important influence on Canada, as Canadian legislators and regulators, as well as judges, look to international precedent and comparative examples for guidance and instruction.¹⁸

Despite differences in regulatory approach, there are a sufficient number of common features to justify comparing responses in these three jurisdictions. Self-regulatory models in common law jurisdictions in Canada and Australia evolved from the English model.¹⁹ A Law Society exercises authority delegated from government and governs admission, standards, conduct and enforcement of professional discipline. Under U.S. constitutional doctrine, the courts have inherent and primary regulatory power over lawyers. Admission to the Bar is a judicial function, and members of the Bar are officers of the court.²⁰ 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.”²¹ American influences are important, as Canada participates in an increasingly integrated North American market. Indeed, the questions posed above about the fundamental relationship between regulation of the profession and the public interest are ones engaged deeply

¹⁸For 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 (1998) at 35-36; also 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.T.L. J. 447(1999). See also the recent Supreme Court discussion found in *R. v. Hape* [2007] S.C.J. No. 26 (June 7, 2007)

¹⁹ Recent changes to the English model of governance are discussed in Chapter Six

²⁰ See e.g. *In re Attorney Discipline System*, 19 Cal 4th 582 at 592-93 (Sup. Ct. 1998); *in re Application of Lavine*, 2 Cal. 2d 324 at 327-328 (Sup. Ct. 1935); *State ex rel. Florida Bar v. Murrell* 74 So. 2d 221 at 224, 226 (Fla. Sup. Ct. 1954)

²¹ Rhode, *In the Interests of Justice*, at 145.

outside Canada during the period. Those considerations help frame this examination of what happened in Canada during the period in question and what models of regulation might be adopted in response.

As the final chapter details further, legislation introduced in England in May 2006 and finally adopted on October 30, 2007, removed the authority of the traditional self-regulatory professional bodies in England and implemented a regulatory model and structures more closely tied to government, together with perhaps its most radical step: specific authorization for the establishment of alternative business structures for the delivery of legal services by lawyers and nonlawyers together.²² 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 change.²³ This followed devastating academic critique years earlier that the profession "did not appear concerned with consumer complaints about lawyers at all."²⁴ 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

²² Judith L. Maute, "Revolutionary Changes to the English Legal Profession or Much Ado about Nothing?" 17(4) *The Professional Lawyer* 1 (2006)

²³ Report of the Regulatory Review of the Regulatory Framework for Legal Services in England and Wales, Final Report (December 2004) ("Clementi Report"), online: <http://www.legal-services-review.org.uk/content/report/index.htm>; The subsequent Legal Services Bill was introduced on 24 May 2006: online: <http://www.official-documents.gov.uk/document/cm68/6839/6839.pdf>; 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: see http://www.publications.parliament.uk/pa/pabills/200607/legal_services.htm

²⁴ Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford: Oxford University Press, 1999) at 13-14, citing Richard Abel, *The Legal Profession in England and Wales* (Oxford: Basil Blackwell, 1988)

profession and the public interest, the end result has been a fundamental transformation of the self-regulatory model.²⁵

In Australia, while coregulatory 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.²⁶ New legislation in both Queensland and in New South Wales 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, on the one hand; on the other hand, it bifurcated the profession's ability to grant entry and 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.²⁷

Similar concerns about professional self-regulation have prompted considerable change in the United States. In the wake of the Enron scandal and other corporate scandals in the United States that led up 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 in

²⁵ Legal Services Act, 2007 (October 30, 2007), *supra*; see also Richard Abel, English Lawyers Between Market and State: The Politics of Professionalism (New York: Oxford University Press, 2004); Richard Abel, "Between Market and State: The Legal Profession in Turmoil," 52(3) *Modern L. Rev.* 285 (1989);

²⁶ 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," (September 2005) at 2; also Australia, New South Wales, Law Reform Commission Report 99 (2000) – Complaints Against Lawyers: An Interim Report

²⁷ Brad Wright, "The Indispensable OBA," *Briefly Speaking* (May-June 2007) at 23

respect of 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.²⁸

Developments in the United States, as well as in England and Australia, 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.”²⁹ Yet in Ontario, the response of the government has been to further devolve self-regulatory responsibility to the profession itself. The key events forming the case studies here illustrate the failures in this approach.

The profession’s regulator in Ontario appears itself to have recognized both the threat to its own authority and the need for further study. The Law Society established a Task Force on the Independence of the Bar in November 2005; its stated objective was “raising public awareness regarding the role of an independent Bar in protecting the public.”³⁰ The Task Force relied on Robert Gordon’s four understandings of

²⁸ See Chapter Four.

²⁹ Janice Mucalov, “Walking the tightrope,” 13(6) CBA National (October 2004) 16 at 17

³⁰ Law Society of Upper Canada, Task Force on the Rule of Law and the Independence of the Bar, Final Report to Convocation, November 23, 2006, at p. 1, available online:

independence in the context of lawyers, including independence from outside regulation, to frame its work.³¹ This accorded with the resounding endorsement of the orthodox approach to independence reflected in the following passage from a decision of the Supreme Court of Canada:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation [. . .] of the law profession by the state must so far as by human ingenuity it can be so designed be free from state interference [. . .], with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.³²

The Final Report shied away from a full-blown equating of independence with self-regulatory authority, however, noting that “[s]elf-regulation may be consistent with the independence of the Bar, but this Task Force is focused on the relationship between lawyers and clients (and potential clients) and on the protection of the public interest that depends on that relationship.”³³

Yet the challenges during the period 1998–2006 to the Law Society’s traditional self-regulatory authority examined in this study have prompted a consistently defensive reaction focused on preservation of the self-regulatory status quo. The desire for

http://www.lsuc.on.ca/media/convnov2306_taskforce.pdf; see also Law Society of Upper Canada, Task Force on the Rule of Law and the Independence of the Bar, Report to Convocation, November 24, 2005, online: <http://www.lsuc.on.ca/media/convnov05motiontaskforce.pdf>

³¹ Task Force Final Report, *ibid.*, at para 11-12; Robert Gordon, “The Independence of Lawyers,” *supra*, note 4 at 6-10. Gordon’s three others are independence from client control, independence from political control, and independence to pursue public purposes.

³² *Canada (A.G.) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 at 335-336. Mr. Justice Iacobucci of the Supreme Court had articulated a similar defense of the importance of self-regulation of the legal profession: F. Iacobucci, “Striking a Balance: Trying to Find the Happy and Good Life Within and Beyond the Legal Profession,” 26 L.S.U.C. Gazette 205 (1992)

³³ Task Force Final Report, at para 12

continued self-regulatory authority underpins the Law Society's defensive reaction throughout the period. It also anchors the "fundamental principles" that the Task Force adopted, including the statement that the "independence of the Bar is an essential element of a free and democratic society," and the principle that the "independence of the Bar is both consistent with and necessary for the pursuit of legitimate public policy goals, such as defending national security."³⁴

As the first case study discussed in this study details, the reaction of the Law Society to proposals for liberalized rules permitting fully integrated multidisciplinary practice showed resistance to change and unseemly turf protection. As the second case study presents, the reaction of the Canadian Bar to proposals for reduced barriers to entry and greater trade in legal services at the General Agreement on Trade in Services (GATS) is a story of professional and institutional resistance to change in the delivery of legal services, as well as to the increased globalization and integration of the profession. As the third case study documents, changes implemented in Ontario in the wake of *Sarbanes-Oxley* took place with virtually no public debate and are woefully inadequate to deal with threats to the public interest posed by corporate misconduct, which contrasts with American approaches. The Law Society of Upper Canada has failed to implement a crime-fraud exception to ethical rules about client confidentiality, unlike its American counterparts. Further, resistance by the Law Society and other legal regulators in Canada

³⁴ Task Force Final Report, *ibid.*, at 2-3. The Task Force commissioned "six background papers on aspects of the independence of the Bar from eminent academic authors," including one from this author: Paul D. Paton, "The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers, or Instruments of State Enforcement?" in Law Society of Upper Canada, [In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Independence of the Bar](#) (Toronto: Irwin Law, 2007)

to money-laundering and antiterrorist legislation in Canada has pitted the self-interest of the profession against the public interest as expressed through the will of elected parliamentarians.³⁵ Cumulatively, these undermine the perception of the Law Society's authority to act in a disinterested fashion, although it has been tasked by the provincial legislature with regulating the legal profession in the *public* interest.³⁶

This study therefore strives to achieve a number of goals. First, it seeks to fill a significant gap in the Canadian literature and contribute to a longstanding debate with new evidence from institutional responses to recent events.³⁷ Such a contribution is particularly valuable for a body of literature criticized as "thin and unsystematic."³⁸ It also responds to accusations that legal ethics in Canada is a "subject in search of scholarship."³⁹

Second, the study seeks not only to provide detailed analysis and criticisms of the institutional responses, but also to illustrate the challenges of balancing professional self-

³⁵ Paton, "Lawyers as Gatekeepers," *ibid.*

³⁶ *Law Society Act*, *supra*, at s. 4.2. See the discussion of the *Law Society Act* and the specific mandate granted to the Law Society to govern the profession "having regard to" the public interest in Chapter Two.

³⁷ Prior versions of portions of this dissertation have been published in progress. 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(2) *New England Journal of International and Comparative Law* 361-416 (2003); Deborah L. Rhode and Paul D. Paton, "Lawyers, Ethics and Enron," 8(1) *Stanford Journal of Law, Business and Finance* 9 (2002); Paton, "Lawyers as Gatekeepers," *supra*. Other works in the Canadian professional ethics literature have addressed the subject broadly but pre-date this period and do not critically focus on self-regulation. See Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Scarborough: Carswell, 1993); D. Buckingham et al., *Legal Ethics in Canada: Theory and Practice* (Toronto: Harcourt Brace Canada, 1996)

³⁸ Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, Second Edition (Toronto: Irwin Law, 2006) at 5.

³⁹ Adam Dodek, "Canadian Legal Ethics: A Subject in Search of Scholarship," 50 *University of Toronto L.J.* 115 (2000)

interest against the broader public interest. In so doing, it seeks to lay the foundation for reform and to advance the debate about what institutional change is required to self-regulation in Ontario. This study thereby responds to experts' calls for essential further efforts to increase public accountability in regulatory processes for the legal profession.⁴⁰

This study therefore identifies the three cases first as individual events or issues worthy of close examination. It also synthesizes them as cumulatively constructing a potential threat to traditional self-regulatory authority. In this, the study deliberately attempts to follow in the path in law and society scholarship emphasizing change and institutional reform through deep description. Drawing on globalization and comparative examples throughout, this study also seeks to bring a purposive explanation of the social and legal phenomena being described.⁴¹ In addition, there has been a strong undercurrent in law and society scholarship of attempting to explain in order to effect change. Building on empirical evidence, broadly conceived, law and society scholarship seeks to base conclusions on behavior observed and by inferences drawn from those observations.⁴²

In that respect, this study situates the individual cases within the broader landscape of challenges to self-regulatory authority in Canada and the international legal community. In the United States, Gillian Hadfield is currently undertaking a critical examination of how a "twenty-first century economy is being built on a nineteenth-century legal platform" and questioning why innovation is "proceeding rapidly in the way

⁴⁰ Rhode, *In the Interests of Justice*, at 147

⁴¹ Lawrence Friedman, "The Law & Society Movement," 38 *Stanford L. Rev.* 763 (1986)

⁴² Lee Epstein and Gary King, "The Rules of Inference," 69 *U. Chi. L. Rev.* 1 (2002) at 3-12, [discussing the state of empirical legal research and a broader definition of "empirical" as applied to legal scholarship]

business gets done, but not in the way law supports and regulates economic activity.”⁴³ The public interest rationale ought to be an integrated part of that analysis. Accountants lost the ability to self-regulate in the United States in the aftermath of the Enron debacle, as elected officials and regulators perceived that the accounting profession had breached a public trust.⁴⁴ Given the legal profession’s responses to the challenges detailed here, the same questions need to be asked about whether the legal profession in Ontario should be subjected to the same fate. This study seeks to lay the foundation for considering those issues.

Relevant Literature

A brief review of the academic literature confirms while the case studies scrutinized here – and their Canadian context – are new, the key questions about self-regulation have been engaged elsewhere and are not. 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.⁴⁵ 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.”⁴⁶ The Commission’s report was released in 1992, the same year as David Wilkins’ touchstone article posited

⁴³ Gillian Hadfield, “Law for a Flat World,” Lecture at the Center for Advanced Study in the Behavioral Sciences, Stanford University, March 27, 2007; see also Gillian Hadfield, “Privatizing Commercial Law,” (2001) *Regulation* 40; Gillian K. Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System,” 98 *Mich. L. Rev.* 953 (2000); Gillian K. Hadfield, “Don’t Forget the Lawyers: Legal Human Capital and the Role of Lawyers in Supporting the Rule of Law,” 55 *DePaul L. Rev.* 401 (2007)

⁴⁴ Paul D. Paton, “Rethinking the Role of the Auditor,” *supra*, at 144-145.

⁴⁵ Deborah L. Rhode, “Legal Ethics in An Adversary System: The Persistent Questions,” 34 *Hofstra L. Rev.* 641 (2006) at 657

⁴⁶ 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”), online: http://www.abanet.org/cpr/reports/mckay_report.html

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.⁴⁷ 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.⁴⁸ Much of that change was the 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.⁴⁹ The

⁴⁷ David B. Wilkins, "Who Should Regulate Lawyers?" 105 Harv. L. Rev. (1992) 801; 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)

⁴⁸ A sampling of considerations of self-regulatory models and structures in the United States generally includes Rhode, *In the Interests of Justice*, supra; 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 Hazards 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 M. Stempel, "Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing the Regulating the Legal Profession," 27 Fla. St. L. Rev. 25 (1999); W. Bradley Wendel, "Public Values and Professional Responsibility," 75 Notre Dame L. Rev. 1 (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. 787 (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. 97 (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); Paul 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);

⁴⁹ Deborah L. Rhode, "Legal Ethics in An Adversary System: The Persistent Questions," (2006) 34 Hofstra L. Rev. 641 at 657; see also Rhode, *In the Interests of Justice*. Other critical examinations include Robert W. Gordon, "The Legal Profession," in Bryant W. Garth, ed., Looking Back at Law's Century (Ithaca: Cornell University Press, 2002) at 287; Richard L. Abel, American Lawyers, (New York: Oxford University Press, 1989) at 142-157 (in particular Chapter 7 – Self-Regulation); Robert L. Nelson, Raymond M. Trubek, & Rayman L. Solomon, eds., Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal System (1992) at 4-5 (a series of essays on new paradigms for conceiving of professionalism in the U.S. legal profession)

challenge to assertions by the American Bar's ability to present self-regulation as a societal value has been considerable, particularly since 1998.⁵⁰ 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."⁵¹ 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. Engaging in similar critical examination and reform in the Canadian context is thus both appropriate and necessary.

As noted above, this study seeks to fill gaps in the literature about self-regulation of the Canadian legal profession. Christopher Moore's history of the Law Society of Upper Canada begins in 1797 and covers the period up until 1997; this study begins where Moore leaves off historically.⁵² The seminal work *Lawyers in Canada* dates back nearly twenty years; it had a self-described "gestation period" between 1974 and 1990.⁵³ A 1979 study of professional regulation in Ontario still stands as essentially the last deep evaluation of the structure of lawyer regulation in Canada.⁵⁴ More recent commentaries

⁵⁰ Rhode, *In the Interests of Justice*, 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.") at 1

⁵¹ Jonathan Macey, "Occupation Code 54110: Lawyers, Self-Regulation and the Idea of a Profession," 74 *Fordham L. Rev.* 1079 (2005) at 1082

⁵² Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997)

⁵³ David A.A. Stager with Harry W. Arthurs, *Lawyers in Canada* (Ottawa: Ministry of Supply and Services, 1990). Stager makes reference to the "gestation period" in the book's introduction, at xi

⁵⁴ Michael J. Trebilcock, Carolyn J. Tuohy and Alan D. Wolfson, *Professional Regulation* (Toronto: Ontario Government Printer, 1979); see also Carolyn Tuohy and Alan Wolfson, "Self-Regulation: Who Qualifies?" in Philip Slayton and Michael J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978); Carolyn J. Tuohy, "Private Government, Property and Professionalism," 9 *Canadian Journal of Political Science* 668 (1976); Carolyn J. Tuohy, "Carolyn J. Tuohy, "Public Accountability of Professional Groups: The Legal Profession in Ontario," in Robert G.

by Professor Harry Arthurs on the self-regulation of the Canadian legal profession in 1995 and 1996 do not take account of the developments covered in the period under scrutiny in this study.⁵⁵ A 2001 article by Roderick Macdonald predicted certain of the challenges – on multidisciplinary practice and globalization in particular -- posed by the cases engaged in this study; this examination therefore responds in part to the predictive nature of his work.⁵⁶ A 2000 book by William Hurlbut on self-regulation of the legal profession in Canada and in England and Wales is important, but this examination does not replicate it. Hurlbut's study does not engage the specific cases presented here or the issues posed by them. Further, Hurlbut's study is descriptive rather than analytical.⁵⁷ It was the product of a 1996 residential fellowship at the Inns of Court in London and was published later when the Law Society of Alberta sought Hurlbut's draft for consideration during its debates on the future of self-regulation. The work itself began with an entirely different purpose: an evaluation of the progress made by Canadian law societies in the promotion and supervision of lawyer competence and quality of service since the 1978 Conference of the Federation of Law Societies of Canada on the Quality of Legal Services and the Federation's 1980 Workshop on the same subject.⁵⁸

Evans and Michael J. Trebilcock, *Lawyers and the Consumer Interest* (Toronto: Butterworths, 1982); a more recent attempt is F.C.DeCoste, "Towards a Comprehensive Theory of Professional Responsibility," 50 UN.B.L.J. 109 (2001)

⁵⁵ Harry W. Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" 33 *Alta L. Rev.* 800 (1995); H.W. Arthurs, "Lawyering in Canada in the 21st Century," 15 *Windsor Y.B. Access to Justice* 202 (1996); see also H.W. Arthurs and Robert Kreklewich, "Law, Legal Institutions and the Legal Profession in the New Economy," 34 *Osgoode Hall L.J.* 1 (1996); H.W. Arthurs, "Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields," 12 *Can. J. L. & Soc.* 219 (1997)

⁵⁶ Roderick A. Macdonald, "Let Our Future Not Be Behind Us: The Legal Profession in Changing Times," 64 *Sask. L. Rev.* 1 (2001)

⁵⁷ William H. Hurlbut, *The Self-Regulation of the Legal Profession in Canada and in England and Wales* (Edmonton: Law Society of Alberta, 2000)

⁵⁸ *Ibid.*, at v See also Conference on Quality of Legal Services: The Legal Profession and Quality of Service (Ottawa: Canadian Institute for the Administration of Justice, 1979)

The Task Force of the Law Society of Upper Canada on the Rule of Law and the Independence of the Bar struck in 2005 specifically and deliberately did not engage a direct examination of self-regulatory authority of the Law Society. Instead, the six background papers commissioned from “eminent academic authors” on aspects of the independence of the Bar only tangentially engaged the direct question of whether continued self-regulation by the legal profession was justifiable, with the exception of the paper by this author prepared for the Task Force and drawing in part from this study.⁵⁹

Organization of the Dissertation

Chapter Two sets out the organization of the legal profession in Canada and the legislative imperative for regulation in the “public interest”. The chapter addresses the debate over whether self-regulatory authority for the legal profession in Ontario is a grant of power from government or legislative recognition of an independent, organic right that pre-dated the existence of legislative authority. It concludes that government is the original source of regulatory authority, thus setting the stage for government to retract that right if regulation by the provincial Law Society is not in accord with the public interest imperative set out in the empowering statute.

Chapter Three details the history of the multidisciplinary practice (“MDP”) debate in Canada, with a particular focus on the response of the Law Society of Upper Canada. The chapter concludes that deliberations about new forms of service delivery were

⁵⁹Task Force Final Report, *supra*, at para 4; see also Paton in Law Society of Upper Canada, *In the Public Interest*, *supra*, note 25

largely about the status of lawyers in the face of competitive threats in the commercial marketplace rather than about the public interest. Opponents of change cast the MDP challenge as threatening the “core values” of the legal profession and successfully relied on the rhetoric of “core values” to prevent MDPs from effectively operating in a meaningful way. Further, by adopting flawed processes to reach decisions on MDP matters, Canadian legal regulators limited the debate and prevented discussions that might have permitted sounder policy decisions. In so doing, they exposed the perils of government delegation of self-regulatory authority and the risk that is presented when professional self-interest trumps public interests.

Chapter Four details the proposals for liberalization of rules pertaining to trade in legal services at the General Agreement on Trade in Services (or GATS). The case study exposes the tension within the legal profession in Canada between “protecting the guild” and desiring more open trade opportunities for exporting legal services expertise. The GATS dialogue recognizes the transformation of the profession into an increasingly globalized business—something that neither the Canadian Bar Association nor legal regulators in Canada seem prepared to accept. As the story of the GATS debate demonstrates, normative arguments by the profession about the independence of the bar became the justification to resist change. Further, and more troubling, these arguments served to diminish the role of government in the name of a so-called “democratic ideal.”⁶⁰ The GATS discussions during this period pitted the profession against the governments that were negotiating the protocols that would have governed lawyers and

⁶⁰ *But see* Garth, *supra* note 46, at 959-960 (contrary view about the need for lawyers to uphold the universal principles embraced by the legal profession to protect the public interest).

their regulators. These discussions also highlight the need for a deeper reevaluation of how lawyers should be governed in a globalized economy.⁶¹ The response of Canadian legal regulators was to close down such a discussion, as well as to reassert the profession's right to self-regulate independently of government, and thereby attempt to foreclose the applicability of GATS trade rules.

Chapter Five places a spotlight on the ethical challenges that face corporate counsel in Canada and the failure of the legal regulators to provide an adequate response to protect the public interest in light of the radical developments in corporate governance reform in the United States in the post-Enron era. The chapter suggests that adopting a crime-fraud exception to ethical rules on confidentiality, as the American Bar Association eventually did in 2003, will send a signal to the public that the profession and legal regulators in Canada are concerned about corporate accountability. The chapter concludes that failure to do so puts into question the continuing confidence of legislators and the public that the Law Society can continue to regulate in the public interest.

Chapter Six situates the Canadian examples in further international context by briefly describing the effective end of self-regulation of the legal profession in England and Australia. Against these examples and the earlier exploration of self-regulatory change for the profession in the United States set out in Chapter Five, this examination seeks to draw conclusions about the lessons to be learned from the responses during the period 1998-2006 and what that may signal for the future of self-regulation in Ontario.

⁶¹ See also Louise L. Hill, "Services as Objects of International Trade: Bartering the Legal Profession," 39 *Vand. J. Transnational L.* 347 (2006) [focusing on European Union directives as a model for shaping the globalization of the legal profession and liberalizing trade in legal services]

Chapter Two

Organization of the Legal Profession in Canada and Regulation in the “Public Interest”

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 situating an understanding of 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 can therefore be retracted by government. The other views self-regulation as having begun organically within the profession itself, only later formalized by government. Accordingly, the profession is fully independent, and elected officials cannot override or withdraw this self-regulatory authority.

Law Societies and bar leaders have vigorously asserted this second view. As the final chapter demonstrates in further detail, governments in England and Australia have relied on the first approach to implement significant reforms that, in many ways, constitute the end of self-regulation. This chapter explores this debate about the origin of self-regulation in the Canadian context and concludes that the first version is the appropriate perspective from which to analyze recent developments.

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.⁶² 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.”⁶³ 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.⁶⁴

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.⁶⁵ In a history commissioned by the Law Society of Upper Canada itself, historian Christopher Moore notes that the Law Society of Upper Canada was something new, emerging from a 1797 meeting of ten lawyers that had “declared the legal profession’s authority to govern itself

⁶² 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.

⁶³ Stager and Arthurs, *Lawyers in Canada*, at 33

⁶⁴ *Ibid.*, at 34

⁶⁵ G.D. Finlayson, “Self-Government of the Legal Profession – Can It Continue?” *Advocates’ Society Journal* (February 1985) 11 at 15.

and [. . .] had established the organization with which to do so.”⁶⁶ According to Moore, these lawyers

left behind, unacknowledged, a mystery. For this Law Society of Upper Canada was something new in the world. In Britain, barristers governed themselves, but that was a matter of traditional usages inherited from the remote past, and those usages had not migrated to Britain’s overseas colonies. Wherever courts had been established in the British Empire, judges (usually the chief justice) supervised the legal profession. Only in the mid-nineteenth century would judges and legislatures begin to transfer that authority to organizations of lawyers, and as a rule, they did so only where the legal community was well-established, well-organized and assertive about its need to govern itself. As late as 1830, the Privy Council declared that in every British colony, lawyers were governed by the chief justice.

By contrast, Upper Canada was transferring authority to its legal profession half a century before the trend towards professional autonomy took hold in the English-speaking world and long before the local legal profession was either organized or powerful. 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.⁶⁷

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.⁶⁸ Accordingly, the better view is that government is the original source of self-regulatory authority, although direct responsibility for governing in the

⁶⁶ Moore, *supra*, at 15

⁶⁷ Moore, *supra*, at 16-17

⁶⁸ Moore, *supra*, at 14-15

public interest has been transferred to the provincial law societies under provincial legislation.⁶⁹ 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.⁷⁰ 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*.⁷¹ 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 *Law Society Act* to provide that in carrying out its functions, duties and powers, the Law Society "shall have regard" to principles enumerated in the new section 4.2 of the *Law Society Act*, including a "duty to maintain and advance the cause of justice 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."

⁶⁹ In further support of this position, see in particular Carolyn J. Tuohy, "Public Accountability of Professional Groups: The Legal Profession in Ontario," in Robert G. Evans and Michael J. Trebilcock, *Lawyers and the Consumer Interest* (Toronto: Butterworths, 1982) at 105; also W. Wesley Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada," in Dale Gibson and W. Wesley Pue, eds., *Glimpses of Canadian Legal History* (Winnipeg: Legal Research Institute of University of Manitoba, 1992) 237 at 246-248

⁷⁰ *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

⁷¹ R.S.O. 1990, c. L-8

The Law Society is accordingly statutorily empowered with responsibility for regulating lawyers in the public interest.⁷²

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. A small number of nonlawyers appointed by the provincial government, known as lay Benchers, also sit on the governing council. 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.⁷³ 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 as 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.⁷⁴

The Act grants to the Benchers the power to govern the affairs of the Law Society, and by extension the legal profession.⁷⁵ In addition to the forty benchers elected by lawyers in the province, as a result of amendments in October 2006, two benchers will be elected from among those who “provide legal services,” or paralegals, licensed by the

⁷² 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)

⁷³ *Law Society Act*, s. 62

⁷⁴ *Law Society Act*, s. 7, *Law Society of Upper Canada By-Law 3*

⁷⁵ *Law Society Act*, s. 10. Note that 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 newly regulated by the Law Society starting in 2007-08.

Law Society.⁷⁶ The Minister of Justice, the Attorney General for Canada, the Solicitor General for Canada, every person who has held the office of elected benchers for at least sixteen years, the Attorney General for Ontario and all former attorneys general for Ontario are also benchers (although such memberships are in abeyance if the individual is appointed as a judge).

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.”⁷⁷ 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.⁷⁸ The Law Society trumpets that it was “the first professional body in Ontario to officially include public representation in its governance, through the appointed lay benchers.”⁷⁹ Relying on these appointments to ensure public accountability is fraught with difficulty, even if their symbolic value is important.⁸⁰ As Deborah Rhode has noted in discussing nonlawyer representatives on regulatory bodies: “[a]lmost never do they have the

⁷⁶ Law Society Act, s. 16

⁷⁷ Law Society Act, s. 13(1)

⁷⁸ Law Society Act, s 23. See also Law Society of Upper Canada, “How the Law Society of Upper Canada is Governed,” online:<<http://www.lsuc.on.ca/about/a/management> (last accessed August 28, 2007)

⁷⁹ Ibid.

⁸⁰ See Carolyn J. Tuohy, “Public Accountability of Professional Groups: The Case of the Legal Profession in Ontario,” in Robert G. Evans and Michael J. Trebilcock, Lawyers and the Consumer Interest (Toronto: Butterworths, 1982) at 111-113.

information, resources, leverage or accountability to consumer groups that would be necessary to check Bar control.”⁸¹

The Law Society’s Web site notes 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.⁸²

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.”⁸³ 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.⁸⁴ 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

⁸¹ Rhode, *In the Interests of Justice*, 146

⁸² See Law Society of Upper Canada, “Law Society Mandate”, online: <http://www.lsuc.on.ca/about/a/about-the-society> (last accessed August 28, 2007)

⁸³ *Royal Commission Inquiry into Civil Rights, Report No. 1* Honourable J.C. McRuer, Commissioner (Toronto: Queen’s Printer, 1968), cited in Stager, *Lawyers in Canada*, supra, 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)

⁸⁴ Tuohy, supra, at 105

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.⁸⁵ 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.

A brief portrait of the profession being regulated further situates regulation of lawyers in the context of the public being served. For the year ending December 31, 2006, the Law Society reported that total membership totaled 37,907 lawyers, an increase of 1,069 from 2005 and 2,206 from 2004.⁸⁶ As of January 1, 2007, Statistics Canada reported 12.72 million people in the province, 38.8% of the national population. Therefore, there is roughly one lawyer in the province for every 335 residents.⁸⁷ Nearly half of all Ontario lawyers (49%) practiced in Toronto, the provincial capital, Canada’s largest city and its commercial center; 42% practiced elsewhere in Ontario; 5% in other provinces and 4% outside Canada. By area of employment, sole practitioners were the largest group (23%), followed by law firm partners (21%), law-firm associates (17%) and lawyers in government (15%). The “other” category, including lawyers in corporations and nonprofit sectors, was a significant 19% of the profession. Sole practitioners made up the largest percentage of the 20,058 members in private practice, at just over 31%. Law

⁸⁵ Tuohy, *supra*, at 135

⁸⁶ Law Society of Upper Canada, *Annual Report 2006*, online:http://www.lsuc.on.ca/media/arep_csc_06.pdf at 20 (hereafter “Law Society 2006 Annual Report”)

⁸⁷ Statistics Canada, “Canada’s population estimates – First Quarter, 2007 (Preliminary),” *The Daily*, (June 28, 2007) online: <http://www.statcan.ca/Daily/English/070628/d070628c.htm> (last accessed August 28, 2007)

firms with 2–10 lawyers accounted for just over 30%; firms with between 11 and 25 lawyers 11%; and law firms with 51 or more lawyers accounted for 22% of the total. Males between 50–65 years old constituted the largest subgroup. In a sign that the profession is changing, however, women accounted for 36% of the total number of lawyers in the profession (an increase from 30% in 2001), but outnumbered men in both the under-30 and 30–39 age groups.⁸⁸ Further, the profession is becoming more diverse: nearly 56% of licensing process students in 2006 were women, 19% were self-identified as members of racialized communities, 4.3% were francophones and 1.5% were aboriginals (compared with 19%, 4.3% and 1.6%, respectively, of the general population of Canada, based on 2001 Census data).⁸⁹

Generally, someone seeking to practice law in a Canadian province must hold a law degree from a recognized Canadian university, typically a three-year LL.B. or J.D. degree. To be admitted as a student in a Canadian law school, the applicant generally must hold an undergraduate degree, typically a recognized four-year bachelor's degree.⁹⁰ One who seeks to become a lawyer in Canada must usually study for a period of seven years and obtain two university degrees. In addition, following the completion of the law degree, the individual must complete a period of articles as a “student-at-law” in the province, demonstrate that he or she is “of good character” and pass an examination that leads to acceptance at the Bar of that Law Society.

⁸⁸ Law Society 2006 Annual Report, at 20-21

⁸⁹ Law Society 2006 Annual Report, at 34

⁹⁰ Certain Canadian law schools outside Quebec permit admission after two years of undergraduate education, though this option is slowly being eliminated. Further, many Canadian law schools are “converting” the law degree granted to the Juris Doctor or J.D. familiar as the U.S. postgraduate law degree. The LL.B., or Bachelor of Laws, is still a second entry degree but has been confused in some jurisdictions as being a first entry degree (as it remains in Hong Kong, and other parts of the British Commonwealth).

Four provincial law societies (in Alberta, Saskatchewan, Ontario and Prince Edward Island) require that their members be either Canadian citizens or permanent residents. The Law Society of Newfoundland and Labrador requires that its members be residents of Canada.⁹¹ Acceptance at the Bar of one province does not automatically lead to acceptance at another. As of November 3, 2006, nine jurisdictions, including Ontario, have fully implemented a national mobility agreement. That agreement provides reciprocal rights to permit representation at the Bar of another province on limited matters within a given 12-month timeframe without the need to pass the qualifying examination in another province. It also provides for the transfer of membership from one province to another or for a lawyer to obtain membership in a second province much more readily than previously, without the need to re-article or sit additional Bar examinations.⁹²

Finally, in light of the importance of its role in the various developments concerning the legal profession in Canada considered in this study, the place of the Canadian Bar Association (CBA) merits note. The CBA is a professional, largely voluntary, organization formed in 1896, permanently established in 1914 and incorporated by a Special Act of the Canadian Parliament in 1921. It represents about 35,000 lawyers, judges, notaries, law teachers and law students from across Canada. Roughly two-thirds of all practicing lawyers in Canada belong to the CBA. The CBA's

⁹¹ See Federation of Law Societies of Canada, "The practice of law in Canada," online:<http://www.flsc.ca/en/lawSocieties/lawSocieties.asp> (last accessed August 29, 2007)

⁹² See Federation of Law Societies of Canada, "Mobility of Lawyers in Canada," online: <http://www.flsc.ca/en/committees/mobility.asp>

primary purpose is to “serve its members.” It also seeks to improve the administration of justice; improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession; promote equality in the legal profession and in the justice system; and to represent the legal profession in Canada domestically and internationally.⁹³ Special attention has been devoted to “uphold[ing] the [honor] of the profession” by developing a formal code of ethics that would serve as a model for adoption by provincial law societies.⁹⁴

Because the legal profession is governed provincially in Canada, the CBA’s structure has been based on strong, virtually autonomous provincial branches. There are also national and provincial sections related to different fields of legal practice and legislation.⁹⁵ As representative of the substantial number of members of the profession and as advocate for lawyers, the CBA’s views are highly influential, although not binding, on provincial regulators. The CBA also regularly intervenes in legislative debates provincially and nationally, and it formally intervenes in cases being argued at the Supreme Court of Canada and provincial appellate courts.

While it is clear, then, that the Law Society of Upper Canada has a statutory duty to regulate in the “public interest” and the CBA also holds itself out as a voice able to pronounce on issues of importance to the public, the concept of the “public interest” is

⁹³ Canadian Bar Association, “About the CBA,” online:<<http://www.cba.org/CBA/about/main>

⁹⁴ Canadian Bar Association, Code of Professional Conduct (2006)

⁹⁵ See Stager, *supra*, at 41-42, for a discussion of the work of the CBA in this regard.

“notoriously difficult to define.”⁹⁶ It is thus open for appropriation and manipulation by self-interested groups. One approach posits that regulation in the public interest, as it deploys public authority, “should be designed to further general public interests and not merely those of private individuals or of the profession itself.”⁹⁷ This assumes, as argued above, that the Law Society as legal regulator is deploying delegated public authority in the exercise of its powers.

Evans and Trebilcock suggest two alternative views of the regulatory process and favor the first as the appropriate mode for governing “in the public interest.” The first “assumes as a prior position that the economic activity of people and firms should be left alone unless a case can be made otherwise.” They posit that regulatory interference with markets can be justified only when markets generate behavior that is individually or socially undesirable. Such regulation must not create distortions worse than the original problem. The second, which “comes more naturally to lawyers,” is anchored in precedent: the status quo should be accepted unless a convincing case is made for change. “Whatever is currently in place, rather than the unregulated market, becomes the standard against which alternatives must prove their case.” This second approach, however, “can be a defense of privilege, as well as a guide to the public interest,” and leaves open the accusation that “professional defenders of the regulatory status quo are inevitably acting as judges in their own cause.”⁹⁸

⁹⁶Robert G. Evans and Michael J. Trebilcock, Lawyers and the Consumer Interest (Toronto: Butterworths, 1982) at xi-xiii

⁹⁷ Evans and Trebilcock, at xiii

⁹⁸ Evans & Trebilcock, at xi-xiii

Others have posited that the rules that lawyers develop for the legal profession, particularly rules of legal ethics, “constitute public policy in the sense that they are designed today to regulate lawyers, not just to guide or inspire them.”⁹⁹ As a result, and because the current regulatory system allows lawyers’ own rules to prevail, there should be a heightened sense of accountability to the public for the quality of this rulemaking. Excluding the public from this process and relying upon the rulemaking processes for expressive or symbolic purposes undercut the authenticity of the claim made by legal regulators that they are acting in the public interest. Meaningful public representation and input, an open and transparent process, and thoughtful assessment of evidence about the public and consumer interest would help ensure that any claim that actions have been taken in the “public interest” have some credible foundation.

An exclusion of the public from meaningful input, however, may be explained in this context by a combination of theoretical understandings. The most common rationale for regulation of the legal profession is the protection of the public from substandard or unscrupulous practitioners. Restrictive rules in this self-regulatory context by the profession is seen not as not self-serving, but rather is “in the public interest” because of high information asymmetry: consumers lack sufficient information to gauge the quality of the product that they will receive and are at risk from substandard service or legal advice.¹⁰⁰ Without external regulation, there is a risk that consumers will receive “incompetent, overpriced or unethical” representation. Further, without regulators setting

⁹⁹ Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study*, 35 *Ariz. L. Rev.* 363 (1993)

¹⁰⁰ 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), 436-439

minimum standards, lawyers will lack adequate incentives to invest the time and resources necessary to provide quality representation. Competition will lead to lawyers cutting corners and a “market for lemons” will result.¹⁰¹ Externalities – external costs to society and third parties from conduct advantageous to particular clients and their lawyers – creates an additional set of problems meriting some form of regulatory response.¹⁰²

This information asymmetry, however, also serves to protect the profession from external scrutiny: as consumers are not aware of the risks from obtaining services from lawyers, consumers are also unaware of legal regulatory processes and decision making that may affect them. Related to this are difficulties for consumers in obtaining information about the various issues. Further, in the Canadian context, it is worth noting that the consumer advocacy sector is woefully underdeveloped in comparison with that sector in the United States. While business groups such as the Business Council on National Issues, the Canadian Federation of Independent Business and local boards of trade and chambers of commerce serve as advocates for business concerns, few organized consumer-advocacy groups in Canada have the range or power of those found in the U.S.

Bounded rationality also serves to explain self-serving regulatory behavior by legal professionals to protect their competitive monopoly in the face of threats of encroachment by other providers. From this perspective, self-regulatory professions act to protect the incomes and status of lawyers by restricting access to supply.¹⁰³ This has a further impact where the profession uses restrictions on unauthorized practice to “protect

¹⁰¹ Rhode, *In the Interests of Justice*, *supra*, at 144

¹⁰² *Ibid.* at 144-145

¹⁰³ Bryant Garth, “From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values, 59 *Brooklyn L. Rev.* 931 (1993) at 933, 956; Schneyer, *supra*, at 392-393; Gary A. Munneke, “Lawyers, Accountants, and the Battle to Own Professional Services,” 20 *Pace L. Rev.* 73 (1999)

the guild”. Such regulations “focus only on whether nonlawyers are providing legal assistance, not whether they are doing so effectively.”¹⁰⁴ While too narrow to be an all-encompassing explanation, self-serving monopolistic conduct animates and at least in part explains the reaction of the Law Society to perceived threats to self-regulatory authority detailed in later chapters. It also directly contradicts the legislative command to act in the public interest, not simply in the interest of the profession. Bounded rationality overlaps with other theoretical threads and is often difficult to discern separately from them as the story unfolds in the cases under scrutiny. Part of the basic problem, however, is the essential grant of self-regulatory authority to the legal profession without procedural or process constraints against which regulators’ actions could be measured and assessed.

Although no mechanism is perfect, self-regulation by lawyers will be problematic so long as policy and regulatory decision making for the profession is “not reviewed and authorized in a forum [that] does provide for broad political judgments and for accountability to a wide variety of interests through established political channels.”¹⁰⁵ The profession needs to ensure that its actions and its decisions can withstand scrutiny. Otherwise, given the Canadian scheme for granting self-regulatory authority to the legal profession, it lies with government to ensure political accountability through one of two channels: government approval of regulations for the profession, and periodic review of the *Law Society Act*.¹⁰⁶

¹⁰⁴ Rhode, *In the Interests of Justice*, 137

¹⁰⁵ Tuohy, at 126

¹⁰⁶ Tuohy, at 126

This has been the lesson of experiences in England, Australia and the United States that were introduced in Chapter One and to which this study returns in Chapter Six. While the structure of regulation in Ontario compares to the older models in place in England and Australia, in both of those jurisdictions the structure of regulation has changed to address perceived abuses by the profession of its self-regulatory authority. Courts asserting “inherent power” to regulate the practice of law in the United States place judges rather than the bar in the position of exercising control over lawyer conduct and qualifications. Yet in the United States, as well, much of this authority has been delegated to the bar and lawyers retain considerable control over their own regulation.¹⁰⁷ Structural differences aside, subsequent chapters tell an important tale that regulators, legislators and the profession in Ontario would do well to recognize: a new era of greater political accountability for and expectations of professional conduct in the public interest means that more attention needs to be paid to both the substance of regulatory decisions and the process by which they are made. As the case studies in Chapters Three, Four and Five detail, while the Law Society has appropriated the language of the “public interest” in its deliberations—and has had to do so to sustain legitimacy for its ultimately self-interested decisions—the process by which those decisions have been reached has frequently invalidated any claims that the Law Society might have had that its actions were in the public interest. At a minimum, a flawed process and self-serving substantive decisions warrant government review of regulatory decision making and a reconsideration of the grant of self-regulatory authority. This would ensure public input and accountability where none has been seen to exist and where at times both have been excluded from the debate.

¹⁰⁷ Rhode, *In the Interests of Justice*, 145

Chapter Three

Lessons from the Multidisciplinary Practice Debate 1998-2003

A close examination of the history of the multidisciplinary practice (or MDP) debate in Canada—and in particular of the response to MDPs by the Law Society of Upper Canada between 1998 and 2002—reveals that the process was largely about the status of lawyers in the face of various threats, particularly competitive threats in the commercial marketplace. Characterized as a struggle of “epic proportions” between legal and accounting professions, opponents of change cast the MDP challenge as threatening the “core values” of the legal profession and successfully relied on the rhetoric of “core values” to propel decisions in Canada against permitting MDPs to operate in a meaningful way.¹⁰⁸ This case study offers important insights into how regulators addressed the ethics of multidisciplinary practice, and into how they used “core values” and “public interest” rhetoric to insulate the legal profession in Canada from external influences in an age of increasing globalization.¹⁰⁹ Reliance on that rhetoric to substantiate restrictive rules served neither the profession nor the public. Those terms became proxies for an “antimarket, anticompetitive attitude of the Bar that impedes change in the rules of professional conduct.”¹¹⁰ Although the language central to the “concept of a profession may set the practice apart as a normative ideal, [. . .] the

¹⁰⁸ Robert A. Prentice, “The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing,” 61 *Ohio St. L. J.* 1597 (2000) at 1599; Jack Giles, QC, “Why Multi-Disciplinary Practices Should be Controlled by Lawyers,” 58(5) *The Advocate* (September 2000)

¹⁰⁹ For a detailed consideration of the rhetoric of “core values” in the context of the multidisciplinary practice debate in the United States, see Nathan M. Crystal, “Core Values: False and True” 70 *Fordham L. Rev.* 747(2001); Bruce A. Green, “The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate,” 84 *Minn. L. Rev.* 1115 (2000): 1144-49

¹¹⁰ Crystal, *ibid.*, at 748.

structuring of the profession is still the structuring of a market,”¹¹¹ pitting the interests of the “legal profession” against the reality of changes to “legal practice.”¹¹² This chapter posits that the MDP debate thus functions as a cautionary tale about the need for greater public accountability for the conduct of legal regulators and the need for a new attitude towards reform in an age of evolving client demand and pressures for change beyond traditional jurisdictional and regulatory boundaries. Both the health of the legal profession and the continued legitimacy of the regulators are at stake.

Introduction and Overview: The MDP Debate in Ontario in Context

The concept of the multidisciplinary practice, or MDP, is fairly simple: an integrated entity that provides legal services as one of several professional services offerings through a single firm or provider. The Canadian Bar Association Committee on Multi-Disciplinary Practices described MDPs as “business arrangements in which individuals with different professional qualifications practice together in partnership or other business arrangements [. . .] to combine different skills to provide a broad range of advice to consumers.”¹¹³ The MDP was different in both conception and design from an

¹¹¹ Gillian K. Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System” 98 Mich. L. Rev. 953 (2000) at 956. See also Robert G. Evans and Michael J. Trebilcock, “Preface” in Robert G. Evans and Michael J. Trebilcock, eds., *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (Toronto: Butterworths, 1982) vii at ix-x.

¹¹² Bryant Garth, “From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values” 59 Brook. L. Rev. 931 (1993) at 931.

¹¹³ Canadian Bar Association, International Practice of Law Committee, *Striking a Balance: The Report of the International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession* (Ottawa: Canadian Bar Association, 1999) at 11 [*Striking a Balance*]. The issue of how to define multidisciplinary practice was the subject of considerable debate itself. The Canadian Bar Association’s August 2000 Council Resolution 00-03-A (revised) encompassed more than the fundamentally integrated ‘one-stop shop’ envisioned by the looser 1999 definition. It provided that “MDPs are business arrangements in which lawyers [including Quebec notaries] and nonlawyers practice together to provide a broad range of advice, including legal advice, to consumers, and which encompass a variety of forms, from

affiliated practice or subsidiary business (such as political consulting or lobbying) developed by a law firm that the law firm could market to its legal and other clientele, and it represented a new and revolutionary way of bringing legal services to the commercial marketplace. This was not simply an abstract idea, however. The MDP posed professional and ethical challenges in particular because of moves during the late 1990s through to roughly 2002 by the then “Big Five” accounting firms to provide legal services. At one stage, Big Five accounting firm MDPs “seemed to represent an irresistible force,” with numbers of lawyers in Andersen Legal, KLegal and Landwell (the legal networks or firms affiliated with accounting firms Arthur Andersen, KPMG and PricewaterhouseCoopers, respectively) in 2000 rivalling those of the largest global law firms, Clifford Chance and Baker & McKenzie.¹¹⁴ In addition to the obvious competitive threat, the fundamental issue was control: whether lawyers could maintain their professional values and standards in an organization controlled by nonlawyers, particularly in an organization controlled by accounting firms. Through the 1990s, accounting firms had expanded into nontraditional areas of practice, explained by the decline of audit services from the most prestigious and profitable professional-service

highly integrated organizations with lawyers and nonlawyers working under one ownership structure to loose referral networks.” The Federation of Law Societies of Canada tabled draft Model Rules for Multi-Disciplinary Practices at its meeting on February 26, 2000 that defined MDPs as encompassing both integrated and affiliated law firm models: Federation of Law Societies of Canada, National Multi-Disciplinary Partnerships Committee, “Model Rules for MDPs – Draft” (25 January 2000) [unpublished, on file with the author]. The Federation failed to reach a “consensus such as would be necessary to have the federation adopt a model rule of any form.”: V. Randell J. Earle, QC, “Report of the National MDP Committee of the Federation of Law Societies of Canada 2000 Annual Meeting, Halifax, NS” (2000) [unpublished, on file with the author]. The Law Society of Upper Canada, for example, separated the concept of the MDP from affiliation arrangements between law firms and other providers. Other regulators have not made similar distinctions and prefer to treat all alliances, from fully integrated firms to looser referral arrangements, as MDPs. For ease of understanding and reference, I adopt the CBA *Striking A Balance* conception and definition of the MDP unless making specific reference to other definitional choices.

¹¹⁴ Bryant G. Garth, “Multidisciplinary Practice after Enron: Eliminating a Competitor but Not the Competition,” 29(3) *Law & Social Inquiry* 591 (2004) at 592

offering to a lower-profit, high-risk activity that could be used as a “loss leader” through which client connections could be made to sell other, more profitable, tax and consulting services.¹¹⁵

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.¹¹⁶ These “core values”—maintaining independence, protecting privilege and avoiding conflicts of interest—became the vocabulary that defined and hijacked the debate. Reliance on “core values” rhetoric supported claims of critics that the profession cannot be trusted to regulate itself in the public interest. As one critic argued in the United States, 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.”¹¹⁷ 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 public

¹¹⁵ Colin Boyd, “The Transformation of the Accounting Profession: The History Behind the Big 5 Accounting Firms Diversifying into Law, A Report Prepared for the Canadian Bar Association International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession,” (May 13, 1999), online: <<http://www.ucommerce.usask.ca/faculty/boyd/mpacc801/FinalCBARreport.htm>> [hereafter “Boyd Report”]

¹¹⁶ Jack Giles, QC, “Why Multi-Disciplinary Practices Should be Controlled by Lawyers,” 58(5) *The Advocate* (September 2000)

¹¹⁷ Crystal, *Core Values*, at 774

input, the Law Society of Upper Canada excluded views that might have allowed for better policy decisions. Good process is not a prophylactic. But inadequate process virtually guarantees an unsound result, leaving policymaking open to the overt political manipulation with which the MDP debate in Ontario was infused. 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 MDP process did not embarrass the Ontario regulator by arriving at rules that made more stark the conclusion that the Ontario approach was not in the public interest.

The MDP debate in Ontario, held entirely within the profession, stands as an outrageous demonstration of self-interested will overriding public interest in both process and substance. It thus 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.¹¹⁸ Lawyers were content to determine what constituted the public interest and to proceed in a fashion that was blatantly self-serving and exclusionary.

¹¹⁸ W. Bradley Wendel, "Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities," 54 *Vand. L. Rev.* 1955 (2002)

The Law Society of Upper Canada: The Lawyers' Interest as Public Interest

Under amendments made to the *Law Society Act* in 1998, government granted the Law Society of Upper Canada power to make bylaws to govern MDPs involving lawyers and other professionals.¹¹⁹ Specifically, the Law Society was given authority to pass rules that governed

the practice of law by any person, partnership, corporation or other organization that also practices another profession, including requiring the licensing of those persons, partnerships, corporations and other organizations, governing the issuance, renewal, suspension and revocation of licenses and governing the terms and conditions that may be imposed on licenses.¹²⁰

No similar language appears in statutes that govern other professions in any form of professional association with lawyers. The legislative scheme thus clearly privileged the Law Society's ability to regulate MDPs.

The work of the Law Society of Upper Canada on MDPs began on April 4, 1997, when Convocation approved the creation of the "Futures Task Force" in response to deliberations within two separate Law Society committees on the need to assess the regulation of its members. As such, it was born of a broad set of interests in the future of the legal profession and issues that concerned how the Law Society regulates legal-services marketplace issues and the economic circumstances of lawyers.¹²¹ With this focus on the profession and the well-being of its members, then, it is not surprising that a

¹¹⁹ *Law Society Amendment Act*, S.O. 1998, c. 21.

¹²⁰ *Law Society Act*, s. 62(0.1)32

¹²¹ 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" (25 September 1998) at 10, online: The Law Society of Upper Canada <<http://www.lsuc.on.ca/services/MDPOct98.pdf>> (last accessed 26 May 2003) [Futures Task Force Final Report].

singular focus on protecting lawyers' interests (equating that with the interests of the public) would emerge.

The ultimate scheme for regulating MDPs in Ontario is comprised of two Law Society bylaws, one on integrated partnership arrangements and the other on affiliation arrangements between law firms and other services providers. These are considered in the next section.

By-Law 25: "Multi-Discipline Practices"

By-Law 25, entitled *Multi-Discipline Practices*, was adopted on April 30, 1999.¹²² 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;¹²³ MDPs offering primarily legal services with no specific provisions for control—the DC

¹²² Law Society of Upper Canada, By-Law 25, *Multi-Discipline Practices*, (30 April 1999) [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, online: http://www.lsuc.on.ca/media/convapr07_bylaw_review.pdf (last accessed August 29, 2007) See the new By-Law 7 (Business Entities) Part III – Multi-Discipline Practices, online: <http://www.lsuc.on.ca/regulation/a/by-laws/bylaw7>. The prior numbering was in place during the period until 2003 and is therefore retained for this discussion.

¹²³ Law Society of New South Wales, *Professional Conduct and Practice Rules*, Rule 40.1, online: The Law Society of New South Wales http://www.lawsociety.com.au/uploads/filelibrary/1025501574834_0.5077010227973097.pdf

model¹²⁴; and MDPs offering legal services only, provided that the partnership is in the effective control of lawyers), only the last option was considered to be in the public interest.¹²⁵

At numerous points, the Task Force that recommended this model took pains to point towards the accounting profession as the principal protagonists for MDPs, yet the Task Force did not directly suggest that such firms' arrangements in continental Europe or elsewhere violated professional ethical rules or the rules that govern the legal profession.¹²⁶ The specter used to justify a doubly restrictive regime in no way took into account the public interest in broader access to legal services or even the supply-side pressures from its own membership. Yet the rhetoric of the public interest and a normative justification of special barriers were invoked to justify the ultimate recommendations and insular approach that the Task Force adopted:

An analysis of these unique features of the profession make it clear that as lawyers, we are not simply at one with other professionals and service providers, being guided by a need to serve with due care and skill. The law has imposed special societal responsibilities upon us [that] we must discharge in the public interest. If we fail, we not only do ourselves discredit, but, more important[ly], we undermine the values themselves

¹²⁴ District of Columbia Bar, *District of Columbia Rules of Professional Conduct*, Rule 5.4(b), online: DC Bar <http://www.dcbbar.org/inside_the_bar/departments/board_on_professional_responsibility/rules_of_professional_conduct/Rule_five/rule05_04.cfm>

¹²⁵ Futures Task Force Final Report, *supra* at 9.

¹²⁶ *Ibid.* at 4, 8 (“The early (and current) protagonists for the development of MDPs are the large chartered accounting or professional services firms who see the partnering of lawyers and accountants as the next logical step in the continued globalization and consolidation of professional services.” Yet, not two paragraphs later the Task Force notes that such developments could flow to “main street,” involving lawyers and other professionals, and service providers in small centers and smaller firms or sole practices. Further, as noted above, the Law Society’s own survey acknowledges that close to 10% of its own members were already in such formal or informal practice arrangements, even if not sanctioned by the Law Society. This contradiction and targeting of the accounting profession is reflective neither of the Law Society’s own findings nor of any broad expression of the profession or the public’s interest).

and place important societal interests at risk. This is the responsibility [that] must be weighed in assessing our compatibility with MDPs.¹²⁷

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.¹²⁸ 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 Task Force and its bias against radical 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.¹²⁹

¹²⁷ *Ibid.* at 35.

¹²⁸ By-Law 25, *supra*, ss. 4(1)-(3) (defining “effective control”), 4(4) (defining “good character”).

¹²⁹ Futures Task Force Final Report, *supra*, at 6 [emphasis added].

Several features of this admission merit attention. First, the study had an openly self-interested bias. This occurred despite evidence from the Law Society's own 1998 survey data, based on 9600 responses, that 10% of its members maintained "regular referral arrangements with other nonlegal professionals." A full 8% acknowledged providing legal services to clients regularly "jointly with other professions and/or nonlegal disciplines [though which] those services are also available." Nearly ten percent acknowledged operating in a multidisciplinary practice arrangement, although the Law Society was not regulating it.¹³⁰ Further, the definition of the public interest was equated with a strong and independent legal profession. Finally, the conception of appropriate regulation is that the Law Society would not permit something (that is already, by its own data, occurring) until such time that a "demonstrable and legitimate demand" is proven. No criteria are offered anywhere in the report for what threshold should be adopted for "demonstrable" demand, and "legitimate" appears to be whatever the Law Society determines. The statement is also undercut by the evidence that is laid out in the appendices, which comes from business lawyers and in-house counsel, about the utility of multidisciplinary services in particular business contexts. Given the premise of the study acknowledged by the Task Force in its report, the outcome of its investigation was inevitable.

For all of the purported concern that the Law Society expressed in its report about the public interest, at no time did the Task Force or its academic experts consult with the

¹³⁰ See Futures Task Force Final Report, *supra*, Appendix 10 at 192-194 (The Law Society's analysis of the survey notes "[a] significantly smaller number of respondents (about 760) indicated that business arrangements with others were entered into to provide multi-discipline services to clients. What is not known is whether this is a result of the current restrictions within the regulatory regime, a desire on the part of lawyers to remain in control and independent, or a combination of both")

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 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.¹³¹

By-Law 32: The Affiliated Law Firm Rules

By-Law 25 was not the end of the MDP story in Ontario. The Futures Task Force report had noted the presence of law firms “captive” to Big-Five accounting firms in

¹³¹ *Ibid.*, Appendix 9 at 178.

continental Europe and the presence in Ontario of Donahue & Partners, a law firm established by the accounting giant Ernst & Young as a “captive firm.” The report noted that the Donahue law firm was a separate partnership, but had linkages to the accounting firm, including a physical presence within the accounting firm’s offices.¹³² It further remarked that “there are regulatory issues [that] require independent study with respect to this model and recommended that “an appropriate vehicle be struck” to undertake such a study.¹³³

Accordingly, in September 1998, Convocation mandated the Multi-Disciplinary Task Force to undertake an “intricate examination” of the provision of legal services to the public through law practices affiliated with professional-service or accounting firms, including questions of “control, trading style, management, conflicts of interest and related matters.”¹³⁴ The Task Force consultation paper noted that among the issues it wanted to assess was “consideration of the public interest in allowing clients to purchase legal services where they wish at a particular cost, in contrast to the historical monopoly on the provision of legal services exercised by the legal profession.” The paper also noted the Task Force’s interest in “whether this type of arrangement will enhance the availability and delivery of legal services to the public.” However, no evidence is presented in the final report of any attempt to canvass this issue outside the profession.

¹³² *Ibid.* at 3.

¹³³ *Ibid.* at 10.

¹³⁴ Law Society of Upper Canada, Transcript of Convocation (25 September 1998) at 218, cited in Law Society of Upper Canada, Multi-Disciplinary Practice Task Force, *Report to Convocation: Implementation Phase* (26 April 2001) at 1, n. 1 [Implementation Report].

The end result was By-Law 32, entitled *Affiliations with Non-Members*, passed on May 24, 2001. By-Law 32 imposed a notification requirement on a lawyer member or firm that “affiliates with an affiliated entity.”¹³⁵ It provided a form¹³⁶ that is to be filed annually that details the financial arrangements that exist between the two firms; sets out the ownership, control and management of the practice through which the member or group delivers legal services; informs the Society of the compliance by the lawyer members with the Law Society’s rules on conflicts of interest and confidentiality with respect to clients who are also clients of the affiliated entity; and provides other information required to satisfy the Society as to the arrangements between the lawyer or law firm and the affiliated entity.¹³⁷

Continuing the control requirements imposed in By-Law 25, By-Law 32 requires that the lawyers own and maintain control of the practice through which the legal services are delivered.¹³⁸ It stipulates a physical segregation of the premises from which the legal services are delivered from those used by the affiliated entity for the delivery of its nonlegal services, “other than those that are delivered by the affiliated entity jointly with the legal services of the member or group.”¹³⁹ The definition of *affiliation* is broad and was considered problematic. By-Law 32 provides that

a member or group of members affiliates with an affiliated entity when the member or group on a regular basis joins with the affiliated entity in the

¹³⁵ Law Society of Upper Canada, By-Law 32, *Affiliations with Non-Members*, (24 May 2001), s. 1(2) [By-Law 32]. Note that this By-Law was also revoked on May 1, 2007 as part of the consequential changes required by the October 2006 amendments to the *Law Society Act*. See also By-Law 7 (May 1, 2007), *supra*, but that its provisions remain in force, with different numeration.

¹³⁶ Law Society of Upper Canada, By-Law 32, Form 32A, “Notice of Affiliation,” (24 May 2001).

¹³⁷ By-Law 32., s. 3(2)-(3).

¹³⁸ *Ibid.*, ss. 2(a)-(b).

¹³⁹ *Ibid.*, s. 2(c).

delivery or promotion and delivery of the legal services of the member or group and the nonlegal services of the affiliated entity.¹⁴⁰

The Task Force acknowledged that “the definition of *affiliation* captures more than law firms and nonlaw firms [that] by design operate under comprehensive arrangements for the joint delivery of legal and nonlegal services. Convocation, however, agreed that the definition proposed by the Task Force was appropriate.”¹⁴¹

Other elements of the scheme are noteworthy. No profit-sharing or fee-splitting is allowed. Most importantly, the clearance of conflicts would act as an impediment to any association on any scale: a system would have to be established to search for conflicts in both the law firm and the affiliated firm. The Task Force stated that

the conflicts search regime should [. . .] extend to searches for conflicts in firms affiliated with the law firm that practice outside Canada [in which] separate national firms or offices of the nonlawyer firm are treated economically as if they were one firm.¹⁴²

In the end, Ontario was left with a restrictive regime, with initiatives that were voted upon before the debates at the Canadian Bar Association or at the Federation of Law Societies (the umbrella group of all Canadian legal regulators) were completed or the Law Society could benefit from the input from its counterparts in the U.S. It is to those developments at the CBA and in the United States that the next section turns.

¹⁴⁰ *Ibid.*, s. 1(2).

¹⁴¹ Implementation Report, *supra*, at 14.

¹⁴² *Ibid.* at 3.

*Canadian Bar Association and American Bar Association Considerations –
Introduction and Overview*

As noted in Chapters One and Two, formal authority for governance of the legal profession lies with state courts in the United States, which assert “inherent power” to regulate the practice of law, and in Canada with the provincial Law Societies acting under statute. However, the American Bar Association and the Canadian Bar Association play significant roles in developing the codes that regulators adopt to govern the legal profession. Their participation in the MDP debate was critical to shaping its outcome and is important for assessing the decisions taken by regulators in Ontario.

July 2000’s Resolution 10F of the American Bar Association (ABA) House of Delegates and Canadian Bar Association (CBA) Resolutions 00-03-A and 01-01-M from August 2000 and February 2001 on multidisciplinary practices were touchstones for the broader debate. After more than two years of deep investigation by its own Commission on Multidisciplinary Practice, the ABA House of Delegates in August 2000 not only rejected the Commission’s recommendations to permit integrated multidisciplinary practices involving lawyers and other professionals, but also struck back with a resolution that disbanded the Commission and left the ABA without any draft model rules to deal with the reality of MDPs in the United States.

Resolution 10F rejected fee sharing with nonlawyers and nonlawyer ownership and control of law firms as “inconsistent with the core values of the legal profession” and proposed rules that prevented the preservation of such innovations. The Resolution

provided a nonexhaustive list of “core values” of the legal profession. State Bars, however, would have to strike out on their own and find appropriate models for themselves, thereby risking the prospect of a patchwork response.¹⁴³

The Canadian Bar Association’s series of reversals on whether to permit multidisciplinary practices resulted in a “final” August 2000 resolution that, in contrast to the ABA resolution adopted only a few weeks earlier, permitted lawyers to engage in “business arrangements in which individuals with different professional qualifications practice together [. . .] to combine different skills to provide a broad range of advice to consumers.”¹⁴⁴ CBA Council subsequently modified the resolution in February 2001, restricting these arrangements, thereby rendering the model essentially useless for provincial regulators.

Nonetheless, at least some state and provincial regulators proceeded to adopt or consider rules to govern MDPs.¹⁴⁵ The merits and drawbacks of MDPs and the policy

¹⁴³ L. Harold Levinson, “Collaboration between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F” 36 *Wake Forest L. Rev.* 133 (2001) at 135. Levinson, an advisor to the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation in 1999-2000, which was “highly influential” in the adoption of Resolution 10F, did not see the resolution as particularly problematic in this regard. This perhaps reflected his confidence that the New York model set out in that state Bar’s committee report provided the answers other state Bars required. See also Sydney M. Cone, III, “Views on Multidisciplinary Practice with Particular Reference to Law and Economics, New York, and North Carolina” 36 *Wake Forest L. Rev.* 1 (2001) at 4. *Contra* Marc N. Biamonte, “Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?” (2001) 42 *B.C.L. Rev.* 1161 (2001) at 1164 (contrary view of the uncertainty left by the ABA August 2000 vote, calling the ABA move to disband its MDP Commission “shortsighted and irresponsible”), and Adam A. Shulenburg, “Would You Like Fries with That? The Future of Multidisciplinary Practices” 87 *Iowa L. Rev.* 327 (2001) at 329.

¹⁴⁴ Canadian Bar Association, International Practice of Law Committee, *Striking a Balance: The Report of the International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession* (Ottawa: Canadian Bar Association, 1999), at 11 [*Striking a Balance*].

¹⁴⁵ See American Bar Association, Center for Professional Responsibility, “MDP Information – January 18, 2005,” online: ABA Network <http://www.abanet.org/cpr/mdp_state_summ.html> (last accessed 12 December 2007) The “MDP Information” chart on the ABA’s Commission on Multidisciplinary Practice

options available to regulators had been canvassed extensively elsewhere in anticipation of decisions by regulators about *what to do*.¹⁴⁶ After reviewing the Canadian Bar Association and American Bar Association discussions on MDPs, the balance of this investigation scrutinizes what was *done*. From this the regulatory response of the Law Society of Upper Canada detailed above can be gauged against the other most commercially important common law jurisdiction at the time in Canada—British

website notes that as of January 2005, its last update, only New York's courts have approved rule amendments proposed through the state Bar's study of MDPs. Of the fifty states and the District of Columbia, six states are categorized as "studying" the issue; five states are listed as "pro" MDP, though none had adopted rules to implement MDPs; 25 have "rejected" MDPs (including New York, where rules implement its report opposing MDPs); seven (Alaska, Hawaii, Louisiana, Massachusetts, Mississippi, Nevada, and Vermont) are listed as "nothing," with no committee or no formal study, or having abandoned the issue or disbanded their committees; one (Idaho) is "dormant"; one (Iowa) is "monitoring"; one (Missouri) is "neutral"; one (Washington) is "divided"; one (Arizona) is "deferred"; and one (Michigan) is "postponed". [last accessed December 12, 2007].

¹⁴⁶ See e.g. Kent Roach & Edward M. Iacobucci, "Multidisciplinary Practices and Partnerships: Prospects, Problems and Policy Options," 79 Canadian Bar Review 1 (2000). Roach and Iacobucci provide a comprehensive and comparative treatment of the many policy issues raised by the regulators in the Canadian MDP debate. They argue that consumers will benefit from a liberal regime of MDP governance. They also offer policy options to extend the range of services an MDP might offer that are consistent with the ethical concerns of the existing regulatory regime in Canada. They refrain from examining the regulatory regime generally, or the process by which it reaches decisions, but rather focus on analyzing how MDPs can be incorporated into it. Foreshadowing the eventual response, they note at page 5: "Whatever regulatory response is taken must be justified in the public interest as necessary to protect the consumers of legal services and the ethical canons of the legal profession. There is a significant danger, however, that regulators will be pressured to act in a protectionist manner." See also Julius Melnitzer, "Here Come the Bean-Counters... A Primer on Multidisciplinary Practice, Part One" *Canadian Lawyer* 23:11 (November/December 1999) 34. Compare Laurel S. Terry, "A Primer on MDPs: Should the "No" Rule Become a New Rule?" 72 Temp. L. Rev. 869 (1999); Mary C. Daly, "What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform" 50 J. Legal Educ. 521 (2000) (note that Daly served as Reporter for the ABA Commission on Multidisciplinary Practice for two years and draws on this experience in this article); Mary C. Daly, "Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in A Multidisciplinary Partnership" 13 Geo. J. Legal Ethics 217 (2000) (description of the activities of the ABA Commission on Multidisciplinary Practice); Phoebe A. Haddon, "The MDP Controversy: What Legal Educators Should Know" 50 J. Legal Educ. 504 (2000); George Steven Swan, "The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice 1999-2001" 24 J. Legal Prof. 151 (2000); Michael W. Price, "A New Millennium's Resolution: The ABA Continues Its Regrettable Ban on Multidisciplinary Practice" 37 Hous. L. Rev. 1495 (2001); Edith Y. Wu, "Why Say No to Multidisciplinary Practice?" 32 Loy. U. Chi. L. J. 545 (2001); Stuart S. Prince, "The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion" 50 Am. U. L. Rev. 245 (2000); Carol A. Needham, "Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?" 84 Minn. L. Rev. 1315 (2000) (scope of practice, unauthorized practice of law, and imputing conflicts of interest in an MDP setting). For discussions after the ABA House of Delegates July 2000 vote, see also Burnele V. Powell, "Looking Ahead to the Alpha Jurisdiction: Some Considerations that the First MDP Jurisdiction Will Want to Think About" 36 Wake Forest L. Rev. 101 (2001); Julia J. Hall, "Resolving the MDP Issue: Deciding if the Status Quo is What's Best for the Client" 52 Mercer L. Rev. 1191(2001).

Columbia – and against the arguably two most commercially important common law jurisdictions in the United States -- New York and California.

Two of the four jurisdictions—Ontario and New York—in the end adopted highly restrictive and essentially parallel MDP rules. As noted above, the Law Society of Upper Canada passed Ontario’s first rule that governed integrated MDP firms in May 1999, before the Canadian Bar Association consultations had been completed; the CBA’s rule on “captive” or “affiliated” law firms was adopted in May 2001. New York rules on MDPs came into force following a July 2001 vote. British Columbia and California, although signalling a less narrow approach to MDPs than the regulatory choices made in both Ontario and New York, and despite extensive consideration of the issues, had by 2003 not implemented new rules to address MDP structures. A British Columbia vote in December 2001 on a resolution that proposed an expansive approach to MDP rules secured a majority of votes, but not the requisite three-fourths majority needed to have the rules implemented. California’s State Bar Board of Governors was originally scheduled to consider its own task force’s 2001 report in August 2002, but by early 2003 had still not voted on the recommendations. Instead, the California State Bar’s August 2002 Long-Range Strategic Plan recommended continuing to assess the “feasibility and ethical implications of permitting lawyers to join with nonlawyer professionals in a practice [in which] both legal and nonlegal professional services are offered to the public.”¹⁴⁷ No action ultimately resulted.

¹⁴⁷ The State Bar of California, *Long-Range Strategic Plan: August 23, 2002*, online: The State Bar of California <http://www.calbar.ca.gov/calbar/pdfs/reports/Strat-Plan_02.pdf> at 11 (last accessed 12 December 2007)

Despite the resounding defeat at the ABA and the muted one at the CBA, as well as the limited regulatory responses noted above, the MDP question has not disappeared. Indeed, as discussed in Chapter Six, alternative business structures and MDPs remain viable in the United Kingdom and in continental Europe.¹⁴⁸ The manner in which both ABA and CBA debates ended, though, meant that the fundamental questions about MDPs in North America were never resolved. The challenge of how best to respond to client demand for a more integrated approach to the delivery of professional services thus remains open. Both demand-side and supply-side perspectives are important.

Professor Michael Trebilcock's seminal 1999 study of a consumer welfare perspective on MDPs further demonstrated international client demand for MDPs and client willingness to experiment with using an MDP option for legal services needs.¹⁴⁹ Trebilcock's economic analysis of MDPs showed that an integrated approach to providing professional services might reduce costs and enhance service quality and accessibility for clients, especially those doing business across borders. Trebilcock found that freedom of choice in professional-service providers is extremely important to clients. He concluded that key objections to MDPs, anchored in concerns over privilege, independence and conflict of interest, overstated these concerns. Rules that permit MDPs only if they are controlled by lawyers and provide legal services as their primary function run against consumer choice, Trebilcock wrote.

¹⁴⁸ See Laurel S. Terry, "Coming of Age in Global and Comparative Perspectives," 4 Wash. U. Global Studies L. Rev. 463 (2005) at 496-501; Sir David Clementi, A Review of the Regulatory Framework for Legal Services in England and Wales, A Consultation Paper (March 2004): online:< <http://www.legal-services-review.org.uk/content/report/index.htm>>

¹⁴⁹ Michael J. Trebilcock and Lilla Csorgo, *Multi-Disciplinary Practices: A Consumer Welfare Perspective* (Toronto: Charles River Associates, 1999) (I was involved in the commissioning of the study, its editing and release, and I adopt its analysis).

From a supply-side perspective, the reporter for the ABA Commission on Multidisciplinary Practice argued that it would be a mistake to assume that resolutions that rejected MDPs would “derail the entrepreneurial engine that drives the U.S. legal profession. The growth of ancillary businesses is proof positive that lawyers who want to join forces with nonlawyers will find ways to do so.”¹⁵⁰ Outright bans on MDP structures only sidestep the question of how professionals might deliver the best and most complete advice to their clients and respond to the demands of individuals and businesses for professional services. The dean of the Houston Law School, Nancy Rapoport, concluded that at the end of the MDP debate, the regulators had missed the point: “The real issue isn’t the structure of the firm(s) that are giving advice, but the nature of the advice itself.”¹⁵¹

The failure of Enron Corp. in late 2001 illustrated this. The Enron debacle and the subsequent implosion of Arthur Andersen dampened the prospect of large-scale mergers between major law firms and the remaining Big Four accounting firms.¹⁵² Some might also argue that the Enron collapse vindicated the ABA and CBA approaches to MDPs,

¹⁵⁰ Mary C. Daly, “Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal” 80 Wash. U. L. Q. 589 (2002) at 645-46.

¹⁵¹ Nancy B. Rapoport, “Multidisciplinary Practice After In Re Enron: Should the Debate on MDP Change at All?” 65 Tex. B. J. 446 (2002) at 447.

¹⁵² The term “Big Five” accounting firms includes the firms of PricewaterhouseCoopers, KPMG, Deloitte & Touche, Ernst & Young, and Arthur Andersen. Arthur Andersen remains in existence, but only as a shell of its former self. The firm imploded in early 2002, even prior to its June 2002 conviction on criminal charges brought by the U.S. Department of Justice against it for obstructing justice in the Securities and Exchange Commission’s investigation of Enron: see *United States v. Arthur Andersen LLP*, No. H-02-121 (S.D.Tex., filed March 7, 2002). During the period under discussion, however, all five accounting firms were actively engaged in or were pursuing the development of legal services and regulatory discussions and the use of “Big Five” remains historically accurate. For the period after mid-June 2002, the term “Big Four” is used herein to refer to the activities of the major accounting firms.

proving that combining other services with legal ones would only compromise the independence of the legal advice.¹⁵³ In particular, concerns that liberalized conflict of interest rules used by accounting firms compromised the integrity of the audit process and led to reform of auditor independence rules.¹⁵⁴ Such a position fails to appreciate the broader lessons that Enron provided. Enron stands as testament to the greater problems of ensuring that all professionals act ethically rather than as proof of the problems of MDP structures. Enron's spectacular failure was not the result of an inherent flaw in multidisciplinary-practice arrangements. Rather, it was improper behavior by many professionals, including lawyers, acting through *separate* accounting or law firms that contributed to the corporate collapse.¹⁵⁵ Focusing attention on structural incentives for the ethical behavior of lawyers and others is essential to inhibiting the chances of future scandals. Those reforms, as well as a renewed commitment to teaching ethics in professional schools, are required whatever structure the professional uses to provide his or her service.¹⁵⁶

¹⁵³ See Ward Bower, "MDP isn't the problem" *National Law Journal* (11 March 2002) A21; an expanded version is available, "Some Thoughts on Enron/Andersen," online: Altman Weil, Inc. <<http://www.altmanweil.com/about/articles/pdf/EnronWAB.pdf>> (last accessed 16 May 2003).

¹⁵⁴ Paul D. Paton, "Rethinking the Role of the Auditor: Resolving the Audit/Tax Services Debate," 32 *Queen's L. J.* 135; U.S. Securities and Exchange Commission, "Strengthening the Commission's Requirements Regarding Auditor Independence," (28 January 2003), 17 CFR Parts 210, 240, 249 and 274, Release Nos. 33-8183, 34-47265, 35-27642; IC25915; IA2103; FR-68; File No. S7-49-02

¹⁵⁵ See especially Deborah L. Rhode and Paul D. Paton, "Lawyers, Ethics and Enron" 8 *Stan. J. L. Bus. & Fin.* 9 (2002) (detailed discussion of lawyer roles in the Enron failure and the need for structural reform of lawyer regulation to address the problems exposed). See Roger Cramton, "Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues" 58 *Bus. Law.* 143 (2002) at 162-67; Susan Koniak, "Who Gave Lawyers a Pass? We Haven't Blamed the Real Culprits in Corporate Scandals" *Forbes* 170:3 (12 August 2002) 58. See also Otis Bilodeau, "In A Harsh Light: Report on Enron Puts Spotlight on Lawyers Who Put Together Sales That Seem Really to be Loans" *Broward Daily Business Review* (1 October 2002) (later revelations brought lawyer conduct increasing attention); Kurt Eichenwald, "The Findings Against Enron" *New York Times* (23 September 2002), C1; Mike France, "What About the Lawyers?" *Business Week* (23 December 2002) 58. Civil lawsuits in Texas with respect to the liability of Vinson & Elkins LLP alleged civil conspiracy and fraudulent conduct by the law firm: See *e.g.* *Newby v. Enron Corp.* (*In re Enron Corp. Sec. Litig.*), No. H-01-3624, 2002 U.S. Dist. LEXIS 25309 (S.D. Tex. 2002) (pleadings).

¹⁵⁶ See Rhode and Paton, *ibid.* at 25-37 (for a detailed consideration of needed changes to rules governing the legal profession, as well as changes recommended for professional education).

The Canadian Bar Association MDP Debate – A History and Discussion

The Canadian Bar Association is a professional, largely voluntary organization that represents roughly two-thirds of all practicing lawyers in Canada. The CBA's primary purpose is to promote the interests of its members. It also seeks to improve the administration of justice; improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession; promote equality in the profession; and represent the legal profession in Canada. However, it is viewed as an "important and objective voice on issues of significance to both the legal profession and the public"¹⁵⁷ and is generally respected by government for its input, although its resolutions are not binding on government or any legal regulator.

Accordingly, the CBA's examination of the MDP issue is relevant as a counterpoint to the legal regulators charged with the responsibility of acting in the public interest. It is also a way to discern the opinion of the body representative of the profession as a whole in Canada on the MDP issue. The process by which it arrived at its final position on the MDP question, involving political intrigue and overt manipulation by representatives of the provincial regulator in the province of Ontario, is also instructive. In short, when it became clear that the Ontario regulator would be embarrassed by having the Canadian Bar Association sanction a far more liberal regime for MDPs than the one that Ontario had already imposed while "acting in the public interest," Ontario representatives embarked on an ultimately successful campaign through

¹⁵⁷ Canadian Bar Association, "About the CBA," online: Canadian Bar Association <<http://www.cba.org/CBA/Info/Main>>

the legal press and at the CBA itself to have the will of the CBA national council reversed and a narrower MDP regime with a lawyer-control requirement adopted.

The Canadian Bar Association established its International Practise of Law (IPL) Committee in 1997 with a mandate to monitor the “activities, negotiations and developments regarding the globalization of legal [practice] and the trend towards multi-disciplinary [practices] through NAFTA, the World Trade Organization (WTO) and the International Bar Association (IBA).” The CBA directed the IPL Committee to report to the CBA’s senior officers regularly on such developments.

The IPL Committee released an interim report to the CBA Council in 1998 that recommended to the provincial Bars that MDPs should not be permitted to provide legal services to clients unless the MDP organization were controlled by lawyers. The report expressed concern that the “core values” of solicitor–client privilege and the avoidance of conflicts of interest could not be adequately protected unless MDPs were controlled by lawyers and primarily offered legal services. To avoid any confusion in the public mind as to the kinds of services offered by an entity, the report also recommended that the rules of practice should be changed to prohibit any MDP or law firm from offering services under a name substantially similar to the name of an entity not authorized to provide legal services.

The report also expressed the view that any regulatory approach to MDPs that rendered legal services must reflect a commitment to the independence of lawyers and

the legal profession; the preservation of solicitor–client privilege; the prohibition against conflicts of interest in the practice of law; and adherence to the Code of Professional Ethics of the legal profession. It suggested that only if a regulatory regime relating to MDPs could demonstrably satisfy these criteria should an MDP be allowed to render legal services. Similarly, no regime relating to MDPs should be permitted if it could reasonably jeopardize privilege or client confidentiality. Finally, reflecting Ontario’s views, the report said that MDPs should be permitted so long as the MDP always had a majority of owners who were lawyers and the MDP was lawyer-controlled; the primary activity of the MDP was the provision of legal services; all owners of the MDP offering legal services were made subject to the disciplinary jurisdiction of the law society of the province in which they practiced; and all owners of MDPs were required to protect the privilege and confidentiality of the MDP’s clients.¹⁵⁸

After further study and consultations, the IPL Committee in August 1999 released its astonishing reversal of views in a report entitled *Striking a Balance*.¹⁵⁹ That report recommended that lawyers be allowed to participate in MDPs even if such MDPs were not controlled by lawyers. The Committee also recommended that law societies not limit the services that MDPs provide to those of a legal nature. It also favored a regime that focused regulation on individual lawyers rather than on the MDPs themselves and took the position that “[l]awyers in MDPs must be subject to their law societies’ rules of professional conduct and must themselves remain responsible for ensuring that the

¹⁵⁸ Canadian Bar Association, International Practice of Law Committee, *Multi-Disciplinary Practices: An Interim Report* (August 1998) online: Canadian Bar Association <http://www.cba.org/CBA/mdp/PDF/InterimReport_Eng.pdf>

¹⁵⁹ *Striking a Balance*, supra.

services [that] they deliver comply with all such requirements.”¹⁶⁰ Both key elements of the new recommendation were embarrassing to the Law Society of Upper Canada, which in May 1999 had already imposed a regime that regulated the MDP structure and restricted lawyer participation to those MDPs in which legal services were the primary service offering.

The ramifications of the CBA position on the Ontario approach went deeper. The report suggested that the adoption of a more restrictive regime contradicted what the IPL Committee saw as more important public interests and values. The “balance” referred to in the report’s title should be struck between “two sets of public interests” in determining the appropriate approach to regulating MDPs:

MDPs [. . .] may threaten [. . .] core values of the legal profession: self-governance [. . .], independence [. . .], avoidance of conflicts of interest, preservation of client confidentiality, preservation of solicitor–client privilege and avoidance of the unauthorized [practice] of law. To preserve these values, there are three main approaches to regulation: first, regulate individual lawyers only and not the MDP as a business entity; second, regulate the business entity, specifying who can control it and the types of services [that] it can provide; third, permit MDPs generally, but address specific issues that may be of particular concern.

The choice of approach is informed by two sets of conflicting public interests. The first is the preservation of lawyers’ role in the administration of justice. This tends to [favor] the separation of the delivery of legal services from the delivery of other professional services and is consistent with the second approach above. The second set of public interests is based on freedom of choice, freedom of association, competition and efficiency. This argues for substantial departures from current business structures in which legal services are delivered and is consistent with the first approach above. The third approach above attempts to strike a balance between the two sets of public interests, but it is difficult to determine how that balance should be struck.

¹⁶⁰ Canadian Bar Association, News Release, “CBA Releases Report on Lawyers’ Involvement in Multi-Disciplinary Practices” (21 August 1999) online: Canadian Bar Association <http://www.cba.org/CBA/News/1999_releases/99-08-21_multi_practices.asp>

The Committee prefers the third approach. Choice, competition and freedom of association are aspects of the public interest that should be given more weight. At the same time, the Committee is not persuaded that the core values of the legal profession can be protected only by lawyers controlling MDPs or by MDPs only delivering legal services. The focus should be on regulation of individual lawyers and not the MDPs themselves.¹⁶¹

The vote on the *Striking a Balance* recommendations came in August 2000 at the CBA Annual General Meeting in Halifax. The new CBA president, Eugene Meehan, had vowed in September 1999 to guard lawyers against “know-nothing document preparers” and invoked democracy as a fundamental reason to oppose MDPs. Questioning how a law firm owned by an accounting firm could remain independent, Meehan said, “Without an independent Bar and without an independent judiciary, you do not have a democracy. It’s that simple, and it’s that important.”¹⁶²

After a two-day debate at the August 2000 CBA Annual General Meeting, the CBA passed a landmark resolution on MDPs that was a stark contrast to Resolution 10F passed by the ABA the previous month and discussed further below. The CBA resolution recommended that provincial regulators adopt rules to permit lawyers to join MDPs and share fees with nonlawyers, but it did so without any requirement that lawyers have financial or voting control of the MDPs themselves. The resolution maintained, however, that lawyers would have to control the delivery of legal services by the MDP. Lawyers would not be able to practice in an MDP with other service providers that had conflicting ethical responsibilities (preventing, for example, the MDP from providing audit and legal services to the same client). MDPs would have to obtain a license from the appropriate

¹⁶¹ *Striking a Balance*, *supra*, at 5.

¹⁶² Monique Conrad, “Canadian Bar Association” *Canadian Lawyer* 23:9 (September 1999) 10.

law society, a condition of which would be the MDP's pledge to adhere to the "core values, ethical obligations, standards and rules of professional conduct of the legal profession."¹⁶³

Council passed the resolution over strenuous objections from its Ontario branch. The Ontario delegates attempted to amend the CBA resolution to require lawyer control of the entire MDP—something upon which the Law Society of Upper Canada adamantly insisted, despite the fact that this would effectively gut the *Striking a Balance* report. The debate ended with a fight by Ontario delegates about when the vote was supposed to have been taken.¹⁶⁴ A motion to reopen debate was defeated 36 to 44. The outcome of the vote, again reflecting that the Law Society of Upper Canada's position, was in accord with neither the Canadian Bar's view of the public interest nor the best interest of lawyers. This outcome prompted an effort to discredit the CBA. The legal press reported it this way:

It [the CBA resolution] certainly won't persuade the Law Society of Upper Canada to change its view, I can tell you that," LSUC Treasurer Robert Armstrong angrily told *The Lawyers Weekly*, minutes after the vote. "At the end of the day, law societies have the final say. [The CBA's resolution] is just a statement of policy."¹⁶⁵

In an effort to discredit the Canadian Bar Association resolution, Armstrong increased the stakes by resigning from the CBA to protest being denied a vote. Some suggested that Armstrong's resignation would undermine the CBA's claims to speak for

¹⁶³ Canadian Bar Association, Council Resolution 00-03-A (20 August 20 2000) online: Canadian Bar Association <http://www.cba.org/cba/epigram/november2000/Resolution_00-03-A.asp>

¹⁶⁴ Cristin Schmitz, "CBA wants law societies to let lawyers join MDPs" *Lawyers Weekly* 20:16 (1 September 2000) 1 at 6. See also Michael Fitz-James, "Lawyers don't have to control MDPs" *Law Times* 11:30 (28 August 2000) 1 at 5.

¹⁶⁵ Schmitz, *ibid.* at 6.

the Canadian legal profession¹⁶⁶ and that the tactic of a very public resignation must be seen as a political move to discredit an outcome that undercut the authority of the Law Society of Upper Canada's position. The debate was not yet over.

In February 2001, CBA Council passed a resolution that "clarified" and amended the August 2000 resolution to require lawyers to have "effective control" over the entire MDP. "Effective control" would ensure that the business and practice of the MDP would be in "continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession." Every client of the MDP would be considered to be the client of every lawyer in the MDP, thereby imposing the lawyers' conflict rules on the entire MDP as though it were no different from any one law firm. The resolution required that such control must be via "a partnership agreement or other contractual arrangements [that governed] the relationship of the lawyer(s) and the nonlawyer(s) within the MDP." Further, the MDP contract stipulated that no service provider with conflicting ethical responsibilities could offer services to the firm's clients incompatible with lawyers' obligations to clients.¹⁶⁷ The alteration on lawyer control brought the CBA much closer to the restrictive approach of the Law Society of Upper Canada, or vindication for Armstrong, the LSUC's head.¹⁶⁸ How the CBA's new approach reflected the public interest laid out in the *Striking a Balance* report was never clarified.

¹⁶⁶ Eric Atkins, "LSUC Treasurer Robert Armstrong quits CBA over voting procedure" *Lawyers Weekly* 20:17 (8 September 2000) 1 at 1, 3.

¹⁶⁷ Canadian Bar Association, Council Resolution 01-01-M, "Multi-Disciplinary Practices (MDPs)" (16-18 February 2001), online: Canadian Bar Association <http://cba.org/cba/news/2001_releases/01-02-19.asp>

¹⁶⁸ "Mid-Winter 2001, CBA Council: MDPs: A New Approach" (*Canadian Bar Association National* 10:2 (March/April 2001) 54.

Given the mandate of the CBA to serve in the best interests of its lawyer members, it would have been plausible for the CBA to have arrived at its original position and stayed there. The force of the *Striking a Balance* report was similar to those of the ABA Commission on MDPs, the Law Society of British Columbia, and the California Bar: that the public interest was more broadly defined and that a regulatory model that did not require either lawyer control or a single-focus delivery of legal services was accepted (for a short time) as the appropriate approach to MDPs. The tale of the reversals, however, speaks to the overt politicization of the CBA process, particularly by the Ontario lawyers and the Law Society of Upper Canada, which led to mixing the role of the legal regulator acting under statutory authority with the machinations of the professional association for all lawyers in Canada, just as the New York State Bar would do in the ABA process.

The American Bar Association – MDP Debate History and Discussion

While the history of the American Bar Association's consideration of the MDP issue has been canvassed elsewhere,¹⁶⁹ a synopsis is appropriate and helpful in situating the regulatory responses from California, New York, and British Columbia set out below

¹⁶⁹ In addition to authorities noted supra, see also Mary C. Daly, "What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform" 50 J. Legal Educ. 521(2000). For a law and economics analysis of consumer welfare issues in the MDP debate in the U.S., see John S. Dzienkowski & Robert J. Peroni, "Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century" 69 Fordham L. Rev. 83 (2000); George C. Harris and Derek F. Foran, "The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm" 70 Fordham L. Rev. 775 (2001); Daniel R. Fischel, "Multidisciplinary Practice" 55 Bus. Law 951 (2000). *Contra* David Luban, "Asking the Right Questions" 72 Temp. L. Rev. 839 (1999) (suggesting that the law and economics analysis is misguided, and arguing instead that in considering the MDP issue, the "right question is not whether new roles with no rules are good for lawyers and clients, but rather whether they are good for the rest of us.") at 839.

and the Ontario actions detailed above. For while the ABA process itself avoided the flaws in both the Ontario and British Columbia considerations, most notably in its broad effort to solicit public input, the outcome—a rejection of its own commission’s recommendations for a liberalized approach to regulating MDPs—was strikingly similar to those in Ontario and New York. The ABA approach was anchored in rhetoric of the “core values” of the legal profession and anticompetitive guild protection.

In 1998, American Bar Association President Philip Anderson appointed a 12-person Commission on Multidisciplinary Practice to “determine what changes, if any, should be made to the ABA Model Rules of Professional Conduct with respect to the delivery of legal services by professional services firms.” The Commission adopted an “open process” and established an interactive Web site in which it posted its own reports, requests for comments, submissions from third parties, and submissions and presentations made at the town-hall style meetings it held between 1998 and early 2000.¹⁷⁰ The Web site was cited as providing “immeasurable” value, and “contributed enormously to the public’s and the Bar’s perception of the transparency of the commission’s process.”¹⁷¹ The Commission heard over 60 hours of testimony from 56 witnesses from a variety of groups around the world through public hearings in 1998 and 1999. Further hearings took place in February 2000. Witnesses included consumer advocates, partners in accounting firms, law professors, chairs of ABA sections and committees, domestic and foreign lawyers and others.

¹⁷⁰ Harris & Foran, *ibid.* at 785.

¹⁷¹ Haddon, *supra* note 42 at 529 (Haddon wrote that “Without this transparency, it is likely that the commission’s recommendations would have been criticized as ‘hidden agendas,’ ‘tradeoffs’ and ‘sellouts’. The open hearing and the Website enabled interested parties to better understand the raw, unfiltered process of the commission’s thoughts as they unfolded”).

In mid-1999, the ABA Commission made revolutionary recommendations that the Model Rules be amended to permit multidisciplinary practice, with safeguards to protect the “core values” of the legal profession.¹⁷² The recommendations would have permitted lawyers to partner with nonlawyers to provide legal services, to share legal fees with nonlawyers, and to share ownership interests in the MDP structure, subject to certain conditions, including an annual certification and the requirement of an undertaking to a court in each jurisdiction from the MDP that it would not allow interference with a lawyer’s exercise of independent professional judgment and would “respect the unique role of the lawyer in society as an office of the legal system, a representative of clients and a public citizen.”¹⁷³

After considerable debate in August 1999, the ABA House of Delegates deferred the issue for “additional study” via the following resolution:

RESOLVED, that the American Bar Association make no change to the Model Rules of Professional Conduct [that] permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without [. . .] compromising lawyer independence and [. . .] loyalty to clients.¹⁷⁴

¹⁷² David Segal, “New Rules May Shake Law Industry” *Washington Post* (4 June 1999) E1.

¹⁷³ American Bar Association, Commission on Multidisciplinary Practice, “Report of the Commission on Multidisciplinary Practice to the ABA House of Delegates” 10:3 (Spring 1999) *Professional Lawyer* 1 at 7 (Draft Resolution, paras. 14(a), (e)).

¹⁷⁴ American Bar Association, “Florida Bar Recommendation Statement,” online: ABA Center for Professional Responsibility <<http://www.abanet.org/cpr/flbarrec.html>> See Daly, “Choosing,” *supra*, at 280, n. 263 (The Commission’s Reporter cautioned that interpreting the 1999 vote as a setback for MDPs would be “too cavalier”, particularly given that it paralleled developments then underway outside the United States.) Compare Harris & Foran, *supra*, at 785 (considering the vote to be “ominous”).

In December 1999, the Commission released its *Updated Background and Informational Report and Request for Comments*. That Report rejected the claim that there is no empirical evidence of demand for multidisciplinary services. This accorded with the testimony before the Commission from consumer groups, business clients and others, whose “support for change created an unusual alliance among disparate groups.” They “uniformly contended that the entry of a new, alternative provider of legal services was in the best interest of the public.” Support for change from solo practitioners and small firms was great, with the Council of the ABA General Practice, Solo and Small Firm Section urging that the rules barring MDPs be relaxed.¹⁷⁵

All of the consumers of legal services who voiced their opinions to the Commission—from Fortune 500 companies to consumer representatives—urged the ABA Commission to change the rules to permit MDPs. Thus, if discussion about “core values” of the legal profession is intended to protect client interests, it is curious that no user of legal services stepped forward to oppose MDPs.

Notwithstanding this overwhelmingly positive response from clients and the public, in July 2000, the ABA House of Delegates rejected a watered-down version of the July 1999 recommendation presented by the Commission on Multidisciplinary Practice. This 2000 proposal made it clear that passive investment in MDPs was not authorized

¹⁷⁵ Daly, “Choosing,” *supra* at 275 (Daly notes in her review at 276 that this support from small firms was consistent with the survey information provided by the Law Society of Upper Canada, noted above, though she does not go on to note that the Law Society of Upper Canada ignored its own evidence in this regard).

and permitted fee-sharing only if “lawyers [had] the control and authority necessary to assure lawyer independence in the rendering of legal services.”¹⁷⁶

The proposal never made it to the floor of the House of Delegates. The Colorado and Denver Bars moved a deferral motion that would have seen the ABA postpone a decision until more state and local Bars had completed their investigations into the issue. This proposal was backed by Sherwin Simmons, chair of the ABA Commission on MDPs, who was reported as noting that 25 states, representing more than 50% of the U.S. Bar, had yet to respond formally on the MDP question before the vote on MDPs.¹⁷⁷

Instead, the ABA House of Delegates voted 314 to 106 in favor of a proposal sponsored by the chair of the New York State Bar’s Committee on the Law Governing Firm Structure and Operation and backed by the Illinois State Bar and Florida State Bar that effectively rejected MDPs. The recommendation was anchored in the language of “preserv[ing] the core values of the legal profession” and encouraged state Bar associations and other agencies to prohibit lawyers from sharing fees with nonlawyers and to retain and enforce laws that generally bar the practice of law by “entities other than law firms.” It called upon the ABA to recommend amendments to the Model Rules of Professional Conduct to “assure that there are safeguards” relating to “contractual relationships with nonlegal professional services providers” consistent with the principles

¹⁷⁶ American Bar Association, Commission on Multidisciplinary Practice, “Report to the House of Delegates,” online: ABA Center for Professional Responsibility <<http://www.abanet.org/cpr/mdpfinalrep2000.html>>

¹⁷⁷ Sue Allen, “U.S. Lawyers vote to retain ban on multi-disciplinary practices” *The Law Society Gazette* (U.K.) (14 July 2000). See also Robert R. Keatinge, “Colorado and Denver in the House: MDP Declared Heresy by the ABA House of Delegates” 29:9 *Colo. Law.* 48 (2000); John Gibeaut, “It’s A Done Deal: House of Delegates vote crushes chances for MDP” 86:9 *A.B.A.J.* 92 (2000).

adopted.¹⁷⁸ Curiously, especially given that the ABA supported further study of an earlier recommendation from New York that would permit side-by-side arrangements by the ABA Ethics Committee, the House of Delegates voted to disband the Commission on MDPs. The text of the note attached to Recommendation 10F stated that “[t]he Commission [on MDPs] deserves our heartfelt thanks, but with the adoption of a comprehensive response to multidisciplinary practice contained in the Recommendation, the work of the Commission will be completed.”¹⁷⁹ The entire debate and vote took less than an hour.¹⁸⁰

Responses were swift. One delegate described the ABA House of Delegates as “acting more like a lynch mob than a deliberative body of professionals.”¹⁸¹ The American Corporate Counsel Association (ACCA) President said that MDPs are essential for the development of the legal market. ACCA found it “hard to understand the assumption that ethical lawyers working in an MDP framework will be unable to uphold their professional obligations.”¹⁸² Richard Miller, general counsel of the American Institute of Certified Public Accountants, condemned the ABA vote as “showing no

¹⁷⁸ American Bar Association, Center for Professional Responsibility, “Recommendation 10F – Revised,” online: ABA Network, Center for Professional Responsibility <<http://www.abanet.org/cpr/mdprecom10f.html>> [Recommendation 10F]. See also Geanne Rosenberg, “ABA Resoundingly Rejects MDPs” *Nat’l L. J.* (12 July 2000); Philip Hault, “ABA says ‘no’ to MDPs,” *Legal Week* (13 July 2000); Allen, *ibid.*; Jean Eaglesham, “Courting Conflict” *The [London] Financial Times* (13 July 2000) 22.

¹⁷⁹ Recommendation 10F, *ibid.*

¹⁸⁰ Gibeaut, *supra* at 93.

¹⁸¹ Keatinge, *supra* at 48.

¹⁸² “Nonlawyers barred from sharing fees with U.S. lawyers,” (12 July 2000) online: Legal Media Group <<http://www.lawmoney.com>>.

vision” and demonstrating that the proponents of the ABA recommendation were “more concerned with maintaining their guild” than the delivery of legal services to clients.¹⁸³

Consistent with approaches by the Law Society of Upper Canada, the Law Society of British Columbia and the Canadian Bar Association, then, the ultimate outcome of the ABA process reflected less a concern with the public interest than a self-serving regime. As one delegate described it:

In the discussion in the ABA meeting in New York, [. . .] the focus was almost entirely on how MDP will affect lawyers, their practice, their integrity and their grip on the provision of legal services. There was almost no consideration [of] how limitations of the provision of legal services would affect clients and their needs. [. . .] The House has chosen to [turn] the legal profession into a protected guild.¹⁸⁴

This view of the final outcome accorded with an earlier outside assessment of the anticompetitive nature of the ABA’s MDP initiative. In February 2000, the American Antitrust Institute (AAI) released a monograph entitled *Converging Professional Services: Lawyers Against the Multidisciplinary Tide*. The monograph called the earlier ABA recommendation (which would have permitted MDPs, but only those controlled by lawyers) “nothing more than an effort to protect lawyers and law firms from competition” and asserted that the proposal in its form at the time “should not survive antitrust

¹⁸³ Rosenberg, *supra* note 39.

¹⁸⁴ Keatinge, *supra* note 38 at 48.

scrutiny.”¹⁸⁵ The president of the AAI urged the MDP Commission to “produce a final proposal that better meets the needs of consumers.”¹⁸⁶

Such antitrust considerations would animate regulatory discussions in England, one of the external influences that legal regulators in Ontario chose to ignore. Before assessing the regimes adopted in British Columbia, New York and California, it is instructive to situate them against government intervention in England to assess the role of regulatory intervention in the “public interest” there.

The Law Society of England & Wales

The importance of the English regulatory context emanates not only from Canada’s historical ties to Britain as a former colony, but also from the fact that the English tradition provides the foundation of Canadian regulatory experience. Substantive developments in England and Wales provided an astounding contrast to the Ontario approach to the issue and to the ABA vote, even though the perspectives of clients on MDPs are similar to what has been identified in Canada and the U.S. The crucial difference is the involvement of government. When government signaled that if the Law Society did not change rules to accommodate MDPs, then the government would do so for it, legal regulators were prompted to act.

¹⁸⁵ American Antitrust Institute, News Release, “American Antitrust Institute Says Legal Profession’s Recommendation on Multidisciplinary Practices May Violate Antitrust Laws” (9 February 2000) online: American Antitrust Institute <<http://www.antitrustinstitute.org/recent/52.cfm>>

¹⁸⁶ *Ibid.* See also Dzienkowski & Peroni, *supra*, at 94.

Unlike the situation in Canada or the U.S., in England, there is no general rule that restricts the provision of legal advice to qualified lawyers. The English *Solicitors Act*¹⁸⁷ provides that only qualified lawyers can provide conveyancing services, conduct litigation, provide “advocacy services” and take out grants of probate. The 1990 *Courts and Legal Services Act*¹⁸⁸ opened the possibility for others to offer these services and provided frameworks for financial institutions to offer conveyancing and all probate services. As a representative of the Law Society of England and Wales noted in testimony before the American Bar Association Commission on MDPs:

Anyone in England and Wales, whether qualified in a profession such as accountancy or not [. . .], can set up a business to provide legal advice, prepare wills and other general legal documents. Such businesses can also advise the public on claims [that] could eventually be dealt with by a court—although they are unable to conduct the litigation [. . .]. There are a growing number of legal-service businesses set up by unqualified and unregulated persons.¹⁸⁹

The traditional English distinction between barristers and solicitors had to do with the former’s rights of appearance before the higher courts. The 1990 Act broke down some of that division, in theory at least, by providing solicitors with a means by which to gain the extra qualification necessary to appear in the higher courts. The Barrister’s Code of Conduct prevents a barrister from entering into partnership with another barrister or into any form of association with a nonbarrister.

The Law Society of England and Wales abandoned its traditional opposition to MDPs in 1996, and thereafter considered different ways to facilitate MDPs while

¹⁸⁷ *Solicitors Act 1974* (U.K.), 1974, c. 47.

¹⁸⁸ *Courts and Legal Services Act 1990* (U.K.), 1990, c. 41.

¹⁸⁹ Alison Crawley, “Solicitors, Accountants and Multi-Disciplinary Practice: The English Perspective,” online: ABA, Center for Professional Responsibility <<http://www.abanet.org/cpr/crawley.html>>.

maintaining adequate regulatory supervision. A consultation paper, entitled *MDPs: Why? . . . Why Not?* was released in October 1998. The Law Society obliquely acknowledged some political pressure to open the field to MDPs.¹⁹⁰ This pressure became far more explicit in March 2001 with the release of a report by the Office of Fair Trading (OFT), the U.K.'s competition and antitrust authority. The report recommended a relaxation of MDP restrictions (including the removal of a ban on fee-sharing by solicitors with other professionals) and giving a one-year time limit within which the legal regulators (the Law Society and the Bar Council) had to act or face the threat of fines or other sanctions.¹⁹¹ The OFT concluded that restrictions that barred MDPs were unreasonable market restraints that gave rise to inflationary pricing and resulted in an anticompetitive practice in the United Kingdom's main commercial professions. The report concluded that legal-professional privilege was anticompetitive, as it gave lawyers an unfair advantage over other professional advisors.¹⁹² The Director General of the OFT said that intervention by the authority would be avoided, "provided [that] real progress is made," and that the OFT

¹⁹⁰ *Ibid.* (Crowley notes that the governing Labour Party made statements that lawyers' restrictive practices would be referred to the Monopolies and Mergers Commission, and states "Part of the Law Society's intention in continuing to consult on the subject of multi-disciplinary practice is to be in a position to avoid the imposition of what might be an unsatisfactory regime should any part of Government decide to take action").

¹⁹¹ Claire Smith, "The OFT report: the legal profession's response" *The Lawyer* (12 March 2001) 6. See also Konstantin Richter, "U.K. Aims for Fewer Restraints on Multidisciplinary Partnerships – OFT Gives Bar Council A Year to Loosen Rules" *The Wall Street Journal Europe* (8 March 2001) 29; Jeremy Fleming, "Society primed to launch fresh battle over MDPs" *The Law Society Gazette* (U.K.) (19 March 2001) 4, online: Law Gazette

<<http://www.lawgazette.co.uk/news/archivearticleframe.asp?ArticleName=/gazettearchive/2001-03-19/11arch.txt>> ; Philip Hoult, "High Times for MDPs" *Legal Week* (31 March 2001) 13, online: Legal Week <<http://www.legalweek.net/ViewItem.asp?id=906&Keyword=>>> ; Jean Eaglesham, "Lawyers to be subject to full force of competition law" *The [London] Financial Times* (March 9, 2001); Jonathan Pearce, "OFT targets silk system and MDPs" *Legal Week* (26 October 2000) online: Legal Week <<http://www.legalweek.net/ViewItem.asp?id=1933&Keyword=>>> .

¹⁹² U.K., Office of Fair Trading, *Competition in Professions* (March 2001) at 7, 11. See also Richard Margetts, QC, "'You Don't Need a Weatherman': Another Word in the Multi-Disciplinary Practice Debate" (2001) 59 *Advocate* (B.C.) 543, reprinted in *Law Society of British Columbia Benchers' Bulletin Supplement* No. 1 (July-August 2001), online: Law Society of British Columbia <[http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp\(MDP-art4\).html](http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp(MDP-art4).html)>.

would “take action after this grace period, if necessary, or earlier if there is no evidence of willingness to make changes.”¹⁹³

The OFT action came after reform had been proceeding at a glacial pace. Following the 1996 statement of principle and the 1998 consultation paper, the Law Society agreed to support MDPs in 1999. Its Council overwhelmingly approved a statement from its MDP Working Party that “[t]he ultimate goal should be to allow solicitors who wish to do so to provide any legal service through any medium to anyone.”¹⁹⁴ In October 1999, the Law Society’s Council considered a Law Society Working Party report that proposed developing two “interim models” to allow for MDPs without the need for legislation. The first of these was called “legal practice plus” and was based explicitly upon the regime adopted by the Law Society of Upper Canada discussed above. This model would allow nonsolicitor partners in a solicitors’ firm, the main business of which must be the provision of legal and ancillary services. The Working Party, however, stated that it did not “believe [that] this model is a complete answer, as it does not permit a one-stop shop.” The other option, labelled “linked partnerships,” built on the model in which an independent firm of solicitors allied itself another professional practice, such as a partnership of accountants. The Working Party was “willing to explore” whether the ban on fee sharing between such linked partnerships was necessary and to explore passive investments in law firms, the extent of conflicting duties between lawyers and others and whether achieving the long-term goals set out in

¹⁹³ Smith, *supra* at 6.

¹⁹⁴ Neil Rose, “Multi-disciplinary partnerships on horizon after ‘seismic’ vote” *Law Gazette* (25 October 1999), online: *Law Gazette* <<http://www.lawgazette.co.uk/archive/oldarchiveframe.asp?ArticleName=/gazettearchive/1999-10-25/00000060.html>>

its report would require a change in the legislative framework by which the Law Society was governed.¹⁹⁵

A change in rules via “interim solutions” came in mid-2000. These were approved in a November 2000 vote.¹⁹⁶ The two “interim solutions” are worthy of note. The “legal practice plus” model looks very much like the Ontario MDP model upon which it was based. Nonsolicitors would become partners in a law firm, so long as the firm’s business remained the provision of legal and ancillary services, although it is not clear whether legal services would have to be the “primary” service, as in the Ontario MDP model. The Law Society Working Party proposed that services be restricted to those “only of a kind [that] are normally provided by solicitors practicing as solicitors.” While it was acknowledged that this might seem to be unduly restrictive, the scope of solicitors’ services was already broad, encompassing property selling, financial services and general consultancy.¹⁹⁷ The nonsolicitors would agree by contract to submit to the Law Society’s regulatory powers. Ultimate control would remain with solicitors.¹⁹⁸

Under the “linked partnership” model, law firms were permitted to have fee-sharing agreements with other businesses. The relationship with the linked business

¹⁹⁵ Alison Crawley, Bronwen Still & Nicola Taylor, “Multi-Disciplinary Practices: Proposals for the way forward – Report for Consideration by the Interim Executive Committee 7th October 1999 and the Council of the Law Society of England and Wales on 13th October 1999” (28 September 1999), online: Law Society of England and Wales <http://www.lawsociety.co.uk/dcs/fourth_tier.asp?section_id=3197> at paras. 22-24.

¹⁹⁶ Nick Speechly, *Accountants and the Legal Business* (Dublin: Lafferty Publications, 1999) at 76. See also “Law Society to push MDPs through early” *The Lawyer (U.K.)* (13 November 2000) (Westlaw).

¹⁹⁷ Law Society of England and Wales, “Multi-Disciplinary Practice Working Party, Third Interim Report: Legal Practice Plus – A First Step Towards MDPs” (7 December 2000), online: Law Society of England and Wales <http://www.lawsociety.org.uk/dcs/fourth_tier.asp?section_id=4376&Caller_ID=> [Legal Practice Plus].

¹⁹⁸ *Ibid.*

would have to be disclosed to clients.¹⁹⁹ A December 2000 Law Society Working Group report favored allowing solicitors in this “linked partnership” model to share fees with any other business, with the proviso that solicitors retain control.²⁰⁰ Changes in 2007, considered in Chapter Six, lay the foundation for implementation of a more open approach. This is considered further in Chapter Six.²⁰¹

The Law Society viewed these two models only as “interim steps.” A report in the July 20, 2000, issue of the *Law Society Gazette* quoted the chairman of the regulation review working party as saying that the committee was looking beyond MDPs to what he called “ ‘Virgin.com solicitors,’ [. . .] with commercial [organizations] such as Virgin, owning their law firms.”²⁰² The Law Society’s steps were particularly timely. A *Financial Times* survey in September 1999 indicated that more than half of British and American corporate purchasers of legal services were willing to make use of firms that had both accountants and lawyers.²⁰³ A survey conducted somewhat later for the British

¹⁹⁹ Neil Rose, “Law Society lays the groundwork for multi-disciplinary partnerships” *The Law Society Gazette* (U.K.), (14 July 2000) online: Law Gazette <<http://www.lawgazette.co.uk/news/archivearticleframe.asp?ArticleName=/gazettearchive/2000-07-14/5arch.txt>>.

²⁰⁰ “Legal Practice Plus,” *supra*. For a more detailed analysis of the two models and the ethical ramifications of their operation, see Aubrey Meachum Connatser, “Multidisciplinary Partnerships in the United States and the United Kingdom and Their Effect on International Business Litigation” 36 *Tex. Int’l. L.J.* 365 (2001) at 380-90.

²⁰¹ See also Judith L. Maute, “Revolutionary Changes to the English Legal Profession or Much Ado About Nothing?” 17 (4) *Professional Lawyer* 1 (2006) at 8-9

²⁰² Neil Rose, “Multi-Disciplinary Practices: Should the UK follow the U.S.’s lead?” *The Law Society Gazette* (U.K.) (21 July 2000) online: Law Gazette <<http://www.lawgazette.co.uk/news/archivearticleframe.asp?ArticleName=/gazettearchive/2000-07-21/71arch.txt>>

²⁰³ Cited in Chris Arnheim, “Why most clients want a one-stop shop” *The [London] Times* (18 July 2000) 16.

publication *Commercial Lawyer* concluded that a significant majority of corporate counsel and finance directors preferred traditional, single-source providers.²⁰⁴

The U.K. was moving accordingly in a very different direction than that taken by the ABA House of Delegates. The adoption of a restrictive MDP model would not satisfy government regulators, particularly those in the Office of Fair Trading who were pressing for far more substantial reforms. Divisions between barristers and solicitors would in this case delay implementation. On July 30, 2002, the Lord Chancellor's Department issued a consultation document on multidisciplinary partnerships that asked for views on MDPs.²⁰⁵ The Bar Council, representing barristers, had campaigned strenuously to forestall permissive rules; the Law Society of England and Wales, representing solicitors, continued to be "actively seeking the parliamentary time" needed to implement a mixed-partnership model.²⁰⁶ Consumer interest, legal ethics and government regulation animated a push in a permissive direction, which presented a stark contrast to the Canadian and American approaches, even though England shares the same common-law tradition and concerns about "core values."²⁰⁷

²⁰⁴ Dominic Londesborough, "MDP's: the clients' view" 41 *Commercial Lawyer* (October 2000) 34. See also Jean Eaglesham & John Mason, "Independent Spirit" *The [London] Financial Times* (6 November 2000) (The article notes that 37% of FTSE 100 companies said they would consider using an MDP as their main law firm, compared with 66% of businesses quoted on the smaller Alternative Investment Market and 56% of businesses within the top 300 private companies).

²⁰⁵ U.K., Lord Chancellor's Department, "In the Public Interest? A Consultation following the Office of Fair Trading Report on Competition in Professions" online: Lord Chancellor's Department <<http://www.lcd.gov.uk/consult/general/oftrept.pdf>>

²⁰⁶ Jean Eaglesham, "Accountants face setback over plans to sell legal services" *The [London] Financial Times* (30 July 2002) P2. See also Law Society of England and Wales, News Release, "Extending competition in legal services" (27 November 2002) online: Law Society of England and Wales <http://www.lawsociety.org.uk/dcs/fourth_tier.asp?section_id=6562&Caller_ID=>

²⁰⁷ Interestingly, as in North America, the most strident opposition to MDPs in England has come from litigators. Since the English system is bifurcated into barristers and solicitors, the response of the Bar Council to the OFT demand is significant both in respect of MDP matters generally and because of intra-professional concerns: the Law Society fears that the English barristers will hold themselves out as the only

The New York State Bar

Just as Ontario was the first Canadian jurisdiction to adopt MDP rules, New York was the first of the American states formally to entrench rules that govern MDPs. The four appellate divisions of the New York Supreme Court, by joint order, adopted rules to govern ancillary services and strategic alliances with nonlegal professional service providers on July 24, 2001, effective November 1, 2001. The changes to the New York Code of Professional Responsibility, which governs the approximately 120,000 lawyers licensed to practice in New York, made New York the first state to adopt rules that specifically governed lawyer participation in MDPs.²⁰⁸ The language adopted to “preserve the core values of the legal profession,” however, was far from an endorsement of integrated multidisciplinary practice and was even less progressive than the restrictive Ontario rules criticized above.

In sharp contrast to the recommendations of the ABA’s Commission on Multidisciplinary Practice and to the Ontario rules, the two New York rules at the heart of that state’s regulatory scheme prevented any meaningful integration of lawyers and nonlawyers in the same firm. The first rule, DR 1-106, specified the circumstances in which a lawyer in an ancillary business will be subject to lawyer discipline rules. The

independent Bar in England should MDPs proceed. The Bar Council strenuously opposes partnerships among barristers and nonlawyers as posing insurmountable conflict of interest problems and limiting consumer choice in advocacy. See Connatser, *supra* at 384.

²⁰⁸ See New York State Bar Association, News Release, “New Rules Clarify Standards for N.Y. Lawyers’ Alliances with Nonlegal Professional Services Firms” (24 July 2001) online: New York State Bar Association <http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Multidisciplinary_Practice_Rules/News_Release/News_Release.htm>, cited in W. Va. Law. 19; Lance Rogers, “New York Becomes First to Allow Multidisciplinary Business Affiliations” *Daily Tax Report* No. 145 (30 July 2001) G4. It should be noted, however, that the District of Columbia has permitted nonlawyer partners in law firms since the early 1990s. District of Columbia Rule 5.4(b) permits such arrangements only if the “partnership or organization has as its sole purpose providing legal services to clients”. Accordingly, the DC rule is viewed as governing law firm arrangements rather than MDPs *per se*.

second rule set out when and how “contractual relationships” would be permitted between lawyers and nonlawyers. The rules categorically prohibited nonlawyers from ownership or management interests in law firms; prevented nonlawyers from regulating the professional judgment of lawyers; banned fee-sharing between lawyers and nonlawyers; prohibited referral fees; and enshrined a presumption that a client who receives nonlegal services from an ancillary business will believe that those services are subject to an attorney–client relationship. The scheme also imposed minimum educational standards on nonlawyer professionals who want to participate in strategic alliances with lawyers and required them to be licensed by a government entity and bound by an enforceable code of conduct.

In addition to the two new rules, amendments to existing rules on publicity and advertising (DR 2-101), professional notices and letterheads (DR 2-102), and solicitation and referrals (DR 2-103) imposed special requirements on lawyers who form alliances with nonlawyers about how they present themselves to the public. For example, the name of the nonlawyer or nonlawyer professional service cannot be incorporated into the law firm’s name.

In essence, far from opening the market to new forms of integrated service offerings, the New York Bar rules constituted a complicated impediment to new forms of services delivery. Indeed, the text of the new rules entrenched the philosophical bias of the New York State Bar Association’s 400-page report entitled *Preserving the Core*

Values of the American Legal Profession against against professional integration and in favor of tight regulation of “side-by-side” business arrangements.²⁰⁹

DR 1-107 begins with a long policy statement stressing the “core values” of the American legal profession—independence, maintenance of client confidences and preservation of client funds. It then goes on to state that “[m]ultidisciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession, and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values.” Even more restrictive than the Ontario approach, nonlawyers under the New York rule DR 1-107(a)(2) were prevented from having any ownership or investment interest in the practice of law by the lawyer or law firm.

The New York State Bar Association, which represents approximately 70,000 members, is the official statewide organization of lawyers in New York and is the largest voluntary state Bar association in the United States.²¹⁰ Its President in 2001 at the time MDP rules were being adopted, Steven Krane, acknowledged that lawyers and nonlawyers had been informally coordinating client-service efforts for many years, but said that the new regulations would “give lawyers guidance on what they can and cannot

²⁰⁹ New York State Bar Association, Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers* (April 2000), online: Legal Information Institute <<http://www.law.cornell.edu/ethics/mdp.htm#members>> . For background on the Chair of the Committee and a key figure in the ABA deliberations, see Victor Futter and E. Nobles Lowe, “A Profile of Robert MacCrate” *Experience* 11 (Summer 2001) 30 (Westlaw).

²¹⁰ See New York State Bar Association, “A Brief History and Purpose,” online: http://www.nysba.org/Content/NavigationMenu/AboutNYSBA/HistoryandStructureoftheAssociation/History_and_Structur.htm

do instead of leaving it to them to find the governing principles scattered throughout the Code of Professional Responsibility.”²¹¹ Krane did not suggest, however, that the rules were directed at better client service; instead, his comments on the adoption of the new regime suggest that the primary goal was protection of the lawyers’ ability to control the practice of law:

Throughout the nationwide debate on MDPs, we have been maintaining that lawyers can provide clients with the purported benefits of coordinated professional services without giving the nonlawyer professionals any say [. . .] in the way [that] lawyers practice law. The new rules announced today [July 24] accomplish that goal by establishing a regulatory framework [. . .] that reaffirms and protects the core values of the legal profession.²¹²

This “core-values” emphasis would have been familiar to Krane from his work as vice-chair of the New York State Bar committee, whose report formed the basis of the Bar’s recommendations for the rule changes that the New York courts adopted, and which was cited as an instrumental influence in the ABA House of Delegates deliberations that led to Resolution 10F.²¹³ The committee’s report was replete with references to the “unique place” of the American Bar in the U.S. legal and governmental system, in contrast to the major accounting and professional-service firms whose interest in legal services was said to be “in acquiring ownership and control of the unidisciplinary practice of law for its own sake.”²¹⁴ It expressed fears that lawyers would lose “their professional culture if many of their daily colleagues and partners come from other professions” or that lawyers would “cut ethical corners to reduce pro-bono commitments or to relax the profession’s rules if colleagues from other professions [. . .] call on them

²¹¹ Rogers, *supra* note 101.

²¹² New York State Bar Association, “New Rules,” *supra* note 101.

²¹³ Cone, *supra* at 12-13 See also Sydney M. Cone, III, “The Future Debate on Multidisciplinary Practice in the United States” (2001) [unpublished on file with the author] at 11.

²¹⁴ Cone, *supra* at 13.

to do so.” These fears animated the Report’s conclusion that the Bar would “enter into new forms of practice only at the cost of injury to its independence and to the rule of law” if “positive answers to these [fears] cannot be found.”²¹⁵ The answers proposed by the report—and ultimately adopted by the New York courts—rested on the proposition that strict separation of legal services is a prerequisite. The Report suggested that contracting legal and nonlegal professional-service firms should be given substantial flexibility to determine the form of their MDP relationship, so long as the three essential requirements (disclosure of the relationship to clients; lawyer ownership and control of the legal practice; and the nonlegal firm’s meeting recognized professional standards) were satisfied.

The New York Bar was ultimately successful, then, in having this view adopted by the New York courts, thereby making a “non-MDP” policy the answer to the MDP question in the State. The New York approach resonates with the Ontario MDP approach (particularly in respect of the second phase of the Ontario scheme that deals with “captive” law firm relationships with nonlawyer providers), but did not find favour elsewhere during the period under scrutiny.

The Law Society of British Columbia

In British Columbia, the *Legal Profession Act*²¹⁶ grants to the Law Society of British Columbia the authority to regulate the legal profession and to make rules “for the

²¹⁵ New York State Bar Association, Preserving the Core Values, *supra* at 323-24.

²¹⁶ S.B.C. 1998, c. 9.

governing of the society, lawyers, articled students and applicants.”²¹⁷ Section 3 of the Act requires that the public interest be paramount by making it the “object and duty” of the Law Society

- (a) to uphold and protect the public interest in the administration of justice by
 - (i) preserving and protecting the rights and freedoms of all persons,
 - (ii) ensuring the independence, integrity and [honor] of its members,
 - and
 - (iii) establishing standards for the education, professional responsibility and competence of its members.²¹⁸

Curiously, subject to the responsibilities just enumerated, the object of the Law Society is *also* to “uphold and protect the interests of its members.”²¹⁹

Until a December 2001 vote on a pro-MDP resolution failed to result in the adoption of a liberal MDP rule,²²⁰ it appeared as though the Law Society of British Columbia would take an approach to MDPs that would be radically different from the restrictive regulatory framework adopted by Ontario and a polar opposite to the New York approach. This followed over two years of steps towards an open regime.

The Law Society of British Columbia, the regulatory body of the roughly 10,000 lawyers in the province, is governed by benchers. Benchers function as its board of directors and supervise the work of the Society in accordance with the *Legal Profession Act*. Benchers are responsible for establishing the Law Society rules and board policies, as well as for overseeing the administration of programs by Law Society staff. Up to six

²¹⁷ *Ibid.*, s. 11(1).

²¹⁸ *Ibid.*, s. 3(a)(i)-(iii).

²¹⁹ *Ibid.*, s. 3(b)(ii).

²²⁰ The proposal, discussed below, attracted a majority of votes, but more than a simple majority was required to amend the Law Society Rules.

nonlawyer lay benchers are appointed by the attorney general of the Province, who is also a bencher.²²¹

In October 1999, benchers of the Law Society of British Columbia agreed in principle to relax the prohibition on fee splitting to permit multidisciplinary practice, “subject to the adoption of a regulatory scheme that protect[ed] the core values of the legal profession, such as privilege, confidentiality and professional independence.”²²² Throughout the first half of 2000, an MDP Task Force comprised of three benchers presented further options on a regulatory scheme for MDPs in the province. Through a series of nonbinding “straw votes,” benchers made provisional decisions on the principles to protect core values that should underpin the regulatory scheme.

The Task Force drafted rules based on the straw votes. These were first introduced at the benchers’ December 2000 meeting. The Law Society’s draft approach was much less restrictive than the approach adopted by the Ontario rules. Benchers had concluded that the Law Society should regulate the MDP through the lawyers participating in it rather than by regulating the firm itself (in contrast to the Ontario MDP rules), just as it did for law firms. With respect to control of the MDP, two options were considered. One would require lawyers to be a majority of the MDP’s partners. The other, which benchers favored, would place no restrictions on control of the MDP and

²²¹ Law Society of British Columbia, “Benchers,” online: The Law Society of British Columbia <http://www.lawsociety.bc.ca/about/body_about_benchers.html>

²²² The Law Society of British Columbia, “Consultation on multi-disciplinary practice,” *Law Society of British Columbia Bencher’s Bulletin Supplement* No. 1 (July-August 2001) at 2, online: The Law Society of British Columbia <[http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp\(MDP\).html](http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp(MDP).html)> [BC MDP Consultation Paper].

would allow lawyers to comprise a minority of the MDP's partners, provided that the delivery of legal services remained under lawyer control. On the question of who could participate in an MDP, benchers did not favor restricting membership to other self-regulating professionals, but thought that nonlawyers in other businesses should be allowed to participate. Their rationale was public-spirited, as well as economically attuned to lawyers' needs: "A restrictive approach may preclude sensible and economic arrangements between lawyers and members of other occupations that may serve the public well."²²³ Benchers were not comfortable, however, with an "open ownership" model.

Benchers directly rejected the approach adopted by Ontario with respect to services (which built on the District of Columbia model) that restricted the scope of services to those directly related to the practice of law. Again, the rationale considered the ability of consumers and the public to access services, as well as the lawyers' economic interests:

A client's problems can cut across professional boundaries, and it is the potential convenience, lower cost and better and more comprehensive advice that may attract consumers to a multidisciplinary practice. By way of example, a lawyer, a social worker and a financial advisor might form an MDP to provide legal and other services in connection with counselling older clients on estate planning, nursing home care and representation agreements.²²⁴

On the issue of client confidentiality, the benchers took a similarly pragmatic approach, rejecting proposals that would prohibit lawyers from participating in MDPs or

²²³ *Ibid.*, at 5.

²²⁴ *Ibid.*, at 6.

from acting for clients when there is a high probability that conflicting confidentiality standards would arise. The consultation paper noted that “[a]lthough such prohibitions would minimize the potential for conflict, they may prohibit some of the most useful forms of MDPs for consumers.”²²⁵ Benchers also favored the use of screening measures within the MDP to prevent the transfer of client confidences to a nonlawyer member of the MDP when the screening solution (or use of “Chinese” or fire walls) was insufficient. The provision of audit and legal services to the same client was not banned outright, but was prevented “unless, in all cases, the client gives informed consent to the disclosure.”²²⁶ The answers lay not in protecting the “guild,” but in figuring out pragmatic solutions that afforded minimum regulatory intrusion.²²⁷

The Law Society’s 2001 president, Richard Margetts, QC, continued this focus on consumer needs, as well as on lawyers’ seeing new challenges as opportunities, not threats. In two separate articles²²⁸ to the legal profession in British Columbia, Margetts expressed his disappointment in what he saw as the profession’s tendency to regard any change as a threat. He forcefully stated that there was a need for increasing integration of legal practice and other disciplines. In dealing with MDPs, as well as other forces of

²²⁵ *Ibid.*, at 9.

²²⁶ *Ibid.*

²²⁷ See Richard S. Margetts, QC, “*President’s View: Lawyers at the crossroads*” *Law Society of British Columbia Benchers’ Bulletin* No. 1 (January-February 2001) 2; Brad Daisley, “Profile: Karl Warner, the new president of the Law Society of British Columbia” *Lawyers Weekly* 19:41 (10 March 2000) 6; Margetts, “You Don’t Need a Weatherman,” *supra*

²²⁸ Margetts, “*President’s View*,” *ibid.*; Richard Margetts, QC, “The Changing Nature of the Practice of Law: A Reply to Mr. Giles on the Issue of Multi-disciplinary Practice” (2001) 59 *Advocate* (B.C.) 31, reprinted in *Law Society of British Columbia Benchers’ Bulletin Supplement* No. 1 (July-August 2001), online: The Law Society of British Columbia <[http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp\(MDP-art2\).html](http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp(MDP-art2).html)> See also Jack Giles, QC, “Response to the President on Multi-disciplinary Practice” 59 *Advocate* (B.C.) 233 (2001), reprinted in *Law Society of British Columbia Benchers’ Bulletin Supplement* No. 1 (July-August 2001), online: The Law Society of British Columbia <[http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp\(MDP-art3\).html](http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-08supp(MDP-art3).html)>

change, the challenge was “to grasp the inevitability of change and use it as a creative force [. . .]. In the face of new competition, we cannot simply ‘circle the wagons’ [. . .] to protect our turf.”²²⁹

Margetts rejected the reliance on a “core-values” defense and openly challenged the assumption that “lawyers [in an MDP] will be prepared to abandon their professional obligations at the whim of their nonlawyer partners.”²³⁰ He did not share the pessimistic view of those who would question the fitness or character of “those members of our profession who might wish to practice in a multidisciplinary setting,”²³¹ and he noted that it was arguable that restrictions on MDPs were unconstitutional. Finally, directly rejecting the Law Society of Upper Canada’s conclusion that the entire MDP debate was prompted only by the expansionist desires of the “Big Five accounting firms,” Margetts’ argument was firmly anchored in a sense of the public interest:

It is a mistake to focus on the ambitions of the Big Five as a determinant of the relationship between the partners of a prospective business association. Ultimately, the consumer will determine successful arrangements. [. . .] Requiring lawyers to be in control will be perceived by the public as simply protecting a monopoly.²³²

This vision, as well as the principles articulated by the Law Society of British Columbia in its evaluation of the MDP issue and the rules proposed by its Multi-Disciplinary Practice Working Group, relied upon a fundamentally different conception of the regulators’ role and the importance of the public interest in a regime that afforded

²²⁹ Gary Oakes, “Profile: Richard Margetts, the new president of the Law Society of British Columbia” *Lawyers Weekly* 20:42 (16 March 2001) 8.

²³⁰ Margetts, “The Changing Nature of the Practice of Law,” *supra*

²³¹ *Ibid.*

²³² *Ibid.*

the flexibility for lawyers to choose the form of delivery through which they wished to deliver legal services, rather than having it dictated to them. Even though the relationship between the regulator and the provincial government was the same in the two jurisdictions, the results of the consultations were strikingly different.

In December 2001, however, Law Society of B.C. benchers rejected the proposed rule changes that would have enshrined the principles approved in the earlier “straw votes” and allowed lawyers to engage in MDPs with nonlawyers. The proposed rule changes that implemented MDPs in British Columbia received a majority of votes of the benchers present and voting, 14 to 13, but required a two-thirds majority to be implemented. The reasons offered for the rejection were based in the “core-values” vocabulary and in the unsatisfactory explanations offered in Ontario about consumer interest. The Law Society of B.C.’s newsletter reported the outcome:

While praising the high quality and comprehensive material presented by the Working Group in December, many of the [benchers] lacked comfort that the proposed rules could sufficiently protect the core values of the profession. It was also flagged by several [benchers] that there is currently a lack of demand within the profession for such a regulatory scheme.²³³

The explanations are extraordinary for several reasons. First, there was no evidence in any of the British Columbia reports of the level of demand for MDPs, either from within the profession or from the public. The argument was consistently anecdotal. The view of the President of the Law Society had been a market-liberalizing approach for at least two years. Richard Margetts had advocated allowing consumers to decide how

²³³ Law Society of British Columbia, “Benchers say no to multi-disciplinary practice,” *Law Society of British Columbia Benchers’ Bulletin* No. 6 (November–December 2001) 15, online: The Law Society of British Columbia <[http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-12-14\(MDP\).html](http://www.lawsociety.bc.ca/library/bulletin/2001/body_bulletin_01-12-14(MDP).html)>

they wanted to access their legal services and lawyers to decide how they wanted to offer them. Questions of demand, then, were arguably irrelevant to the regulatory scheme; if they were relevant, there was no evidence to support any conclusion about them. The language of “core values” again became a crutch upon which recalcitrant benchers could comfortably rest without having to articulate how they thought the “core values” would be compromised by the proposed rules.

As a result, there are no specific rules in British Columbia to govern MDPs apart from the existing restrictions on marketing, fee-sharing and lawyers’ activities provided for in the *Legal Profession Act*, Law Society Rules or Professional Conduct Handbook. Whether what lawyers are already doing in their business arrangements is acceptable was left unclear, and all of the talk regarding international competitiveness and the consumer interest was simply rhetoric.

The California Bar

Like British Columbia, by 2003 California lacked a single governing rule or regime for multidisciplinary practices, although there were “existing practice models through which a form of indirect MDP currently exists in California, and there are potentially viable models for permitting a ‘pure form’ of MDP to exist” there.”²³⁴ Rule 1-310, operative since September 1992 and current in 2007, provides that a member “shall not form a partnership with a person who is not a lawyer if any of the activities of

²³⁴ State Bar of California Task Force on Multidisciplinary Practice, *Report and Findings on Multidisciplinary Practice* (29 June 2001) at iii, online: The State Bar of California <<http://www.calbar.ca.gov/calbar/pdfs/mdpreport.pdf>> [California Bar MDP Report]

that partnership consist of the practice of law.”²³⁵ Just as in British Columbia, in California, the regulatory body responsible for MDP rules signaled a more direct interest in responding to consumer accessibility and indeed situated the MDP issue as “just one aspect of [a] much larger delivery-system issue,” one that requires leadership from within the legal profession to serve client needs in light of a “revolution” in the delivery information, including legal information.²³⁶ Building on the work of the ABA Commission on Multidisciplinary Practice, a California State Bar Task Force on Multidisciplinary Practice proposed various rule changes that would permit MDPs in various forms. The Task Force report was first discussed at a California Bar Board of Governors meeting on July 28, 2001. It was released for comment in August 2001; comments were to have been discussed at Board meetings scheduled for August 23–24, 2002.²³⁷ However, that discussion never took place and the item was tabled.²³⁸ Instead, the California State Bar’s Long-Range Strategic Plan, dated August 23, 2002, recommended continuing assessment of the feasibility “of permitting lawyers to join with nonlawyer professionals in a practice [in which] both legal and nonlegal professional services are offered.”²³⁹

The State Bar task force viewed the five MDP models identified by the ABA Commission on MDPs as insufficiently comprehensive. It also conceded that associations

²³⁵ California Rules of Professional Conduct, Rule 1-310, online: http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf (last accessed December 12, 2007)

²³⁶ California Bar MDP Report at 3.

²³⁷ American Bar Association, Center For Professional Responsibility, “MDP Information,” *supra* note 4.

²³⁸ Randall Difuntorum, Professional Competence Unit, The State Bar of California (discussion with author, 17 March 2003). Difuntorum suggested the matter might come back before the Board in August 2003 but there is no accessible record of it having done so.

²³⁹ The State Bar of California, “Long-Range Strategic Plan,” August 23, 2002), online: http://www.calbar.ca.gov/calbar/pdfs/reports/2002_Strategic-Plan-Report-pdf. There is no reference in the 2004 Strategic Plan to MDPs. (last accessed December 12, 2007)

through which lawyers practice law and offer legal services continue to evolve and that the five models at least offered a basis for its findings. Three of the models—the cooperative model, the ancillary business model, and the contract (strategic alliance) model—were determined to be within existing standards, fully viable without the need to change existing California rules or regulations. This stands in contrast to the approaches in both Ontario and New York, which specifically target linkage relationships for new rules and requirements.

With respect to the “command-and-control” model that exists in Washington, DC (and on which the Ontario By-Law 25 governing MDPs is based), the report found that it “allows for a form of multidisciplinary practice within the confines of lawyer-controlled legal services” but is not a “‘pure form’ MDP.” It would require changes to California’s existing prohibitions on fee-sharing (CRPC 1-320) and partnering with nonlawyer professionals (CRPC 1-310) to implement this model, but the report recommended that such changes could be made “consistent with core values to allow this model to be viable in California.”²⁴⁰

Unlike either Ontario or New York rules, but consistent with the ABA and CBA reports and the BC-approved principles, the California State Bar Task Force report found that a fully integrated professional-services firm, the fifth of the ABA models, would

²⁴⁰ California Bar MDP Report, *supra* at v, 20, 22-23, 38-42. Various other rules would require modification, including CRPC 1-300 (aiding the unauthorized practice of law); CRPC 1-400, B&P sec. 6150 et seq. (advertising and solicitation); B&P sec. 6068(e) (protection of client confidential information); CRPC 3-300, 3-310 and 3-320 (avoidance of conflicts of interest); CRPC 1-600 (professional independent judgment); CRPC 1-100(D) (geographic scope of rules); CRPC 2-100 (communication with a represented party) and others.

permit the “core values of the legal profession not only [to] be maintained, but [also to] be reaffirmed.” The report’s recommendations in this regard, however, were far from an open regime. Passive investment would be prohibited in this and all other legal practices. Allowing such a “ ‘pure form’ MDP” to exist would require cross-imputation of all professionals to each other when integrated services are provided to consumers and a presumption that when a consumer seeks assistance from the MDP, the consumer must affirmatively opt out of the legal services for the “lawyer values” to cease to apply.²⁴¹ The Task Force proposed exploring this model, subject to State Bar certification, although responsibility for adherence to the State Bar Rules of Professional Conduct would rest with individual lawyers. If a breach of Bar rules occurred, the MDP would be subject to decertification.²⁴² The model was thus a combination of the British Columbia emphasis on individual lawyer accountability and the Ontario licensing and certification of firms in bylaws for MDPs.

The California Bar approach for the Fully Integrated Model also reflected the New York Bar’s emphasis on lawyers’ maintaining relationships solely with other professionals. Under the Demonstration Program, lawyers would only be able to partner with licensed “professionals, as defined in existing state wage and hour laws (i.e., licensed professionals in law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, accounting or another traditionally recognized learned profession).” Further, there would be a requirement that the licensed profession in question “maintain a code of professional ethics [. . .] compatible with the legal

²⁴¹ *Ibid.*, at vi.

²⁴² *Ibid.*, at 24-25.

profession's core values."²⁴³ These aspects of the proposal threw into question whether the form being proposed is indeed an open integrated multidisciplinary practice, as the report suggests, or a model more of the type adopted in Ontario, which is called an MDP, but in reality is a law firm with other professional services serving as an inferior adjunct to the firm's primary focus.

The California Society of Certified Public Accountants offered criticism along these lines. In a letter dated October 31, 2001, the California CPAs commented that

The Fully Integrated MDP [. . .] is, in our view, not a true MDP, but rather is a law firm that permits equity ownership by nonlawyers. In that regard, it is quite similar to the current law [that] pertains to accountants.²⁴⁴

Further, the requirement that codes of professional ethics or responsibility be compatible with those of the "core values" of the legal profession effectively excluded audit functions from an MDP and might preclude many types of litigation from coexisting with various accounting functions. While appearing to be a quantum leap beyond the New York model of "side-by-side" alliances, the proposal was tame.

The ambition is clearly tempered by the Task Force's focus on the "special role of lawyers" with "values and duties that have traditionally resulted in lawyers' being segregated from other professionals and regulated by the judicial branch of

²⁴³ *Ibid.* at 25-26 (The report uses the certified public accountant audit function (in conflict with the lawyer's duty of confidentiality) and the duty of certain health care and counselling professionals to disclose evidence of child abuse (in conflict with the lawyer's duty of confidentiality) to illustrate situations of "some professional services that so inherently conflict that they cannot be integrated in an MDP environment" at 30-31).

²⁴⁴ Letter from David L. George, CPA, PFS, Chairman, California Society of Certified Public Accountants to Mr. Randall Difuntorum, Senior Attorney, Office of Professional Competence, The State Bar of California (31 October 2002) [on file with the author].

government.”²⁴⁵ Relying on the language of Justice Kennard in *Howard v. Babcock*²⁴⁶ (“If the practice of law is to remain a profession and retain public confidence and respect, it must be guided by something better than the objective of accumulating wealth”), the Task Force Report is emphatic in its efforts to assert that lawyers need to aspire to goals higher than financial gain alone:

As professionals consider joining together with lawyers in an MDP environment, there will have to be an acceptance of the “core values” of the legal profession [. . .]. There will also have to be acceptance by lawyers of the “core values” of the other professionals within an MDP [that] do not conflict with the legal profession’s “core values.”²⁴⁷

On balance, while the California Report speaks boldly and is more progressive than New York’s model, it finds an affinity with Ontario’s MDP scheme as a model for law firms and comes nowhere close to the more open regime rejected in British Columbia.

Conclusions from the MDP Debate

During the period 1998-2003, when the debate about MDPs was at its height and stakes highest, three of the four significant jurisdictions under study here imposed restrictive MDP regimes, and the fourth rejected a more boldly integrated, consumer-focused model. The Law Society of Upper Canada was thus in good company in terms of its regulatory response to the issue. For the MDP opponents in Ontario who celebrated the ABA and CBA resolutions on multidisciplinary practice, the story ended happily. The reliance on “core-values” rhetoric sustained a regime that, while anchored in

²⁴⁵ California Bar MDP Report, *supra* at 12.

²⁴⁶ 6 Cal. 4th 409 at 434 (Sup. Ct. 1993).

²⁴⁷ California State Bar Task Force Report, *supra* at 17.

legitimate concerns about preventing conflicts of interest, maintaining independence, and preserving attorney–client privilege, also functioned to protect lawyers’ turf.

Perhaps this result was inevitable, given that “[r]egulation of the legal profession has been designed primarily by and for the profession and too often protects its concerns at the public’s expense.”²⁴⁸ Although the MDP debate at the ABA and CBA raised “important questions, such as how to define what it means to be a lawyer and whether the practice of law ought to be isolated from other services that are required in problem solving for clients,”²⁴⁹ the move to implement rules at the regulatory level made real the challenges to the nature of the profession and the ability of lawyers to sustain the view that governance of lawyers is impenetrable. While the end result was protective, there were cracks in the armor.

This history stands as a “partial concrete surrogate for the long-standing dispute over whether the law is a profession or a business.”²⁵⁰ It shows that regulators in Ontario and elsewhere relied on “core values” rhetoric to strenuously assert rules that sustain the former view of law as a profession. This came even in the face of pressures to recognize concerns of consumers and the public interest that would diminish the professional emphasis and focus more on the business of legal services delivery. As the Law Society of Upper Canada put it, an MDP regime that drew bright lines between legal and other

²⁴⁸ Rhode, *In the Interests of Justice*, *supra*, at 208.

²⁴⁹ Haddon, *supra*, at 509.

²⁵⁰ Daly, “What the MDP Debate Can Teach Us,” *supra*, at 528.

services was necessary to “*sell* the proposition that there is a public interest in having lawyers maintain independence.”²⁵¹

In the end, in addition to Law Society rules, external regulatory changes made the issue of multidisciplinary practices on a grand scale (particularly with the Big Four accounting firms) moot in Ontario. The summer 2002 demise of Donahue & Partners, the law firm affiliated with Ernst & Young in Canada and the focus of the Law Society of Upper Canada’s ire, may in large part be attributed to these external factors.²⁵² In November 2000, the U.S. Securities and Exchange Commission Final Rule on Auditor Independence Requirements prohibited accountants from providing legal services to an audit client,²⁵³ severely hampering the extent of any law firm alliance or integration that the Big Five may even have considered in the United States or Canada. If there was doubt about the flexibility of that rule to afford a multidisciplinary practice that combined legal and audit services for SEC registrant clients, rules on auditor independence adopted by the SEC on January 22, 2003, closed the door.²⁵⁴ These rules specifically addressed legal services and prohibited an accountant or accounting firm from “providing to an audit client any service that, under circumstances in which the service is provided, could be

²⁵¹ CBA Futures Task Force Final Report, *supra*, Appendix 9 at 178. [emphasis added]

²⁵² See Julius Melnitzer, “Annus Horribilis at Donahue LLP” *Lexpert* (September 2002) 108 at 108-110 (The reasons for the firm’s demise were said to include “cultural differences, legal, business and personality conflicts, the SEC, Enron, the economic downturn, regulatory restrictions, the failure of expensive lateral recruits to produce, the auditors’ inability to cross-sell, inordinate overhead, lack of or an ill-conceived game plan, the failure of other accounting firms to adopt the MDP model, and the reluctance among top-tier clients to abandon longstanding relationships with traditional law firms”).

²⁵³ *Revision of the Commission’s Auditor Independence Requirements* 17 C.F.R. § 210, 240 (2001), online: U.S. Securities and Exchange Commission <<http://www.sec.gov/rules/final/33-7919.htm>>

²⁵⁴ *Strengthening the Commission’s Requirements Regarding Auditor Independence* 17 C.F.R. § 210, 240, 249, 274 (2003), online: U.S. Securities and Exchange Commission <<http://www.sec.gov/rules/final/33-8183.htm>>

provided only by someone [. . .] qualified to practice law.”²⁵⁵ This new Rule was part of a broader package of reforms that the SEC was mandated to issue pursuant to legislation passed by the U.S. Congress in 2002 to address the Enron scandal.²⁵⁶ These are considered further in Chapter Five, but merit brief reference here.

Section 201 of *The Sarbanes-Oxley Act of 2002*, entitled “Services outside the scope of practice of auditors,” added a new Section 10(A)(g) to the *Securities Exchange Act of 1934*.²⁵⁷ The clause prohibited a “registered” public accounting firm from providing an issuer audit client any of eight specified nonaudit services at the same time as the audit itself; legal services was one of the eight. Accordingly, Congressional and regulatory direction forbade audit and legal services from being offered by the same firm to an SEC registrant. While it was still possible for an accounting firm to offer legal services to its nonregistrant clients, the business synergies that make a multidisciplinary practice attractive are absent under the new rules.²⁵⁸

One of the most significant dimensions of *Sarbanes-Oxley* is that Congress was willing to legislate rules for lawyer behavior and to direct securities regulators to adopt “minimum standards of professional conduct” for attorneys’ “appearing and practicing” before the SEC. The legislation and the regulations were products of the Bar’s own failure to impose adequate requirements for lawyer conduct in the face of client

²⁵⁵ *Ibid.* at 19.

²⁵⁶ *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107-204, 116 Stat. 745.

²⁵⁷ 15 U.S.C. § 78c(a) (1934).

²⁵⁸ For a detailed consideration of the implications of *Sarbanes-Oxley* on the provision of nonaudit services in Canada, see Robert D. Brown and Paul D. Paton, “Public Interest, Public Accountability and Canadian Tax Professionals After *Sarbanes-Oxley*” in Canadian Tax Foundation, *2002 Annual Conference Papers* (Toronto: Canadian Tax Foundation, 2004).

misbehavior.²⁵⁹ The American Bar Association resisted these new legislative and regulatory directions. According to former ABA President Robert Hirshon, “we don’t need the SEC to be drafting new codes of ethics.”²⁶⁰ A. P. Carlton, Hirshon’s successor as president, agreed: “We have a very fine system of lawyer regulation in this country. [. . .] If lawyers have transgressed, they will be called into account.”²⁶¹ Legislators, regulators, and the general public have understandably taken a different view.

The actions by the Law Society of Upper Canada in the MDP debate and the ultimate outcome of that debate demonstrate how core values were invoked to sustain the legal profession’s monopoly over legal services, and to segregate lawyers and the legal profession from public input into the rule-making process. The rhetoric of core values was used as a “veto over change.”²⁶²

The failure of the Bar to appropriately and credibly consider the public interest in assessing the merits of MDPs also invites legislative response. The reaction of the Law Society of England and Wales to clear direction from the Office of Fair Trading that reform to permit MDPs was necessary to promote competition and better service for the public is further illustration of how the gap between public interest and Bar intransigence might be closed.

²⁵⁹ See the discussion in Rhode and Paton, *supra* at 26-27 (on the ABA’s rejection, twice, of the recommendation of its Ethics 2000 Commission to amend the Bar’s Model Rules of Professional Conduct to require lawyers to reveal information when necessary to prevent or rectify substantial economic harm, as well as preserve life).

²⁶⁰ Jonathan D. Glater “Round Up the Usual Suspects. Lawyers, Too?” *New York Times* (4 August 2002) s. 3, p. 4.

²⁶¹ Jonathan Glater, “A Legal Uproar Over Proposals to Regulate the Profession” *New York Times* (17 October 2002) C2.

²⁶² Crystal, *supra* at 774.

So, too, law societies and state bars should have considered more than the Big Four accounting firms in arriving at their conclusions and rules on MDPs. Much as the British Columbia Bar examination and recommendations focused on the role of small practitioners in small communities, legal regulators in Ontario ought to have centered their attention on ensuring how regulatory structures could increase access to legal services for middle- and lower-income clients. Permitting alternative delivery structures, such as MDPs, would have a far broader impact on ordinary citizens' ability to purchase legal services than Big Four initiatives about which the Law Society was so concerned.²⁶³

²⁶³ See Charles W. Wolfram, "Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken" 52 *Case W. Res. L. Rev.* 961 (2002) at 963-66.

Chapter Four

Legal Services and the GATS: Norms as Barriers to Trade

Economic Integration, Domestic Regulation, and Norms as Barriers to Trade

The General Agreement on Trade in Services (GATS) presents a new challenge to traditional conceptions of domestic sovereignty, one with significant implications for the legal profession and for traditional forms of self-regulatory governance. “New issues” – services, intellectual property, and investment – were open for negotiation as part of the Uruguay Round of world trade talks launched in 1986 and concluded in Morocco in April 1994. Discussions about services went well beyond the original General Agreement on Tariffs and Trade (GATT) objectives of liberalizing trade through reducing or eliminating border barriers (or their domestic proxies) to trade in goods. As Sylvia Ostry has noted, barriers to access for these “new issues” involved domestic regulatory policies or domestic legal systems, and dealing with them on the world stage meant moving past traditional conceptions of sovereign relations in international trade relations:

This is hardly the GATT world of shallow integration, but a different world of ever-deepening integration and globalization. [. . .] [T]he new issues were not only new to the GATT, but also [new] in a fundamentally radical sense: they would involve negotiations centered entirely on what were considered domestic policies and even institutional infrastructure.²⁶⁴

Nowhere is the challenge to traditional domestic barriers and fiefdoms more evident than in the area of legal services, part of the GATS agreement and the subject of

²⁶⁴ Sylvia Ostry, *Globalization and the World Trading System – The Deeper Integration Policy Agenda*, in CANADIAN BAR ASSOCIATION AND DEPARTMENT OF JUSTICE CANADA, 14th INTERNATIONAL TRADE LAW SEMINAR 1996 2 (1996).

continuing discussion and negotiation by WTO member states during the period of this study. In 2001, WTO member states commenced a new comprehensive series of negotiations (the “Doha Round”) building on prior discussions during the Uruguay Round. Prior to the collapse of talks in mid-2006, the Doha Round had a deadline of January 1, 2005 for services negotiations and December 2006 for completion of the entire Round, so legal services were a feature throughout the period.²⁶⁵

Increasing international economic interaction and globalization of the legal profession and international trade in legal services makes liberalized trade in this area important for Canadians and Americans, both significant exporters of legal services. Considerable interest in liberalizing trade rules for legal services, however, is tempered by the Bar’s interest in “protecting the guild” and immunizing domestic self-regulation of the legal profession from international trade rules.

Despite the Bar’s interest in protectionism, the agenda may have moved beyond the domestic regulators as a result of increased international economic interaction. Matters that were once the sole purview of regulators at the state level are now squarely on the international agenda.²⁶⁶ While progress has been made in establishing new international understandings for at least one profession—accounting—that will diminish

²⁶⁵ See Laurel S. Terry, “GATS, Legal Services and Bar Examiners: Why Should You Care?” *The Bar Examiner*, May 2002, 25 at 27-28; also Louise L. Hill, “Services as Objects of International Trade: Bartering the Legal Profession,” 39 *Vand. J. Transnational L.* 347 (2006) at 357-358. The Doha Round collapsed in the spring and summer of 2006 primarily as a result of disagreement over agricultural tariffs and tariffs on industrial goods between second and third world countries. Notes of author, OECD Roundtable on the Doha Round, Paris, May 2006.

²⁶⁶ D.P. Steger, *The Impact of GATT/MTO Rule-Making and Rule Interpretation on the Sovereignty of States*, in *STATE SOVEREIGNTY: THE CHALLENGE OF A CHANGING WORLD*, CANADIAN COUNCIL ON INTERNATIONAL LAW ANNUAL PROCEEDINGS, 1992, 138 at 140-41.

the potential for domestic barriers to trade in that professional service, it appears unlikely that similar progress will be made on legal services unless governments are willing to override objections from the Bar and legal regulators in Canada and the United States.

There has been little discussion in the U.S. legal community about the potential impact of the GATS on domestic regulatory authority and the autonomy of state bars to determine the rules and regulations that govern the behavior of lawyers, and no significant outcry from the U.S. bar.²⁶⁷ In contrast, the Canadian government and the Canadian legal profession have actively debated and developed positions on the issue.²⁶⁸ Indeed, one expert praised the Canadian bar's efforts as an example from which Americans should learn.²⁶⁹ The Canadian discussion is important for the American Bar and others who seek insight into GATS discussions of liberalized rules for all professional services. Resistance to openness in various Canadian proposals is anchored in the notion that the legal profession is unique or at least different, that its "core values" place it beyond the scrutiny or attention of trade negotiators.

The invocation of norms as a barrier to trade is not new.²⁷⁰ The reliance upon the idea of law as a profession rather than as a business to resist international economic integration, however, poses challenges to international negotiators, as well as to the

²⁶⁷ Laurel S. Terry, *GATS Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989, 1089 (2001) [hereinafter Terry]. "To date, virtually all U.S. experts in the law of lawyering have been unfamiliar with the GATS and have not participated in the development of GATS policy." *Id.*

²⁶⁸ See *infra*, Section V, below.

²⁶⁹ *Id.* at 1054. See also Press Release, Canadian Bar Association, CBA praised for informing members on GATS issues (Feb. 28, 2002), available at http://www.cba.org/News/Archive/2002Archives/2002-02-28_vanderbilt.asp

²⁷⁰ See Terry, *supra* at 993. See also Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, 35 JOURNAL OF WORLD TRADE 1081, 1082-83 (2001).

credibility of the profession itself. The tension between conceptions of law as a business and law as a professional calling is tested by this issue.²⁷¹ The risk is that the profession's self-regulatory authority will be de-legitimated through this process.²⁷² Liberalized trade has already become a "fundamental quasi-constitutional norm" itself.²⁷³ Protecting the legal guild from deepened integration in the long term will therefore set up a clash between the legal profession and the deepening global integration agenda.

Background—The GATS: An Introduction

To understand the particular challenges and opportunities presented by the GATS for legal services, it is important first to have a general sense of how the agreement functions. This section accordingly provides an overview of the sections and provisions of the treaties most relevant for the legal services industry.

The GATS forms Annex 1b to the Agreement that created the World Trade Organization, and the GATS is an integral part of it.²⁷⁴ It came into force in January 1995, and it is the only set of multilateral rules that govern international trade in services. While it is a government-to-government agreement, it establishes a framework of international rules within which firms operate around the globe. The GATS covers most

²⁷¹ Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values*, 59 BROOK. L. REV. 931, 931 (1993).

²⁷² *Id.* at 959.

²⁷³ Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J. 1, 8 (1996) (bemoaning the movement of economic activity beyond the reach of state intervention).

²⁷⁴ General Agreement of Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade in Services, 33 I.L.M. 1125 (1964), available at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter GATS].

major services, most major world markets, the different ways in which a service can be supplied to a customer in a foreign market and the establishment of commercial operations in foreign markets.²⁷⁵ Its twenty-nine Articles and eight annexes can be best understood as constituting two main component parts: (1) a framework agreement that defines and provides for basic obligations for trade in services generally and (2) a series of national “schedules” that list individual countries’ commitments on access to their domestic markets by foreign suppliers.²⁷⁶

The most important general obligation is found in Article II, which provides that each WTO member state shall accord most-favored-nation (MFN) treatment to all other members: “treatment no less favorable than that it accords to like services and service suppliers of any other country,” except as may be allowed under the Article II exemptions.²⁷⁷ Although MFN status guarantees equal opportunities for suppliers from all WTO members, in reality, no degree of market openness is required. The exemptions were in principle limited to a ten-year duration, allowing members to grant differential treatment to certain trading partners.²⁷⁸ Exemptions were “considered essential [. . .] to

²⁷⁵ *Services 2000— Canadian Services Industries and the GATS 2000 Negotiations, Canadian Legal Services, A Consultation Paper in preparation for the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) Negotiations*, INDUSTRY CANADA: INTERNATIONAL INVESTMENT AND SERVICES DIRECTORATE 4 (1999), available at <http://services2000.ic.gc.ca> [hereinafter *Services 2000*].

²⁷⁶ *GATS, supra*. See also Bruce Stockfish & Fulvio Fracassi, *International Trade in Services: A New Frontier for Commercial Lawyers*, 1 CANADIAN INTERNATIONAL LAWYER 153, 154 (1995).

²⁷⁷ *GATS, supra*, Article II:2. See also WTO Secretariat, *Guide to the Uruguay Round Agreements* (1999), 165-66 [hereinafter *Guide to the Uruguay Round*]: “During the Uruguay Round, it became clear that unqualified liberalization in some service sectors could not be achieved, and that liberalization subject to some temporary MFN exceptions would be preferable to no liberalization at all. The result was that more than 70 WTO members made their scheduled service commitments subject to a further list of exemptions from Article II.”

²⁷⁸ The duration of a country’s MFN exemption is, however, unresolved. While the WTO explains that the Council for Trade in Services is to review all MFN exemptions after five years and in principle MFN exemptions should be terminated after ten years, many countries indicated in their list of Article II

maintain existing measures or agreements that are not consistent with MFN²⁷⁹ status, and most members took some form of exemption.²⁸⁰

The other fundamental principles that animate the operation of the GATS include: (i) national treatment (under which a member state must treat foreign firms as favorably as domestic firms, unless an exception to national treatment is set out in a member's schedule of commitments); (ii) market access (a member cannot restrict market access through quotas, economic needs tests, requirements for certain types of legal entities or maximum foreign shareholding limits, except as set out in the schedule of commitments); (iii) transparency (members have to make public all measures that pertain to the GATS and must notify the WTO of any relevant changes to domestic policies, regulations or administrative guidelines that will significantly affect trade in services; and, importantly for the discussion of legal services); and (iv) domestic regulation (which provides that a member state's regulations must be administered in a "reasonable, objective and impartial manner," and that qualifications, licensing requirements and technical standards "must be based on objective and transparent criteria and not more burdensome than necessary").²⁸¹ This last principle is particularly important for any discussion of legal services.

exemptions that their intended duration was indefinite. "The legal consequences of such an entry in the exemption list are unclear." Terry, *supra* at 1003, n. 40. See also WTO Secretariat, *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services* (2001) [hereinafter *Guide to the GATS*].

²⁷⁹ Stockfish & Fracassi, *supra* at 155.

²⁸⁰ See *Guide to the GATS, supra* at chs. 4 & 16.

²⁸¹ See *GATS, supra* at Article XVII; Market Access, Article XVI; Transparency, Article III; Domestic Regulation, Article VI,1, and Article VI, 4(a), (b). See also *Services 2000, supra* at 4-5.

There is no meaningful definition of “services” in the GATS.²⁸² Rather, the agreement relies on four ways in which a service can be traded, known as “modes of supply.” These include:

- i) services supplied from one country to another, officially known as “cross-border supply”;
- ii) consumers from one country making use of a service in another country, officially known as “consumption abroad”;
- iii) a company from one country setting up subsidiaries or branches to provide services in another country, officially known as “commercial presence”; and
- iv) individuals travelling from their own country to supply services in another, officially known as “movement of natural persons.”²⁸³

In addition to the four fundamental principles noted above, each member “proffers” schedules of commitments in which it specifies the degree of access that it is prepared to guarantee for foreign service suppliers.²⁸⁴ Governments are free to choose those services in which they will make commitments and can differentiate between the four modes in respect to each service.²⁸⁵ National schedules of commitments typically comprise what are known as “horizontal commitments,” together with industry-specific commitments and MFN exemptions.²⁸⁶

The specific commitments are made by reference to the mode of supply, and they apply only to the listed service sectors. Governments may also withdraw and renegotiate a commitment within three years from the date at which the commitment entered into

²⁸² GATS, Article I(3)(b). For purposes of the Agreement, “‘services’ includes any service in any sector except services supplied in the exercise of governmental authority.”

²⁸³ GATS, Article I(2)(a)-(d). *See also* WTO Secretariat, GATS—*Fact and Fiction*, 1-2, available at http://www.wto.org/English/tratop_e/serv_e/gatsfacts1004_e.pdf. (Feb. 2001) [hereinafter GATS: Fact and Fiction].

²⁸⁴ GATS, Article XVI. *See also* Guide to the Uruguay Round at 171-172

²⁸⁵ GATS, Article XX. *See also* Guide to the Uruguay Round, at 172

²⁸⁶ Guide to the Uruguay Round at 181, (describing horizontal commitments as “in other words, provisions that apply to foreign suppliers of any service that has been scheduled”)

force by following the procedure for doing so set out in Article XXI of the GATS.²⁸⁷ On request, compensation may need to be negotiated with members whose trade would be affected by such a change. “Compensation” does not necessarily have to be monetary recompense, but “merely the replacement of the commitment withdrawn by another of equivalent value.”²⁸⁸

Finally, various annexes to the GATS and ministerial decisions provide information regarding ongoing negotiations and rights to temporary MFN exemptions. The annexes include sector-specific understandings. Decisions include both updates on negotiations with respect to particular sectors, as well as on functional understandings, such as with the Decision on Certain Dispute Settlement Procedures.

The Agreement employs both a negative approach to MFN status (applying unless an exemption is listed) and a positive approach for market access and national treatment obligations (which apply only to those sectors listed in the annexes).²⁸⁹ Accordingly, understanding a country’s obligations under the GATS first requires an analysis of the application of the MFN rule and any MFN exemptions, followed by a review of that country’s schedule of specific commitments, with particular attention given to which mode of supply is relevant for a particular commitment. The analysis is completed by reviewing the various annexes and decisions.

²⁸⁷ GATS Article V(5), Article XX. *See also* GATS: Fact and Fiction, at 7.

²⁸⁸ GATS: Fact and Fiction, at 13.

²⁸⁹ Stockfish & Fracassi, *supra*, at 156.

The GATS and Legal Services

Although the GATS was agreed upon in 1995, it provided only the basic framework of general rules for trade in services, leaving questions of how the general rules would apply. The official launch for these further GATS negotiations was originally scheduled for the WTO ministerial meeting in Seattle in December 1999, but the trade ministers from member states failed to arrive at an agenda for further negotiations.²⁹⁰ Notwithstanding this result, the GATS' "built-in" schedule for negotiations in Article XIX provided that member signatories were obligated to "enter into successive rounds of negotiations [. . .], with the view of achieving a progressively higher level of liberalization."²⁹¹

Negotiations were formally launched on February 25, 2000, with two phases planned: (1) the "rules-making" phase, during which members would negotiate new rules for services on subsidies, safeguards, and government procurement; and (2) the "request-and-offer" phase, during which members would negotiate further market access. Work in the first phase was planned for the existing services committees, with market-access negotiations to take place in special sessions of the Services Council.²⁹²

²⁹⁰ Canadian Bar Association, *The World Trade Organization General Agreement on Trade in Services Negotiations: What it Means to Canadian Lawyers* 1, 2 (2000) available at <http://www.cba.org/EPIIgram/February2000/default.asp> [hereinafter Canadian Bar Association].

²⁹¹ GATS, *supra* note 11 at Article XIX. See also Cristin Schmitz, *GATS Talks to Liberalize Trade in Legal Services*, 19 LAWYERS' WEEKLY, Jan. 7, 2000, at 1.

²⁹² Press Release, World Trade Organization, Services Negotiations Formally Launched (Feb. 25, 2000), available at http://www.wto.org/english/news_e/news00_e/servfe_e.htm. See also Press Release, World Trade Organization, WTO Services and Agriculture Negotiations: Meetings set for February and March (Feb. 7, 2000), available at http://www.wto.org/english/news_e/pres00_e/pr167_e.htm

The Doha Declaration, which emerged from the WTO ministerial conference in Doha, Qatar, in November 2001, provided a mandate for negotiations on a range of subjects (including the continuation of negotiations in services). It set January 1, 2005, as the date for completing the services agenda.²⁹³ The Doha Declaration also provided that progress was to be reviewed at the Fifth Ministerial Conference in Mexico in 2003.²⁹⁴ In regard to services specifically, the Doha Declaration provided that participants in the services negotiations “shall submit initial requests for specific commitments by June 30, 2002, and initial offers by March 31, 2003.”²⁹⁵

The pace of events was glacial. The Doha Declaration came three years after the WTO’s Council for Trade in Services had begun preparatory work on the new round of negotiations for liberalization of trade in various services sectors in the summer of 1998. The foundation for this work had been laid nine years earlier. In 1989, the WTO Secretariat had released a note during the Uruguay Round entitled “Trade in Professional Services” that focused on licensed professions, including law.²⁹⁶ The note attempted to identify core issues and to raise questions that surrounded barriers to trade in services, including whether certain types of regulations are necessary to protect consumers.²⁹⁷ As licensing and qualification requirements constitute two of the most important sets of

²⁹³ World Trade Organization, *Negotiations, implementation and development: The Doha Agenda*, available at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (a website gateway to WTO information on the Doha agenda and related documents). See also World Trade Organization, *Doha Ministerial 2001: Ministerial Declaration*, ¶ 45 (Nov. 20, 2001), WTO Doc. WT/MIN(01)/DEC/1, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter *Doha Declaration*]. See also *id.* ¶¶ 7, 45 (reaffirming the right of members under the GATS to regulate and to introduce new regulations on the supply of services and on timing and the agenda for negotiations generally).

²⁹⁴ *Doha Declaration*

²⁹⁵ *Id.* at ¶ 15. See also ¶ 7 (reaffirming the right of members under the GATS to regulate and to introduce new regulations on the supply of services).

²⁹⁶ WTO Doc MTN.GTS/W/67 (Aug. 25 1989).

²⁹⁷ *Id.*

barriers to trade in legal services, the willingness to engage these issues signaled potential international agreement to break down barriers to legal practice traditionally imposed by the self-regulating profession in Canada or by state Bar rules in the United States. These have relied on arguments about the independence of the profession and protection of the public through the maintenance of “core values.”

Building on this 1989 note, in July 1998, the WTO Secretariat prepared a note entitled “Legal Services” for discussions on the sector at the Council for Trade in Services.²⁹⁸ It is thus the appropriate starting point for an analysis of the various negotiations that followed, which are detailed below. The note’s purpose was not to duplicate the work undertaken during the Uruguay Round, but to attempt “to provide a more specific analysis of issues [that affect] trade in legal services.”²⁹⁹ The note tracked the growth of international trade in legal services. The internationalization of the economy had led to the client demand for lawyers to address transactional needs that cross borders. Interest in “one-stop shopping” and access to high-quality services were also factors. Certain countries also believed that “the establishment of foreign lawyers is seen as a catalyst for foreign investment, contributing to the security and predictability of the local business environment.”³⁰⁰ While the note identified business law and international law as the sectors most affected by international trade in legal services, it cautioned that “the entry of foreign-service suppliers in more traditional sectors of domestic law should not be completely discounted as the sector becomes increasingly

²⁹⁸ World Trade Organization: Council For Trade In Services, *Legal Services: Background Note by the Secretariat*, WTO Doc S/C/43 (July 6, 1998). [hereinafter WTO Legal Services 1998 Note].

²⁹⁹ *Id.* at ¶ A3.

³⁰⁰ *Id.* at ¶¶ A3-A4, E22-29.

more integrated,” and questioned whether liberalization could also expand to these more traditional fields of domestic law.³⁰¹

Even the definition of what constituted “legal services” was important in light of varying legal traditions in different nations. The WTO “Services Sectoral Classification List” listed “legal services” as a subsector of “(1) business services” and “(A) professional services.”³⁰² This entry corresponds to the CPC number 861 in the United Nations Provisional Central Product Classification. Member states have scheduled GATS commitments the following way, to express different degrees of openness in the following categories: host-country law (advisory/representation); home-country law and/or third-country law (advisory/representation); international law (advisory/representation); legal documentation and certification services; and other advisory and information services.³⁰³

The note flagged various regulatory barriers to trade as issues of particular importance to discussions of legal services. Nationality requirements, restrictions on movement of professional personnel as part of a country’s immigration policy, prohibitions on incorporation and other restrictions on legal form were identified as important barriers to market access.³⁰⁴ Important national-treatment limitations included

³⁰¹ *Id.* at ¶¶ E23, E29.

³⁰² WTO Doc. MTN.GTS/W/120 (July 10, 1991)

³⁰³ WTO Legal Services 1998 Note, at ¶¶ C16, 17. *See* Guide to the GATS, at 402-403 (definition of legal services) and 425-27 (enumeration of each Member’s commitments using these categories and by modes of supply). *See also* WTO Website, Schedules of Specific Commitments, *available at* http://www.wto.org/english/tratop_e/serv_e/22-specm_e.htm . *See also* WTO Website, Guide to Reading the GATS Schedules of Specific Commitments and the Lists of Article II (MFN) Exemptions, http://www.wto.org/wto/english/tratop_e/serv_e/guide1.htm (with respect to reading GATS Schedules).

³⁰⁴ WTO Legal Services 1998 Note at ¶¶ F30-33.

restrictions on partnership with local professionals, rules on the use of international and foreign firm names, residency requirements and general discrimination in the hiring process.³⁰⁵ Qualification requirements, the note highlighted, “often represent an insurmountable barrier to trade in legal services, especially for the practice of host-country law.”³⁰⁶ There was precedent, however, for how such barriers might be overcome. Three European Union directives illustrated how deeper integration could be accomplished in this regard by providing for mutual recognition of qualification requirements, full integration into the legal profession of a host state, and an even more liberal approach: simply proving registration as a lawyer in another EU member state, with no limitations on the scope of practice and without supervision by locally qualified lawyers.³⁰⁷

The question of foreign legal consultants’ (FLCs) practicing international law or home-country law in a foreign jurisdiction also attracted attention. FLCs encountered fewer barriers when providing services cross-border, and yet their establishment was regulated by most WTO members with an array of regimes and differing requirements. At the time of the note, eighteen U.S. states and the District of Columbia had adopted rules for licensing foreign legal consultants (FLCs), and in 1993, the American Bar Association issued guidelines on FLCs that included liberal provisions.³⁰⁸ NAFTA rules were less liberal. These are discussed briefly below.³⁰⁹

³⁰⁵ Id., at ¶¶ F34-40.

³⁰⁶ Id., at ¶¶ F41.

³⁰⁷ Id., at ¶¶ F43-44, citing EC Directives 77/249/EEC, 89/48/EEC, and 95/5/EC.

³⁰⁸ WTO Legal Services 1998 Note at ¶ 49.

³⁰⁹ Id. at ¶ 50. See the discussion of NAFTA in Section III, *infra*.

The submission of FLCs to a local code of ethics as a condition of licensing was not considered to be a major obstacle, which put the objections noted below about GATS rules' supplanting the ability of regulators to protect the "core values" of the profession into question. As the note put it, "Although differences exist between countries, national codes of conduct for lawyers appear to be based on a certain number of overriding common principles, including strict rules on conflicts of interest, loyalty to the client and confidentiality."³¹⁰

The International Bar Association's Code of Ethics, first adopted in 1956; the IBA's General Principles for the Establishment and Regulation of Foreign Lawyers, adopted in 1988; and the Council of the Bars and Law Societies of the European Community (CCBE) European Code of Conduct (which applies to seventeen European countries) were cited as illustrating common approaches to ethical concerns.³¹¹ Indeed, in 1995, the OECD compared the respective codes of conduct for lawyers used by the CCBE, the American Bar Association and the Japanese lawyers' professional association, and it found no serious differences.³¹² The perception of what constituted "core values" of the legal profession appeared to be shared internationally.

As a foundation for discussions on liberalizing trade in legal services, the WTO secretariat's note signaled recognition of the importance of this sector to international economic growth and points of common concern that would need to be addressed for trade liberalization to occur. The growth of the sector, the globalization of the profession,

³¹⁰ WTO Legal Services 1998 Note, *supra* at ¶¶ F54-56.

³¹¹ *Id.*, at ¶ 54-56.

³¹² OECD, *Liberalization of Trade in Professional Services*, OECD DOCUMENTS, 1995.

and its importance for Canada and the U.S. are worth noting before considering NAFTA Rules and the Canadian responses to the GATS reform proposals.

Globalization of the Legal Profession and Trade in Legal Services

Globalization of the legal profession has been a subject of considerable study.³¹³ In addition, trade in legal services has grown faster than the services sector generally.³¹⁴ A concentration of legal practice has occurred in large law firms in North America and Europe over the last twenty years. Waves of consolidation in the latter half of the 1990s magnified these developments and the drive towards cross-border offerings. Of the top ten firms listed in the *American Lawyer* October 2007 survey of the largest “Global 100” law firms, six were categorized as “international”. Clifford Chance, a U.K. firm, was the top firm by revenue, with 3800 legal advisors, gross revenue in 2006–2007 of \$2.2 billion, and twenty-seven offices in twenty countries.³¹⁵ The WTO in July 1998 noted a combined net trade balance for the U.S. and the U.K., the two largest exporters of legal services, of almost \$2 billion in the early 1990s. A 2007 U.S. International Trade Commission Report showed that the U.S. exported more in legal services than it imported and that legal services formed part of a total trade surplus in “business, professional and

³¹³ See Carole Silver, *Globalization and the U.S. Market in Legal Services – Shifting Identities*, 31 LAW & POL’Y INT’L BUS. 1093 (2000). In a comprehensive consideration of the impact of globalization on the market for American law firm services and the growth of the sector, Silver focuses upon seventy two U.S. firms as “only part of the story of internationalization of the U.S. Bar.” *Infra*, note 43. See also R. Daniel Keleman & Eric C. Sibbitt, *The Globalization of American Law*, unpublished paper presented at the 97th Annual Meeting of the American Political Science Association (August 30–September 2, 2001).

³¹⁴ See Guide to the GATS, *supra*, at 406. See also Services 2000, *supra*, at 7

³¹⁵ “The AmLaw Global 100”, AMERICAN LAWYER, (October 2007), online: <http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=coverstory&id=1190745417>; see also Clifford Chance, “About Clifford Chance,” online: http://www.cliffordchance.com/about_the_firm/?LangID=UK&. By comparison, see 2001 data in Aric Press, *The Global 100 – Leaders and Laggards, Outposts and Outlooks: A Region-by-Region Examination of the Worldwide Legal Market*, AMERICAN LAWYER 89 (NOV. 2001)

technical services” of \$33.1 billion.³¹⁶ Clearly, the sector is of critical importance for the United States, which enjoys a comparative advantage as a result of its dominance in financial and securities markets. The role of New York as a center and a standard for international business transactions, its close association with U.S. multinationals, and the structure of the sector favor large law firms with the human and financial resources to conduct complex and massive transactions.³¹⁷ The internationalization of the U.S. economy is the critical feature.³¹⁸

For Canadians, legal services are also significant. Canada had a population of 31.6 million in 2006, an increase of five percent since 2001.³¹⁹ That year, the last available data set for labour market information until 2006 census reports are released in 2008, Canada had roughly 67,000 people employed as lawyers, notaries or judges.³²⁰ As of the end of 1997, the Federation of Law Societies of Canada estimated that there were over 13,000 sole practitioners, over 5,000 firms with between two and twenty-five

³¹⁶ See U.S. International Trade Commission, *Recent Trends in U.S. Services Trade, 2007 Annual Report, Publication 3925*, (June 2007), online: <http://hotdocs.usitc.gov/docs/pubs/332/pub3925.pdf>. Legal services were not broken out in the report as a specific subcategory. See also Terry, at 995-97. Professor Terry writes that many lawyers believe the value of U.S. cross-border exports of legal services is substantially understated and that the actual value was understated in 2001 by at least half, and was closer to \$5.2B rather than the \$1.4B reported.

³¹⁷ WTO Legal Services 1998 Note, at ¶¶ 28, 29. See also Arthurs & Kreklewich, *supra* at 50-60. (discussing the export of the “Cravathist” large, corporate American law firm pioneered by the Wall Street firm of Cravath, Swaine, Moore in the 1960s, as a practice model)

³¹⁸ Silver, *supra* at 1094-96. Silver cites the size, specialization, comprehensiveness in substantive coverage, foreign expansion, administration and aggressive marketing of U.S. law firms as factors, as well as the dominance of U.S. based financial institutions and capital markets.

³¹⁹ Press Release, Statistics Canada, 2001 Census: Latest Indicators-- Population Estimate (Mar. 12, 2002), available at <http://www.statcan.ca/start.html>. The 2006 Census, held on May 12, 2006, reported a population of 31.6 million. Other data from the 2006 census relating to comparative provisions included here has not yet been released, and so the 2001 data are retained for reference. See Statistics Canada, 2006 Census, Release topics and dates, online: <http://www12.statcan.ca/english/census06/release/index.cfm>; labour market information is scheduled for release on March 12, 2008

³²⁰ Services 2000, *supra* at 12 (citing 1997 data from the Federation of Law Societies.)

lawyers, and sixty firms with more than fifty lawyers.³²¹ Canada's trade in services has grown more rapidly than its trade in goods, significantly faster than the rate of growth in the overall economy. Between 1987 and 1997, services exports grew on average of 9.1% per year, and commercial services exports increased at 11.2% per year.³²² In 1999, the services sector accounted for C\$507 billion of GDP (in 1992 constant dollars), representing 68% of total GDP. A March 2001 Industry Canada paper stated that the share of services in GDP was increasing, even though services accounted in 1999 for only 13% of total Canadian exports, less than the worldwide average of 19%.³²³ In 1999, Canada exported C\$51.8 billion of services, while importing C\$57.8 billion.³²⁴ Roughly 63% of commercial services exports were to the United States, while the U.S. market accounted for 85% of goods exports.³²⁵

Statistics on trade in legal services, produced for the first time in 1996, indicate that exports of legal services totaled C\$263 million, with 80% of this originating in legal fees and the balance in patent and trademark-related work.³²⁶ Two-thirds of this constituted exports to the United States, with the balance distributed among other countries, with the United Kingdom and Hong Kong responsible for the most foreign

³²¹ *Id.*, at 12

³²² Testimony of Mr. Robert Ready, Acting Director, International Investment and Services Policy Directorate, Industry Canada, before the Sub-Committee on International Trade, Trade Disputes and Investment of the Standing Committee on Foreign Affairs and International Trade, (June 9, 1998), available at <http://www.parl.gc.ca/InfoComDoc/36/1/SINT/Meetings/Evidence/SINTEV19-E.HTM>.

³²³ Industry Canada, *Overview of Canada's Service Economy*, 35 (Mar. 2001), available at <http://strategis.ic.ca>

³²⁴ *Id.*, 36

³²⁵ *Id.*, 40

³²⁶ STATISTICS CANADA, CANSIM II, Table 379-0004 and Catalogue no 15-001-XIE, available at <http://www.statcan.ca/english/Pgdb/Economy/Finance/fin06.htm>. Canadian statistics, data for 2000, in constant 1992 dollars, valued accounting and legal services GDP at factor cost at C\$7,565M, using Standard Industrial Classification 1980, which does not disaggregate the respective amounts for the two professions.

billings. Imports of legal services were estimated at C\$208 million in 1996, with 60% for legal fees and 40% for patent and trademark fees.³²⁷ Two-thirds of this total, as well, was related to the United States.³²⁸ Accordingly, the trading relationship with the United States, governed by the North American Free Trade Agreement (NAFTA), is of primary importance for Canadian providers of legal services. A brief review of NAFTA is therefore relevant.

The North American Free Trade Agreement and Professional Services: A Brief Note

The predecessor to the North American Free Trade Agreement (NAFTA), the Canada–U.S. Free Trade Agreement (FTA), marked the first time that cross-border services were addressed in a general trade agreement. These services were subjected to the principles of nondiscrimination and transparency.³²⁹ NAFTA, signed in December 1992 by the leaders of the three respective nations, Canada, the United States and Mexico, and subsequently passed upon by the respective legislative bodies of the three nations, drew on this and on the initial experience of the GATS to entrench basic principles that govern cross-border trade in services.³³⁰

Unlike the FTA, which required a service to be specifically listed to be “covered,” NAFTA covers all cross-border nonfinancial services, unless such a service is

³²⁷ Services 2000, *supra*, at 13

³²⁸ *Id.* See also Guide to the GATS at 423.

³²⁹ Canada–United States Free Trade Agreement, January 2, 1988 – U.S.T. – T.I.A.S. – reprinted in 27 I.L.M. 281 (1988) [hereinafter FTA]. See also United States–Canada Free Trade Agreement, Communication from the President, H.R. Doc. No. 216, 100th Cong., 2d Sess. (1988). See also Colleen S. Morton, *The Impact of the Free Trade Agreement on the Flow of Services Between Canada and the United States*, 16 CUSLJ 91 (1990)

³³⁰ North American Free Trade Agreement, December 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (entered into force Jan. 1, 1983) [hereinafter NAFTA] For the U.S. legislation implementing NAFTA, see NAFTA Implementation Act of 1993, 19 U.S.C. SS 3301-3473 (2000)

specifically excluded.³³¹ The services excluded under NAFTA include Canadian “cultural industries,” most air transportation, U.S. maritime transportation services and government services, such as health and social services.³³² The general principles included improvement of national and MFN treatment for all of its service providers, a commitment to eliminate citizenship and permanent residency requirements for licensing or certification of professional-service providers within two years from the effective date of NAFTA (by January 1, 1996). A sector-specific annex to NAFTA (Annex 1210.5) on professional services outlined the ways in which the general principles applied to legal and other professional services.³³³

In particular, Annex 1210.5 set out procedures aimed at the development of mutually acceptable professional standards and criteria.³³⁴ Like the FTA, the annex required that licensing be based on criteria, such as competence, education, experience and professional development.³³⁵ NAFTA did not contain, however, binding provisions for the mutual recognition of qualifications among its signatories. Instead, specific provisions for foreign legal consultants facilitate their practice via temporary licenses, assuming they meet local standards. Canadian provincial law societies were required to ensure that the national of another party to NAFTA was permitted to practice or advise on its own laws as a foreign legal consultant.³³⁶

³³¹ NAFTA Chapter 12, Article 1201.

³³² See EXTERNAL AFFAIRS AND INTERNATIONAL TRADE CANADA, *NAFTA: WHAT'S IT ALL ABOUT?* 65-68 (1993)

³³³ *Id.* See also Fasken Martineau Walker, Barristers & Solicitors, *The North American Free Trade Agreement: A Guide for Business – What it Says and How it Will Work* (Toronto: March 1993) at 10-11.; NAFTA Chapter 12, Article 1210.5 (Professional Services)

³³⁴ *Id.*, ¶¶ 2, 3

³³⁵ *Id.*, ¶ B

³³⁶ *Id.*

In 1998, the three NAFTA signatories signed an agreement that permitted lawyers from any one of the three to act as foreign legal consultants in the other two.³³⁷ Under this agreement, lawyers licensed to practice in their home country are allowed to set up offices in the other countries and advise on their home-country law, as well as representing clients in international commercial transactions.³³⁸ It has been argued that the agreement provides for stricter disciplines on the professional services sector than does the GATS, but that both NAFTA and the GATS contain mechanisms for future liberalization.³³⁹ Accordingly, while NAFTA remains significant for Canada and the United States, its operation is accordingly limited with respect to liberalization of trade in legal services, and GATS negotiations could significantly broaden what both countries are required to permit in respect of legal services.

Organization of the Legal Profession in Canada and Foreign Legal Consultants

As discussed in Chapter Two, regulation of admission to practice falls under provincial and territorial competence. Four law societies require their members to be either Canadian citizens or permanent residents, and one law society requires that its members be residents of Canada.³⁴⁰ Acceptance at the Bar of one province does not automatically mean acceptance in another. There is a protocol on interprovincial mobility that allows for representation at the Bar of another province for a limited period on a

³³⁷ Services 2000, *supra*, at 15

³³⁸ *Id.*, .

³³⁹ See Stockfish & Fracassi, *supra* at 159.

³⁴⁰ Services 2000, *supra*, at 15.

small number of matters within a given twelve-month timeframe, without the need to pass the qualifying examination in that province.³⁴¹

Foreign lawyers or Canadians with a foreign law degree who want to become members of a provincial bar have to apply to the National Committee on Accreditation (NCA), a standing committee of the Federation of Law Societies of Canada.³⁴² The Federation is the umbrella group made up of representatives of each of the provincial and territorial law societies. The NCA is made up of representatives from the Committee of Canadian Law Deans, members of the practicing Bar, and administrators from the provincial law societies. It evaluates the legal training and professional experience of the applicants, and it determines what additional legal education or training that person needs to be admitted to a provincial Bar.³⁴³

In Canada, foreign legal consultants are persons who are “qualified to practice law in a country other than Canada or in an internal jurisdiction of that country, who give legal advice in one Canadian provincial jurisdiction respecting the laws of that country or of the internal jurisdiction in which that person is qualified.”³⁴⁴ Each provincial Bar has its own rules on foreign legal consultants, but generally, these foreign legal consultants are able to practice in Canada as long as they are in good standing in their home jurisdiction, will not handle trust funds, have three years of experience working under the

³⁴¹ *Id.*, at 16.

³⁴² Federation of Law Societies of Canada, “National Committee on Accreditation,” available at <http://www.flsc.ca/english/foreignlawyers/foreignlawyers.htm>

³⁴³ *Id.*

³⁴⁴ The Federation of Law Societies of Canada, *Foreign Legal Consultants in Canada* (Apr. 2000), <http://www.flsc.ca/en/pdf/flc.pdf> (last accessed December 12, 2007). This document, last updated in 2000, sets out in detail the acceptance province by province of foreign legal consultants.

direct supervision of a qualified foreign legal consultant, carry appropriate insurance, and agree to submit to the jurisdiction of the relevant Canadian governing body and to comply with that law society's legislation, regulations and professional conduct rules.³⁴⁵

THE CANADIAN COMMITMENTS AND PROPOSALS ON LEGAL SERVICES

A. The Canadian Government Consultation Paper

In 1999, the Canadian government released a discussion paper on legal services to solicit assistance from providers of legal services and the private sector in formulating Canadian objectives and positions for the GATS 2000 negotiations. The government also sought to “increase industry awareness of the main issues, challenges, and most importantly, opportunities that are relevant to the legal services industry” and to “develop a better understanding of the real barriers that have limited the export of Canadian legal services.”³⁴⁶ The government signaled interest in particular issues, such as: (i) whether partnering with foreign firms or creating other forms of association was considered a viable way to deliver legal services abroad; (ii) what Canadian measures the sector would offer concessions to obtain further liberalization in other domestic markets; and (iii) how important the sector believed liberalization was in legal services.³⁴⁷

³⁴⁵ *Id.*

³⁴⁶ Services 2000, *supra*, at I(ii).

³⁴⁷ *Id.* at iii-iv.

The paper staked out a position in favor of trade liberalization, and it aggressively dealt with the criticism that had been raised about the impact of the GATS.³⁴⁸ The language adopted by the government, however, reinforced Ostry's vision of a more deeply integrated international economy.³⁴⁹

The GATS is not just a treaty between governments; it is first and foremost an instrument for the benefit of business [. . .]. Specifically, it increases opportunities for service companies [that wish] to export services or to invest and operate abroad.³⁵⁰

[. . .] The GATS is primarily helpful to service exporters, but it also benefits other Canadians. Because it promotes trade and competition in services, business and consumer users of services have access to a broader spectrum of service suppliers and more competitive prices. All citizens stand to benefit from the new job opportunities and growth [that] can result from increased trade in services.³⁵¹

The paper implored the legal profession to take advantage of Canadian expertise and to look beyond domestic markets to exploit trade opportunities:

In light of the increasing [ability to trade] services and the growing importance of the service industries to the economy, the prospects for more rapid growth [. . .] are excellent. Canada clearly has the necessary [. . .] capabilities to succeed in selling its services into rapidly growing international markets. In particular, Canadian lawyers should be able to capitalize on this growing trend of trade in services.³⁵²

The paper noted that there was considerable room for liberalization of Canada's commitments in legal services under the GATS. Canada's scheduled commitments in

³⁴⁸ GATS: Fact and Fiction, *supra*, at 14, 16 (noting in two places criticism by a Canadian journalist and by the Canadian Centre for Policy Alternatives that GATS may abolish regulation designed to protect health standards and other public interests, and that GATS provisions on domestic regulation constituted "dangerous threats to democratic decision making," respectively). *See also* Canadian Broadcasting Corporation, GATS negotiations could threaten health care in Canada, (Sept. 14, 2000), available at <http://cbc.ca/cgi-bin/templates/Nwview.cgi?/news/2000/09/13/gats000913>

³⁴⁹ *See also* Susan Hainsworth, *Sovereignty, Integration and the World Trade Organization*, 33 OSGOODE HALL L.J. 583, 586-87 (1995). Hainsworth rejects a traditional realist conception and argues that economic integration has transformed "hard-shelled and self-sufficient sovereign states" into "porous and vulnerable" entities "transcended by transnational activities and forces," thereby straining the regulatory and normative capacity of national and international institutions. *Id.*

³⁵⁰ *Services 2000, supra*, at 1.

³⁵¹ *Id.* at 6.

³⁵² *See id.* at 10.

legal services meant “relatively restricted access for lawyers from outside Canada.”³⁵³ Further, the variations in provincial regulations added extra burdens to foreign lawyers. Commercial presence requirements under provincial Bar rules imposed restrictions on firms wanting to invest and do business in Canada.³⁵⁴

Finally, the paper proposed a modest set of objectives for GATS negotiations on legal services. The list constituted a frontal attack on the ability of the legal profession to regulate itself in the traditional manner. The first three objectives identified would require changes to provincial Bar rules. The objectives included:

- securing better market access for the commercial presence mode of delivery [. . .];
- securing improved access for professionals and natural persons;
- improving transparency requirements and ensuring consistency of domestic regulations to facilitate foreign entry;
- achieving higher levels of liberalization in a variety of other professional-service industries [. . .]; and
- increasing the number of countries [that make] full commitments in legal services.³⁵⁵

B. The Canadian Proposal for the GATS 2000 Negotiations

These objectives, by and large, made their way into the Canadian Sectoral Negotiating Proposal about professional services that eventually constituted Canada’s contribution to the start of the GATS 2000 services negotiations.³⁵⁶ The boundaries for discussions on legal services, however, were severely constrained, limited to foreign legal consultancy. Canada included foreign legal consultancy services for specific

³⁵³ *Id.* at 20

³⁵⁴ *Id.*

³⁵⁵ *See id.* at 21.

³⁵⁶ Industry Canada, *Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals, General Agreement on Trade in Services (GATS)*, available at <http://strategis.ic.gc.ca/SSG/sk0097e.html> (filed at the GATS as WTO Doc. S/CSS/W/67 (Mar. 27, 2001) [hereinafter Canadian Negotiating Proposals]).

consideration, and then lumped all other sectors together to create a negotiating “checklist of issues” for all professional services.³⁵⁷

Canada sought to eliminate overt discriminatory requirements in nationality, citizenship and alternatives to residency or permanent residency. The Proposal recommended improvements in the coverage for the temporary entry and stay of foreign professionals.³⁵⁸ It suggested improving mutual recognition of credentials and extending the “Guidelines for Mutual Agreements or Arrangements in the Accountancy Sector” to professional services in general.³⁵⁹ Canada offered to work toward the development of general disciplines, but “with the possibility of developing specific disciplines to accommodate specific characteristics of individual professions,” and it included legal services.³⁶⁰

The introduction to the sectoral proposal, however, signaled ambivalence about the area:

Despite their growing importance, it is widely evident that trade in professional services by foreign businesses and, in particular, individual professional service providers continues to be hampered. [. . .] The protection of the consumer, as well as the need to ensure competency and

³⁵⁷ *Id.*, at 15-16

³⁵⁸ *Id.*, at 16

³⁵⁹ *Id.*, at 16. World Trade Organization, Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, December 14, 1998, WTO Doc. S/L/64 (98-5140) [hereinafter WTO Accountancy Disciplines] was considered a model for other services sectors. The Working Party on Professional Services, which was responsible for the creation of this set of disciplines, was replaced in April 1999 by the Working Party on Domestic Regulation. The WPDR was mandated to focus on “the development of generally applicable disciplines for all services sectors.” See WTO Doc S/L/70, (Apr. 28, 1999). See also Guide to the GATS, *supra* note 15, at 7-35 (general discussion of the accountancy sector). See also Anthony DePalma, *W.T.O. Pact Would Set Global Accounting Rules*, N.Y. TIMES, March 1, 2002, at W1. See also Press Release, World Trade Organization, WTO Adopts Guidelines for Recognition of Qualifications in the Accountancy Sector, (May 29, 1997), available at http://www.wto.org/english/news_e/pres97_e/pr73_e.htm

³⁶⁰ Canadian Negotiating Proposals, *supra* at 16.

quality of service, are paramount [. . .]. However, the extensive differentiation of regulations and their application often constitute serious impediments to trade.³⁶¹

The introduction to the proposal as a whole further reinforced this duality, although in the main focusing on public-sector services in Canada:

While recognizing the importance of a liberalized services trade environment, it is an underlying tenet of the GATS [. . .] that the process of progressive liberalization will take place with due respect for national policy objectives. In particular, the GATS emphasizes the right of members to regulate and to introduce new regulations on the supply of services within their territories [. . .] to meet national policy objectives. These are important principles of the GATS.³⁶²

This introduction signaled that the Canadian government, although pursuing an agenda of more open trade in services, would bow to domestic concerns in the refinement of that agenda. This was the opening that the legal profession was pursuing, thereby resorting to normative rationales for restrictions on even foreign legal consultants in Canada. Federalism exacerbated the inability of the federal government to directly dictate the domestic agenda to recalcitrant legal regulators operating under a variety of provincial regulations. The first pronouncement on the issue by the legal profession in Canada, that of the Canadian Bar Association in 2000, reflected the attempt to constrain liberalization of Canadian domestic markets.

C. The Canadian Bar Association Submission (2000)

In August 2000, the Canadian Bar Association (CBA) delivered a submission to the Canadian federal government's Department of Industry and Department of Foreign

³⁶¹ *Id.* at 15.

³⁶² *Id.* at 2-3.

Affairs and International Trade. It was entitled “The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession.”³⁶³ The submission was the CBA’s response to the Industry Canada Consultation Paper and to the WTO Working Party on Domestic Regulation’s examination of how rules already established for accountants might apply to the legal profession. The paper reflected the internal contradictions that faced the legal profession on the broader question of liberalizing trade in services, particularly the central dilemma explored in the previous chapter: is law a business or a profession? How can Canadian lawyers open up what is obviously an important export market, yet maintain the strictures of domestic self-governance without interference from international trade commitments? Above all, how can the legal profession ensure that lawyers are not treated like mere accountants, whose status as a profession lacks the gravitas of the public role of lawyers in the protection of democratic values?

The paper fundamentally rejected the application of the accountancy-discipline model as appropriate for legal services.³⁶⁴ However, it nonetheless accepted that many of the principles set out in the Accountancy Disciplines could be readily adapted to the legal profession.³⁶⁵ Indeed, the paper rejected the notion that legal practice constituted trade in services: “at their core, the activities of the legal profession involve the execution of

³⁶³ Canadian Bar Association, *Submission on The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession*, (Nov. 2000), available at <http://www.cba.org/EPIIgram/November2000/pdf/00-30eng.pdf> [hereinafter CBA Submission].

³⁶⁴ *Id.* at 2, 7. “International trade treatment of legal services cannot be blindly subsumed in a common approach toward professional services generally, nor should international trade considerations drive all aspects of these deliberations.” *Id.* at 2 “[A] wholly common approach is not appropriate.” *Id.* at 7

³⁶⁵ *Id.* at 7.

public duties, not the trade of services.”³⁶⁶ It accepted basic principles, including transparency, pre-established licensing and qualification procedures and requirements, and mutual recognition agreements, as compatible with the legal profession’s “fundamental characteristics.”³⁶⁷ It deemed the remainder of the provisions of the Accountancy Discipline problematic. The President of the CBA argued that the legal profession needed its own rules in international trade because “Lawyers play a unique role in our justice system.”³⁶⁸

The press release accompanying publication of the submission neatly encapsulated the schism between a desire for limited trade liberalization and the desire to protect self-regulation:

The submission says that Canadian lawyers are uniquely placed to take advantage of opportunities to [practice] Canadian law and international law abroad. When [practicing] abroad, they may face unnecessary obstacles. [. . .] The CBA does not oppose international rules to remove such barriers. However, as members of a self-regulating profession, lawyers must be able to determine standards of admission, rules of conduct and discipline. Independence requires the profession’s freedom from governmental or international pressure in matters of access to the profession or of discipline.³⁶⁹

A subsequent report issued by the CBA also emphasized this reliance on the unique role of lawyers, anchored in the language of the “core values” of the legal profession. The November 2000 “EPIIgram” highlighted the central argument:

The submission noted that the legal profession has unique characteristics arising from its role as intermediary between the citizen and the law and [.

³⁶⁶ *See id.* at 1.

³⁶⁷ *See id.* at 9.

³⁶⁸ Press Release, Canadian Bar Association, Public Interest Must Be Protected Under GATS, Says CBA, (Sept. 19, 2000), available at http://www.cba.org/news/releases/2000_releases/00-09-19_gats.asp [hereinafter CBA Submission Press Release].

³⁶⁹ *Id.*

. . .] the state. Lawyers do not simply trade in services; they perform public duties. Lawyers have obligations flowing from their special role [. . .], such as preserving independence, maintaining client confidences and avoiding conflicts of interest.³⁷⁰

The CBA also insisted that the profession needed to be at a distance from the state and not simply subject to the international obligations that ordinarily the state would be able to impose on its subjects:

The CBA strongly urges the government of Canada to insist that international trade rules reflect a respect for the self-regulating nature of the profession. [. . .] Law societies must be able to determine the standards of admission to the profession, establish standards and rules [that] govern members of the profession and discipline those who fail to meet those standards. This maintains independence of the profession [. . .]. Generally speaking, law societies should be given the widest possible scope to regulate in what they believe to be the public interest, including [. . .] multidisciplinary [practice]. *Trade rules should not inhibit law societies from regulation in furtherance of the core values of the profession.*³⁷¹

The CBA's primary concern was anchored in its legal analysis of the language of the text of Article I of the Accountancy Disciplines.³⁷² That Article provides that regulatory measures must not be "prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade."³⁷³ Further, it commits member states to ensuring that "such measures are not more trade-restrictive than necessary to [fulfill] a legitimate objective."³⁷⁴ The nonexhaustive list of "legitimate objectives" enumerated in the Article includes quality of service, professional competence and integrity.³⁷⁵ The "more trade restrictive than necessary" standard, the CBA feared, had been interpreted

³⁷⁰ Canadian Bar Association, *Update – Multi-Disciplinary Practice and World Trade Organization*, EPIIgram (November 2000), at 3-4, available at <http://www.cba.org/CBA/EPIIgram/November2000/default.asp>

³⁷¹ *Id.*, at 3-4

³⁷² WTO Accountancy Disciplines, *supra*, Art. I

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

very strictly by WTO dispute-resolution panels.³⁷⁶ The CBA concluded that the word “necessary” under Article XX of the GATT required a party to establish that there “were no alternative measures consistent with the General Agreement or less inconsistent with it” that could reasonably be expected to have attained the relevant objective.³⁷⁷ Relying on the “dozen or so” cases decided by WTO dispute-resolution panels to that point under Article XX, a member state’s measure had never been upheld on the grounds of “necessity.” In addition, the CBA worried that legal regulators would have to justify themselves to external dispute-resolution panels, rather than simply being free to regulate in whatever fashion they decided best served the public interest.³⁷⁸ The CBA proposed instead that a standard be adopted that would have the party that sought to impose a restriction establish that the “primary aim” of a measure otherwise inconsistent with GATT rules “relates to” a permissible objective.³⁷⁹

Again, this proposal was anchored in the language of ethics and norms, a normative perspective of the legal profession’s unique place in society and the maintenance of the sanctity of that place in the face of international trade reform: “Our view is that the legal profession should not have to prove the ‘necessity’ of rules [that] it is convinced are required to preserve its integrity and protect the public.”³⁸⁰

³⁷⁶ CBA Submission, *supra* at 9-10

³⁷⁷ *Id.*, at 9, citing *Thailand S Restrictions on Importation of and Internal Taxes on Cigarettes*, 37th Supp. B.I.S.D. (1990) at 223, *infra*,

³⁷⁸ CBA Submission, *supra* at 9-10. *See also* CBA Submission Press Release, *supra*

³⁷⁹ CBA Submission, *supra* at 10

³⁸⁰ *Id.*

The CBA submission also resisted the application of the accountancy disciplines to residency requirements as a licensing requirement and to membership in professional organizations as required to fulfill a “legitimate objective.” It also rejected applying the Accountancy Disciplines to restrictions on firm names, professional indemnity insurance requirements, the assessment of qualifications acquired in the territory of another member, the scope of examinations and other qualification requirements and standards relating to competence and professional conduct.³⁸¹ In essence, the CBA position was that in all of these areas, legal regulators’ rules should not be subject to third-party review.

The overall impact of the submission was clear. The Canadian Bar Association was telling the government that despite the substantial interest of Canadian lawyers in taking advantage of opportunities to export legal services, the government should ensure that nothing changed or compromised the ability of Canadian legal regulators’ sole discretion to determine all of the rules that would govern the legal profession in Canada. It was as though the GATS chapter on legal services should not exist without the consent of the profession in Canada, particularly given the “independence and self-governing feature of our legal profession and [its] importance [. . .] in our democracy. How can nation-to-nation agreements take into account *this reality?*”³⁸²

The summary offers two alternative arguments: the profession should govern the application of the GATS on the profession because it is independent from government;

³⁸¹ *Id.*, at 11-15

³⁸² See Canadian Bar Association, *supra* at 5 (emphasis added).

and, alternatively, if government goes ahead alone, there is only a limited scope of regulations at issue, and limited impact on the “average Canadian lawyer”: “Liberalization in trade in legal services would probably have its largest impact in international business transactions, financial services and large-scale mergers and acquisitions. These are the big money-making areas in which international law firms would likely be most interested. People with smaller practices or who practice real estate law, family law, criminal law, general litigation or small-scale corporate and commercial law may be affected but the chances are fairly small.”³⁸³ It was a curious way to position the regulators’ role.

This view of the legal profession as being outside the purview of government, rather than a creature of government exercising delegated authority, underpinned the CBA submission. As discussed in Chapter Two, while legal regulators in Canada exercise delegated authority under provincial law society statutes, the profession views this relationship differently. It is not that the state has delegated certain functions to the Law Society; “the state recognized and encouraged the origin and growth of the Law Society within the framework of the state.”³⁸⁴ The Law Society, in this view, was not answerable to the public: “It is not public policy that is enunciated, but Law Society policy.”³⁸⁵

This concept of the role of the legal regulator and its relationship to the state is contrary to the fundamental operating framework of the GATS discussions on legal

³⁸³ *Id.*

³⁸⁴ G.D. Finlayson, *Self-Government of the Legal Profession – Can It Continue?* 4 ADVOCATES’ SOCIETY JOURNAL 11, 13 (1995).

³⁸⁵ *Id.*

services, which conceives of legal services as a commodity.³⁸⁶ The GATS operates on the assumption that states dictate conduct rules to lawyers in their respective jurisdictions. This clash of underlying conceptions about the relationship of the profession to the state—and the assertions of independence that come along with the language about protecting the core values of the profession—makes the GATS proposals for liberalizing trade in legal services so threatening to the Canadian legal profession.

D. The Federation of Law Societies WTO Paper (February 2001)

The Canadian government's initial negotiating proposal included a reference to possibly extending the disciplines developed for liberalizing trade in the accountancy sector to other professional services.³⁸⁷ The Federation of Law Societies of Canada (the "Federation") responded in February 2001.³⁸⁸ An umbrella group composed of the provincial and territorial law societies responsible for the self-regulation of the legal profession in their respective jurisdictions, the Federation answered with a resounding "No" to any such extension. The Federation's GATS paper also relied on normative barriers to trade in a fashion parallel to the Canadian Bar Association's paper discussed above. Accordingly, both the Federation as regulator and the CBA as trade association for lawyers relied on normative objections to resist liberalizing trade in legal services. The Federation signaled some readiness to review certain domestic restrictions on foreign

³⁸⁶ See Robert G. Evans & Michael J. Trebilcock, *Preface* of Robert G. Evans & Michael J. Trebilcock, eds., *LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES*, ix-x (1982) in respect of the characterization of and economic analysis of legal services as a commodity.

³⁸⁷ Canadian Negotiating Proposals, *supra*, at 16

³⁸⁸ Federation of Law Societies of Canada, "Meeting Canada's Current Obligations for the Legal Profession under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO)," February 2001, online: <http://www.flsc.ca/en/pdf/2001wtoreport.pdf> [hereafter Federation of Law Societies GATS Paper]

legal consultants (along the lines of the broad proposals contained in the initial sector negotiating position adopted by the Canadian government), but even that was far from a bold or uniform commitment. Both dimensions of the Federation paper—the normative barriers to trade and the rejection of the Accountancy Disciplines—are intertwined and merit review.

With respect to the reliance on norms, the language used in the Federation paper is replete with reference to the uniqueness of the legal profession. The Federation states that it “believes that it is possible to have both international trade in legal services and a standard of professional regulation that properly protects the public interest.”³⁸⁹ It proposes to accomplish this, however, only through a very constrained opening of the regulations that apply to foreign legal consultants and, not surprisingly, through maintaining the self-regulatory authority of the various law societies in Canada to coexist with the GATS.³⁹⁰ The paper reviews the “unique structure and values of the legal profession” and emphasizes the “vital role [that] local law societies play in ensuring that lawyers practicing within their jurisdictions are competent, ethical and independent.”³⁹¹

The paper embraces the contradictions and ambivalence noted in the Canadian Bar Association paper and the Canadian government discussions. Even in rejecting the applicability of one set of disciplines for the legal profession, those modeled on the ones that had been developed for accounting, the Federation paper notes that the legal profession in Canada “shares a number of unique values. *These values are also, in large*

³⁸⁹ *Id.* at 3.

³⁹⁰ *Id.*

³⁹¹ *See id.*

*part, shared by the legal profession globally.*³⁹² The values highlighted include the usual suspects: the independence of the legal opinion and individual lawyers; self-governance of the legal profession; maintenance of client confidentiality; and strict standards to prevent conflicts of interest.³⁹³ These were echoed in passages quoted from an International Bar Association discussion of the GATS that differentiated the legal profession from other professional services, at least for purposes of GATS recognition of professional qualifications. In this regard, the universal dimensions included the special role of the legal profession in the maintenance and functioning of democratic societies.³⁹⁴ These speak to the need for potential differentiation from other professions, but they do not address why a global standard is inappropriate.

An International Bar Association paper addressed this in discussing the “Heterogeneity of Substantive Knowledge.” The fact that the qualifications of a lawyer are highly individuated to national or local jurisdictions means that developing uniform international standards may be inappropriate:

Thus, unlike medicine or engineering, [in which] the applicable principles are exactly the same from one country to another, or accounting, [in which] the rules [. . .] are readily subject to reconciliation in accordance with common principles, law is highly variable from one jurisdiction to the next and [. . .] is significantly cultural in its context.³⁹⁵

On balance, then, the Federation of Law Societies proposed modest changes to the status quo, rejecting the accountancy disciplines as normatively appropriate for

³⁹² *See id.* at 6 (emphasis added).

³⁹³ *Id.*, at 6-7

³⁹⁴ *See id.* at 7 (quoting International Bar Association, *Proposed Standards and Criteria for Recognition of the Professional Qualifications of Lawyers* (July 31, 2000)).

³⁹⁵ *Id.* at 7

application to the legal services sector, while acknowledging the potential applicability of a number of the detailed accountancy disciplines to legal-services issues. Reasserting the distancing of the profession from the government relied upon by law societies as their *raison d'être*, the paper demanded further consultations if the Canadian government's intentions—not to expand Canada's GATS commitments to the legal profession in the near future—had been correctly understood.³⁹⁶ It was a bold assertion of purpose by Canadian legal regulators.³⁹⁷

An Overview of Other Countries' Proposals on Legal Services

The WTO website is a valuable resource for comprehensively reviewing the proposals formally submitted to the Council on Trade in Services and the various schedules of commitments offered by each member state.³⁹⁸ Only a brief consideration of proposals from other Western member states is offered here to compare with the Canadian Sectoral Proposal. Such a sampling reveals that the Canadian approach lay close to its Western counterparts: very limited ambition for meaningful liberalization of

³⁹⁶ *See id.*, at 4

³⁹⁷ Chi Carmody, *Public Participation in WTO Dispute Settlement: Stay Tuned*, 4 CANADIAN INTERNATIONAL LAWYER 125, 130 (2001). Carmody argues that public participation in WTO matters in Canada, and in particular the WTO dispute settlement process, is limited. He submits that it would be better to legislate a formal, accessible, transparent procedure for the initiation and maintenance of Canadian action in WTO dispute settlement, like the U.S. and European Community mechanisms for the public initiation of unfair foreign trade complaints, replacing the current expensive and time-consuming system of lobbying government. His point about the process – that while ordinary Canadians are invited to “consult” but that the pattern of official behaviour “effectively limits dialogue to a small segment of society overwhelmingly dominated by business interests” is applicable not only to dispute settlement but arguably to the creation of international commitments in the first place with the GATS. The sense of entitlement articulated by the Federation of Law Societies submission attempts to place it and the legal profession on a level akin to a “quasi-government”, well above any input enjoyed by the public, and is a rather extraordinary statement about the self-perceived role and norms of the legal profession in Canada.

³⁹⁸ *See* WTO Website, http://www.wto.org/english/tratop_e/serv_e/legal_e/legal_e.htm.

legal services and significant protection of the domestic bar's monopoly on the delivery of host country legal services.

For example, Japan's proposal emphasized that "each profession is subject to a specific discipline that is unique [. . .]. Liberalization in these sectors, therefore, needs to take into account the specific characteristics of the profession in question."³⁹⁹ Japan focused on nationality requirements, reciprocity in permissions of qualification, and the lack of a legal framework for accepting professionals with foreign qualifications (or the lack of internal consistency of such a framework) as being of primary importance, identifying them as problems that "are expected to be improved, while the unique characteristics of each profession are maintained."⁴⁰⁰ Japan excluded foreign lawyers from the Japanese legal-services market entirely until 1986, and then restricted them from advising on Japanese law or from hiring Japanese lawyers for their foreign firm.⁴⁰¹ Couching any reform in language of sensitivity to professions' being "unique to each country," however, leaves the impression that Japan's negotiating room is very modest and that it will maintain severe restrictions.

Australia, which shares Canada's common law and Commonwealth tradition, as well as having a similar profile in respect of its professional services offerings, proposed an expanded definition of *legal services* in the WTO Services Sectoral Classification List

³⁹⁹ Ministry of Foreign Affairs of Japan, *Proposal by Japan on the Negotiations on Trade in Services*, at ¶ 28, available at <http://www.mofa.go.jp/policy/economy/wto/propos0012.html>

⁴⁰⁰ *Id.* at ¶ 29.

⁴⁰¹ See Keleman & Sibbitt, *supra* at 37-41 (includes a detailed discussion of Americanization of law in Japan and the opening of the Japanese legal services market in the 1980s and 1990s). Under Japanese rules, legal service providers must practice for five years in the same jurisdiction to register with the Japanese Bar. At the time of the proposal, only *bengoshi* were allowed to provide legal services in Japan, and they were not permitted to establish a full partnership with foreign firms.

noted earlier.⁴⁰² It also proposed six guiding principles for the liberalization of trade in legal services.⁴⁰³ The proposed subcategories were a way that Australia believed members could make commitments that would lead to meaningful market access for foreign legal practitioners, while “where considered appropriate, restricting access to the practice of host-country law.”⁴⁰⁴ Together with a “limited-licensing” system, the result would be a “clear mechanism through which to limit the practice of ‘host country law (representation services)’ to local practitioners, but make substantial commitments through other subcategories. This would protect the ‘public function,’ as well as providing meaningful market access to foreign practitioners.”

Despite having a liberal regime for trade in services amongst its own members, the European Community (EC) proposal nonetheless had significant restrictions for legal-services qualification and licensing.⁴⁰⁵ The EC proposal on professional services included legal services as a subsector (defined as being limited to “legal advice on home-country and international public law”).⁴⁰⁶ It noted nationality requirements as “often an inappropriate tool to control professional competence” and residency requirements as acceptable only for “reasons of consumer protection and accountability.” It suggested that

⁴⁰² World Trade Organization, Council For Trade In Services, Special Session: Committee On Specific Commitments, *Communication from Australia, Negotiating Proposal: Legal Services Classification Supplement*, ¶ 9, (Mar. 11, 2002), WTO Doc. S/CSS/W/67/Suppl.2, S/CSC/W/32. See also WTO Doc S/CSS/W/67 (Mar. 27, 2002); S/CSS/W/67/Corr.1 (Apr. 11, 2001) with respect to the six guiding principles for liberalization, and S/CSS/W/67/Suppl.1/Rev.1 (July 10, 2001) with reference to the original proposal for “Limited Licensing.”

⁴⁰³ World Trade Organization, Council on Trade in Services, Special Session – Committee On Specific Commitments, *Communication from Australia, Negotiating Proposals on Legal Services*, WTO Doc S/CSS/W/67 (Mar. 27, 2001); S/CSS/W/67/Corr.1 (Apr. 11, 2001)

⁴⁰⁴ World Trade Organization, Council For Trade In Services, Special Session: Committee On Specific Commitments, *Communication from Australia, Negotiating Proposal: Legal Services Classification Supplement*, ¶ 9, (Mar. 11, 2002), WTO Doc. S/CSS/W/67/Suppl.2, S/CSC/W/32

⁴⁰⁵ European Commission, *GATS 2000: Professional Services, Proposal from the EC and their Member States*, (Dec. 2000), available at <http://www.europa.eu.int/comm/trade/services/nspw01.htm>

⁴⁰⁶ *Id.*

lesser trade-restrictive forms, such as limited or indirect forms of local presence, be adopted.⁴⁰⁷ It also stated that restrictions on internationally known brand names were inappropriate.⁴⁰⁸ The EC did not favor unrestricted deregulation of professional-services sectors, “given the important public-service function many of these professions fulfill.” Further, it suggested that exceptions to full commitments be accepted for “proof of professional qualification, consideration of security issues, consumer protection, etc.”⁴⁰⁹ In sum, there is ample room in adopting the approach suggested by the EC proposal to continue to maintain significant barriers to any meaningful liberalization in legal services.⁴¹⁰

Finally, the United States’ proposal was notable for its brevity. Its aggressive ambition for liberalized trade stands in stark contrast to the proposals noted above. An initial U.S. analysis of the GATS schedules of service commitments of its major trading partners (including Canada, the European Union, Japan and Mexico) concluded that “[a]ll subject trading partners appear to maintain significant restrictions on foreign provision of legal services,” with Canada the least restrictive and Mexico and Japan the most restrictive.⁴¹¹ Scheduled commitments afforded regulatory transparency and “benchmarking,” although the lack of a common approach to scheduling within the EU

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ See also Press Release, *European Services Forum, GATS 2000 – Meeting with Trade Commissioner Pascal Lamy* (Nov. 9, 1999). The ESF is a “network of high-level representatives from the European services sector committed to promoting the interests of European services and the liberalization of services markets throughout the world through the GATS 2000 negotiations.” *Id.* Its membership includes over 90 companies and service industry associations in more than 20 service sectors, including professional services. Its website is www.esnet.be. The ESF pushed for a comprehensive agenda not limited to tradeoffs between agriculture and services, to be “achieved within three years by a single undertaking.” *Id.* This approach is not reflected directly in the December 2000 EC proposal.

⁴¹¹ United States International Trade Commission, Executive Summary: GATS, available at <http://www.usitc.gov/332S/ES2940.htm> .

countries made it difficult to discern which EU member states were most restrictive. The analysis also noted that U.S. industry representatives had expressed dissatisfaction with Japanese commitments. Japan is the United States' largest export market, yet barriers to the foreign provision of legal services remained unacceptably high.⁴¹² The two-page U.S. proposal focused on "mak[ing] it easier for lawyers and law firms to provide services to clients involved in international transactions," as well as "enabling those clients to conduct business successfully and in compliance with applicable laws and regulations, thereby contributing to economic and social progress in various countries."⁴¹³ Like the Australian proposals, the U.S. proposal suggested modifying the WTO services-classification list to define legal services specifically and to broaden its scope to "include the provision of legal advice or legal representation in such capacities as counseling in business transactions, participation in the governance of business organizations, mediation, arbitration and similar nonjudicial dispute-resolution services, public advocacy and lobbying."⁴¹⁴ The proposal looked for liberalization opportunities in market access and national treatment.⁴¹⁵ All of this was consistent with the interests of potentially the most dominant player in the market for legal services internationally. Notably, this proposal lacked the reference contained in the other proposals enumerated above about the need to develop country- or culture-specific rules that would effectively bar entry to foreign providers of legal services.

⁴¹² *Id.*

⁴¹³ World Trade Organization, *Council for Trade in Services: Special Session, Communication from the United States, Legal Services, Initial Sectoral Proposal by the United States*, WTO Doc. S/CSS/W/28 (Dec. 18, 2000) ¶ III [last accessed December 12, 2007]

⁴¹⁴ *Id.* at ¶ IV

⁴¹⁵ *Id.* at ¶ V

Conclusion: The Future of Norms as Barriers to Trade in Legal Services

The tension within the legal profession in Canada between "protecting the guild" and desiring more open trade opportunities for exporting legal-services expertise mirrors the tension between conceptions of the practice of law as a profession and as a business. The GATS dialogue recognizes the transformation of the profession into an increasingly globalized business—something that neither the Canadian Bar Association nor the Federation of Law Societies – the umbrella group of regulators including the Law Society of Upper Canada -- seems prepared to accept.⁴¹⁶

Gillian Hadfield has forcefully analyzed this tension from an economic point of view: "The concept of a profession may set the practice apart as a normative ideal, but the structuring of the profession is still the structuring of a market."⁴¹⁷ Hadfield's criticism is anchored in the noncompetitive nature of the market for legal services and the need to reform the system to improve public accessibility. The lessons she points towards are equally troubling in the context of liberalization of legal services, in which normative arguments become the justification to resist change. It is even more troublesome when that reliance on norms is used to diminish the role of government in the name of a so-

⁴¹⁶ Arthurs & Kreklewich, *supra*, at 48. This discussion is not new; see Chapter One; also Carolyn J. Tuohy, *Public Accountability of Professional Groups: The Case of the Legal Profession in Ontario*, in *LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES* 105, 106 (Evans & Trebilcock, eds., 1982); W. Wesley Pue, *Becoming "Ethical": Lawyers' Professional Ethics in Early Twentieth Century Canada*, in *GLIMPSES OF CANADIAN LEGAL HISTORY* (Gibson & Pue, eds., 1992) at 237, 239-240, for an historical perspective.

⁴¹⁷ Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 *MICH. L. REV.* 953 (2000). See also Evans & Trebilcock, *supra*, *Preface*, ix-x (1982) for an economic analysis of legal services as a commodity.

called “democratic ideal.”⁴¹⁸ The arguments that the Canadian legal profession has used in the GATS dialogue bring to the fore the democratic deficit in the long-standing canard that a self-appointed and self-regulating profession is more democratic than an elected government under whose legislation the profession is supposed to operate. The GATS discussions pit the profession against the governments that are negotiating the protocols that will govern lawyers and their regulators. These discussions also highlight the need for a deeper reevaluation of how lawyers should be governed in a globalized economy.

Others have made the same point about the rhetoric of core values being used to prop up a professional monopoly and justify the legal profession’s independence. As Nathan Crystal has noted, this language is used to impede change in rules of professional conduct, “including efforts to improve the delivery of legal services to people of moderate means.”⁴¹⁹ In the context of the globalization of the legal profession, Christopher Whelan has rightly noted that discussions about global self-regulation should be viewed critically, as there are “lingering doubts about any kind of self-regulation and, indeed, about the whole idea of professionalism generally.”⁴²⁰ Whelan concludes that global rules of professional responsibility based on “core values” will add value to private clients, but little to the public interest. Whelan also notes that a jaundiced view about domestic self-regulation having enhanced the protection of lawyers from

⁴¹⁸ *But see* Garth, *supra* at 959-960 (contrary view about the need for lawyers to uphold the universal principles embraced by the legal profession to protect the public interest).

⁴¹⁹ Crystal, *supra*, at 748.

⁴²⁰ Christopher Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?* 34 *VAND. J. TRANSNAT’L L.* 931, 935 (Oct. 2001).

competition is appropriate in evaluating the elevation of the “core-values” rhetoric to the reality of global legal practice.⁴²¹

Even domestically, the concept of self-regulation merits review by government in the GATS context. The GATS discussions themselves mandate such review. This will require the legal profession to carefully reevaluate its role and an inherent conflict of interest between its desire for enhanced trade and the parallel desire for protection of the domestic franchise. The Chief Justice of Ontario’s Advisory Committee on Professionalism discussion paper on a definition of professionalism for the legal profession notes:

Lawyers are subject to self-regulation [. . .]. This aspect of professionalism has been identified by some legal scholars as a social contract under which society has delegated self-regulatory powers to the legal profession on the understanding that the profession will exercise those powers in the public interest. In this sense, lawyers assume the moral and ethical obligation individually and collectively to perform their side of the implied bargain. [. . .]The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar.⁴²²

At the end of an exhaustive review of the potential applicability of the GATS to U.S. domestic legal regulation, Laurel Terry notes worries that “the GATS 2000 negotiations might not defer to the interests of legal regulators, but instead might include the legal profession within horizontal disciplines that could be interpreted to invalidate

⁴²¹ *Id.* See also Detlev Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT’L L. 250 (1996) (discussing of the need for greater regulation of international law practice).

⁴²² Law Society of Upper Canada, Chief Justice of Ontario Advisory Committee on Professionalism, Working Group on The Definition of Professionalism, *Elements of Professionalism* (Oct. 2001), revised December 2001 and June 2002, available at <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf> [last accessed December 12, 2007]

existing U.S. lawyer regulations.”⁴²³ Professor Terry writes, “while this may [. . .] be desirable, I think it useful to recognize this possibility and discuss the desirability and normative aspects of such an event, rather than just waiting blindly for others to act.”⁴²⁴ The response of the Canadian legal regulators has been to close down such a discussion, as well as to reassert the profession’s right to self-regulate, independent of government, and thereby attempt to foreclose the applicability of GATS trade rules. Neither result is satisfactory. This clash of underlying conceptions about the relationship of the profession to the state is what makes the GATS proposals for liberalizing trade in legal services so threatening to the Canadian legal profession and to Canadian legal regulators.⁴²⁵

However, this tension is the natural consequence of the “deepening integration” of which Sylvia Ostry speaks as the most important effect of the services discussions at the end of the Uruguay Round.⁴²⁶ The legal profession has changed, and the practice of law has changed. The potential for the domestic-based legal regulator to protect the legal franchise may have diminished with the opening of the GATS 2000 negotiations.⁴²⁷ If the negotiations do not move beyond the confines of liberalizing the rules that relate to foreign legal consultants, then the “core values” arguments will have triumphed. However, if the negotiations after the collapsed Doha Round broaden beyond that

⁴²³ Terry, *supra* note 3, at 1088.

⁴²⁴ *Id.* See also Electronic Interview with Laurel S. Terry, Professor, Penn State Dickinson School of Law (May 17, 2001), available at <http://www.crossingthebar.com/Terry.htm>

⁴²⁵ Richard Margetts, QC. *The Changing Nature of the Practice of Law: A Reply to Mr. Giles on the Issue of Multi-Disciplinary Practice*, 59 THE ADVOCATE 31 (Jan. 2001). Not all Canadian legal regulators have been so uniformly narrow. In a surprising and forward-thinking note, the past president of the Law Society of British Columbia noted “To simply say that the legal profession’s statutory monopoly to deliver legal services it there for the protection of the public at large is simply not an acceptable answer to the resolution of the multiplicity of challenges that we face. The profession must be vigilant to ensure that our regulatory structures withstand the force of increasing public and political scrutiny.” *Id.*

⁴²⁶ Ostry, *supra*,

⁴²⁷ See Hainsworth, *supra*. Hainsworth argues that economic liberalization has diminished the capacity of domestic regulators and governments to effectively function.

focused agenda, it will be another matter. Governments will have to reassess assumptions about the role and position of legal regulators and the immunity of the legal profession from liberalization embodied in the GATS accordingly.

Chapter Five

Corporate Counsel: Special Challenges

Introduction and Overview

The transformation of corporate, or in-house, counsel practice has rightly garnered increasing attention in recent years. Once considered to be the refuge of those unable to sustain the intense pressure of a private major firm practice, an in-house lawyer now occupies a privileged position of power.⁴²⁸ The misperception of corporate counsel as lawyers lacking the “stern stuff required to fill the vast quotas of billable hours and sustain the great partnerships” and occupying “the lesser part of our profession” is in decline.⁴²⁹ Moves of senior practitioners in Canada from private law firms to prominent positions as general counsel at major Canadian corporations⁴³⁰ have signaled that positions as corporate counsel are increasingly attractive as a career option and that in-house posts are providing both compensation and levels of sophistication sufficient to challenge the cream of the profession.⁴³¹ Several American studies have tracked the

⁴²⁸ Abram Chayes and Antonia Chayes, “Corporate Counsel and the Elite Law Firm” 37 *Stan. L. Rev.* 277 (1985) at 277 ; see also Geoffrey C. Hazard, “Ethical Dilemmas of Corporate Counsel” 46 *Emory L. J.* 1011(1997) at 1011-12; Corporate Counsel in the Corridors of Power” *Lexpert* 3:6 (April 2002).

⁴²⁹ Douglas Mah, “The Others—The ethereal life of the in-house lawyer” *CBA National* (January-February 2005) at 62.

⁴³⁰ Selected moves attracting media attention and comment included Lawson Hunter (formerly head of the competition group at Stikeman Elliot) being appointed as executive vice-president and chief Corporate Officer at BCE. See Sandra Rubin “Lawson Hunter Leaving Stikemans” *National Post* (19 February 2003), FP7 . Similarly, J. P. Bisnaire moved from Davies, Ward to become Executive Vice-President and General Counsel at Manulife, see Sandra Rubin, “J. P.’s shift of a double-edged sword?” *National Post* (2 June 2004), FP11 ; Calin Roivinsescu moved from Stikeman Elliot to Air Canada in April 200 to become executive vice president, corporate development and strategy; see Jeff Sanford, “The dealmaker” *Canadian Business* (March 2005), online: Canadian Business at http://www.canadianbusiness.com/managing/article.jsp?content=20050314_66100_66100< >.

⁴³¹ Indeed, the cover story of *Lexpert* Magazine’s final 2005 edition for the first time featured profiles of top Canadian corporate counsel 40 years of age and under, selected on the basis of recommendations requested from 4868 in-house corporate counsel and corporate lawyers in private practice across Canada and from a list of 239 candidates so identified: see Irene E. Taylor, “The Top 40 Corporate Counsel: 40 and Under 40” *Lexpert* (November/December 2005) 60 at 62.

transformation of the in-house stereotype over the last forty years.⁴³² The old view of in-house counsel as a lawyer who, having been passed over for partner, left private practice to do “routine, repetitive corporate work, while everything interesting was farmed out to private firms” has been reversed, replaced by the image of corporate counsel managing major transactions, complex litigation, and hiring outside lawyers only on an as-needed basis.⁴³³ A seminal 1985 U.S. study asserted that a “new breed of general counsel has left [the old] stereotype behind. Not only have the offices grown in size, but [also] in importance [. . .]. The general counsel sits near the top of the corporate hierarchy.”⁴³⁴

Despite the increased importance of this role, particularly during the period under examination in this study, the Law Society of Upper Canada has failed to both take into account the particular challenges facing this increasingly important segment of the Bar, and to provide adequate or particularized ethical guidance or support to the corporate counsel it governs. In the United States, an inadequate response by the organized Bar to the activities of lawyers – in-house counsel and external advisors – in corporate scandals during the period 1998-2002 ultimately led to Congress assigning responsibility for regulation of the segment of the legal profession appearing and practicing before the Securities and Exchange Commission (SEC) to the SEC itself.

⁴³² For a recent review of the American literature, see John M. Conley and Scott Baker, “Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street” *Law & Soc. Inquiry* 783 (2005); also John Conley, “How Bad Is It Out There? Teaching and Learning about the State of the Legal Profession in North Carolina” 82 *N.C.L. Rev.* 1943 (2004);

⁴³³ Conley and Baker, *ibid.*, at 796-797.

⁴³⁴ Chayes and Chayes, *supra*, at 277

This discussion therefore has a number of goals. First, in placing a spotlight on the ethical challenges that face corporate counsel, it seeks to highlight the need for greater attention to a segment of the Bar not well studied in Canada, one for which the general ethical guidance provided by the Law Society of Upper Canada remains inadequate to respond to the challenges being faced. Second, in providing a review of regulatory developments in the United States in the post-Enron era and in providing an overview of the Canadian response, it seeks to encourage the Law Society and other Canadian regulators to do better, and more, to provide greater clarity and support for corporate counsel making their way through the “moral maze.”⁴³⁵ Finally, it suggests that adopting a crime-and-fraud exception to confidentiality, as the ABA eventually did in 2003 and as the Law Society of Upper Canada has thus far failed to do, will send a signal to the public that the profession is concerned about corporate accountability, along with providing a moral anchor for counsel who face tough choices with career consequences that their counterparts do not face.

Corporate Counsel and the Corporate Environment

Scholars have lamented the lack of empirical evidence on the role of in-house counsel and the performance of their duties in the context of a corporate environment, although at least one study attempted to close this gap by examining ethical decision making by in-house counsel in Canada.⁴³⁶ The U.S. literature is replete with attention to

⁴³⁵ Mark A. Sargent, “Lawyers in the Moral Maze” 49 Vill. L. Rev. 867 (2004)

⁴³⁶ Hugh P. Gunz and Sally P. Gunz, “The Lawyer’s Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel” 39 Am. Bus. L.J. 241 (2002) at 241. Gunz and Gunz, management and accounting professors respectively, undertook a study focused upon

the challenges that face corporate counsel.⁴³⁷ There is a paucity of attention in the Canadian academic literature and elsewhere to the subject.⁴³⁸ This is so despite efforts by the Canadian Corporate Counsel Association (CCCA) to draw attention to the ethical challenges of in-house practitioners.⁴³⁹

In a post-Enron era, the demands on in-house lawyers to ensure compliance with new corporate governance rules, as well as the shifting requirements of regulators, directors, officers, shareholders, employees, pensioners and creditors, have made the role of in-house counsel even more important and ethically complex.⁴⁴⁰ This has prompted

organizational-professional conflict (OPC) encountered in 484 responses to questionnaires from a sampling of 2414 corporate counsel in Canada. *Ibid.* at p. 263. See also Sally Gunz and Robert V.A.Jones, *The New Corporate Counsel* (Toronto: Carswell, 1991). Complaints about the lack of empirical evidence include Mary C. Daly, "The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel" 46 *Emory L.J.* 1057 (1997) at 1067 For a complaint about the lack of scholarly attention to legal ethics issues in Canada generally, see Adam P. Dodek, "Canadian Legal Ethics: A Subject in Search of Scholarship", *supra*.

⁴³⁷ See, for example, Robert Eli Rosen, "The Inside Counsel Movement, Professional Judgment and Organizational Representation" 64 *Ind. L.J.* 479 (1989); Hazard, "Ethical Dilemmas," *supra*; ; Daly, "General Counsel", *supra*; Richard S. Gruner, "General Counsel in an Era of Compliance Programs and Corporate Self-Policing" 46 *Emory L.J.* 1113 (1997); Robert Eli Rosen, "Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence" 56 *U. Miami L. Rev.* 179 (2001). The issue of Ethics in Corporate Representation was the subject of a Colloquium at Fordham Law School in 2005: see, e.g. William H. Simon, "Introduction: The Post-Enron Identity Crisis of the Business Lawyer" 74 *Fordham L. Rev.* 947 (2005), and Sung Hui Kim, "The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper" 74 *Fordham L. Rev.* 983 (2005)

⁴³⁸ The major Canadian legal ethics references do not pay particular attention to the subject: see e.g. Justice Kenneth Lysyk and Lorne Sossin, eds., *Barristers and Solicitors in Practice* (Markham: Butterworths, 1998)(contains no chapter on ethics issues facing corporate and in-house counsel, though such a chapter has been commissioned from this author.) See also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Scarborough: Carswell, 1993); Randal N. Graham, *Legal Ethics: Theories, Cases, and Professional Regulation* (Toronto: Emond Montgomery, 2004). This is not to be read as a criticism of the authors, but an observation about the gap in the Canadian literature which my efforts are attempting to fill. For a U.S. example of such work, see Milton C. Regan, Jr. and Jeffrey D. Bauman, eds. *Legal Ethics and Corporate Practice* (New York: West Group, 2005).

⁴³⁹ The CCCA's Spring 2000 Meeting, for example, focused on corporate counsel as organizational "moral compass." Apart from one panel on Ethics and Integrity in In-House Practice at the Chief Justice of Ontario's 6th Colloquium on Professionalism held at Queen's University in October 2005 (presentations available online: Law Society of Upper Canada <<http://www.lsuc.on.ca/news/a/hottopics/committee-on-professionalism/papers-from-past-colloquia>> in which an earlier version of this paper was presented, I could find no other academic colloquia dedicated to ethics challenges facing corporate counsel in Canada.

⁴⁴⁰ Terry Carter, "Ethics Czars in Demand" 90 *ABA Journal* 32 (2004)

caution amongst those considering a move in-house.⁴⁴¹ Beyond simply managing litigation, the emphasis in ethics and compliance positions in-house has been described as “more strategic than tactical.”⁴⁴² An in-house counsel’s role extends beyond providing technical legal services and litigation management into matters at the heart of the governance of organizations. Building on whatever experience that they have gained in a variety of private-practice settings, in-house lawyers layer focused legal knowledge with the broader insight into a client or corporate environment that a perch inside an organization affords. That poses unique ethical challenges for lawyers who seek to maintain professional integrity within the confines and constraints of their corporate client, particularly as these lawyers typically occupy multiple roles within the organization.⁴⁴³

The professional and ethical failings of those in-house counsel who were involved in the Enron scandal have been the subject of particular attention.⁴⁴⁴ Beyond Enron, other corporate scandals -- including Tyco, Worldcom, Adelphia, Global Crossing, Qwest, Dynegy, Vivendi, Sprint and HealthSouth – prompted radical corporate governance

⁴⁴¹ Jill Schachner Chanen, “Cautiously Corporate – In the Sarbanes-Oxley Era, Lawyers Still Go In-House But Enter Carefully” 90 ABA Journal 14 (2004).

⁴⁴² *Ibid.*

⁴⁴³ Deborah A. DeMott, “The Discrete Roles of General Counsel” (2005) 74 Fordham L. Rev. 955. DeMott identifies the following identities of chief general counsel: 1) legal advisor to the corporation and its constituents; 2) corporate officer and member of senior management team; 3) administrator of the internal legal department; 4) agent of the corporation in dealings with third parties. See also Taylor, *supra* note 5 at 61 (quoting Jim Riley, senior corporate partner at Ogilvy Renault: “These people are not lawyers in the pure sense anymore. They are a unique hybrid that is part lawyer, part business leader and, in some cases, part entrepreneur.”) See also Robert L. Nelson, “Cops, Counsel and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations” (2000) 34 Law & Soc. Review 457; Carl D. Liggio, “The Changing Role of Corporate Counsel” (1997) 46 Emory L.J. 1201.

⁴⁴⁴ See, *inter alia*, Deborah L. Rhode and Paul D. Paton, “Lawyers, Ethics and Enron” (2002) 8 Stan. J.L. Bus. & Fin. 9

reform, including new rules for corporate counsel explored in this chapter.⁴⁴⁵ The *Sarbanes-Oxley Act* of 2002, which directed the Securities and Exchange Commission (SEC) to develop standards of professional conduct for attorneys, discussed further below. The development of these standards has already had a significant impact on both U.S. and Canadian in-house lawyers.

Focusing on work in legal ethics that takes “account of the particular contexts in which lawyers practice”⁴⁴⁶ is necessary and important. As one British study has noted, while core values “may survive at a symbolic level, their role as a starting point for the formulation of detailed rules of professional conduct may become more difficult to sustain as the discrete arenas [that] help shape ethical norms and form the context of regulation become increasingly diverse.”⁴⁴⁷ One of the profession’s belated responses is particularly significant for Canadians. In August 2003, the American Bar Association (ABA), under pressure from its own Task Force on Corporate Responsibility, finally passed an amendment to the ABA Model Code of Professional Responsibility that had been rejected in 1983, 1991 and 2002. This amendment permits an exception to the ordinarily strict requirement of confidentiality in circumstances to prevent criminal

⁴⁴⁵ For a summary overview of the U.S. scandals, see P. Patsuris, “The Corporate Scandal Sheet” *Forbes Magazine* (26 August 2002), online: <http://www.forbes.com/home/2002/07/25/accountingtracker.html>. See also K.R. Fisher, “The Higher Calling: Regulation of Lawyers Post-Enron” 37 *U. Mich. J.L. Ref.* 1017 (2004); Geoffrey Miller, “From Club to Market: The Evolving Role of Business Lawyers” 74 *Fordham L. Rev.* 1105 (2005); and Sargent, “Moral Maze”, *supra*. See also James Fanto, “Whistleblowing and the Public Director: Countering Corporate Inner Circles” 83 *Or. L. Rev.* 435 (2004) at 436-438 (criticizing outside advisors, including lawyers: “[as] sycophantic cheerleaders of top executives and companies during the bubble of the late 1990s, they were often active participants in the fraudulent behaviour or acquiesced in it. Moreover, they generally denied responsibility and blamed others when a scandal emerged”).

⁴⁴⁶ Milton C. Regan, Jr., *Eat What you Kill: The Fall of a Wall Street Lawyer* (Ann Arbor: University of Michigan Press, 2004) at 4. See also “The Rule of Law, Not of Lawyers: Ethics and the Legal Profession,” *Harv. L. Rev.* 2422 (2005) at 2425 (reviewing Regan, *Eat What You Kill*).

⁴⁴⁷ Andrew M. Francis, “Legal ethics, the marketplace, and the fragmentation of legal professionalism” 12(2) *Int’l J. Legal Prof.* 173 (2005) at 175.

financial fraud. While the Law Society of Upper Canada (LSUC) adopted a minor change to its Rules of Professional Conduct in March 2004 to address situations that involve the “organization as client,” both that reform and the August 2004 adoption of a revised Canadian Bar Association (CBA) Model Code of Professional Conduct only go part way to making the same demands—and affording the same protection—for in-house counsel that faces ethical challenges in Canada.

Practicing with integrity in an in-house position, whether in the private or public sector, has always required special skill, but along with the advantages of the insider’s perspective come particular challenges. The fact of having one client—the corporation or the government—means that an in-house lawyer is particularly vulnerable when there is challenge from within the organization. Telling senior officers “no” to their proposed plans may be the right legal and ethical answer, but it can exact a high price, especially if the lawyer finds that he or she has to exercise the ultimate professional recourse and withdraw from representation. Losing a major client in a law firm can have significant consequences, but withdrawing from your one client as an in-house lawyer equates to a loss of status, income and employment, raising the stakes for in-house practitioners. Remaining ethical, independent and professional in an in-house practice requires a level of personal sacrifice and dissociation from the company or the team not demanded of almost any other corporate player.⁴⁴⁸

⁴⁴⁸ The notable exception is the internal auditor, for whom the professional and personal stakes may be similarly significant. See Donald Langevoort, “Where Were the Lawyers? A Behavioral Inquiry Into Lawyers’ Responsibility for Clients’ Fraud” 46 Vand. L. Rev. 75 (1993) at 95-110, discussing how assimilation of client views can lead to attorney complicity in client fraud. See also Sargent, *supra*, at 880-881; Donald C. Langevoort, “The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron,” 70 Geo. Wash L. Rev. (2002); Donald C. Langevoort,

The response of Canadian regulators to the challenges faced by in-house counsel has been inadequate and merits review. An important lesson from the U.S. experience is that legislators and regulators are no longer content simply to permit a self-regulating legal profession to rectify an obvious failing. In introducing the amendment to *Sarbanes-Oxley* that directed the SEC to draw up “Rules of Professional Responsibility for Attorneys,” Senator John Edwards said that for “the sake of investors and regular employees, ordinary shareholders, we have to make sure not only that the executives and the accountants do what they are responsible for doing, but also that the lawyers do what they are responsible for doing as members of the Bar and as citizens.”⁴⁴⁹ Senator Mike Enzi said, “Lawyers have just as much responsibility as accountants and corporate executives to protect the best interest of the shareholder. It is not unreasonable to expect attorneys to play it straight with their clients.”⁴⁵⁰ While the perspectives of Senators Edwards and Enzi might be controversial,⁴⁵¹ their comments signal that public representatives are no longer willing to let the profession determine for itself the boundaries of appropriate lawyer conduct. That has ramifications for the self-regulation of the legal profession, and ought to serve as a cautionary tale for the Law Society of

“Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering,” 75 *Fordham L. Rev.* 1615 (2006)

⁴⁴⁹ Quoted in American Bar Association, “Senate Passes Amendment to Accounting Bill Requiring Corporate Lawyers to Report Fraud” (2002) 18(15) *ABA/BNA Lawyers’ Manual on Professional Conduct*.
⁴⁵⁰ *Ibid.*

⁴⁵¹ See, for example, Stikeman Elliott, “Comments of Stikeman Elliott on S7-45-02” (18 December 2002), online: U.S. Securities and Exchange Commission, <<http://www.sec.gov/rules/proposed/s74502/selliott1.htm>>; Osler, Hoskin & Harcourt, “Comments of Osler, Hoskin & Harcourt on S7-45-02” (18 December 2002), online: U.S. Securities and Exchange Commission <<http://www.sec.gov/rules/proposed/s74502/osler1.htm>>; Torys, “Comments of Torys LLP on S7-45-02” (18 December 2002), online: U.S. Securities and Exchange Commission <<http://www.sec.gov/rules/proposed/s74502/torys1.htm>>.

Upper Canada.⁴⁵² In an address at the University of Toronto Faculty of Law in November 2007, the former Chairman of the Ontario Securities Commission stated that it would require just “one more scandal” before legislators in Canada would have to seriously reconsider the grant of self-regulatory authority to the Law Society of Upper Canada and other Canadian regulators.⁴⁵³

Background: Enron and in the Role of In-House Counsel as “Gatekeeper”

After some regrettable illustrations of misfeasance by lawyers at the in-house counsel Bar, the post-Enron era has properly placed a greater focus on the roles and responsibilities of corporate counsel as significant “gatekeepers” in corporate governance. While a complete cast of characters—officers, directors, managers, auditors and others—all contributed in some way to the Enron debacle, lawyers, too, were part of that story.⁴⁵⁴ Lawyers gave advice on all of the transactions (including special-purpose entities, or SPEs) that were later impugned as the primary cause of the firm’s collapse. In *The Final Report of the Enron Bankruptcy Examiner*, Neal Batson excoriated Enron’s General Counsel James Derrick as having “rarely provided legal advice to Enron’s

⁴⁵²Janice Mucalov, “Walking the tightrope” 13(6) CBA National (October 2004) 16 at 17

⁴⁵³David A. Brown, address to the University of Toronto Legal Ethics Bridge Week on Ethics in Corporate Settings, November 8, 2007 (notes of author)

⁴⁵⁴For a more complete treatment, see Rhode and Paton, *supra*, from which portions of this section are drawn; see also Roger C. Cramton, “Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues” 58 Bus. Law 143 (2002); Michael F. Fox, “To Tell or Not to Tell: Legal Ethics and Disclosure After Enron” Colum. Bus. L. Rev. 867 (2002); Robert W. Gordon, “A New Role for Lawyers? The Corporate Counselor After Enron” 35 Conn. L. Rev. 1185 (2003); Susan P. Koniak, “Corporate Fraud: See, Lawyers” 26 Harv. J.L. & Pub. Pol’y 195 (2003); also the comprehensive review of the impugned transactions and lawyer responses in the Enron debacle in Milton C. Regan, “Teaching Enron,” 74 Fordham L. Rev. 1139 (2005). See also Senator John Edwards, “The Ethical Responsibility of Lawyers After Enron,” U.S. Senate (18 June 2002)

Board, even when significant issues [. . .] came to his attention” and having “failed to educate himself adequately on the underlying facts or the applicable law to enable him to carry out his responsibilities as legal advisor.”⁴⁵⁵ In addition, the special committee of the Enron board that investigated the fiasco in late 2002 and early 2003 found that one of the company’s in-house lawyers, Kristina Mordaunt, not only gave advice on the transactions, but also invested her own money in one of the SPEs. Mordaunt reportedly was enriched by a \$1 million return on her \$5,800 investment,⁴⁵⁶ which she received without obtaining the consent of Enron’s chairman and CEO, in violation of Enron’s code of conduct.⁴⁵⁷ Her investment may also have violated Bar disciplinary rules on conflicts of interest, although there is no indication that Mordaunt has been prosecuted by the Texas State Bar.⁴⁵⁸ The Internal Special Committee Report noted, however, that Mordaunt later admitted that her participation in the SPE was an error in judgment.⁴⁵⁹

In contrast, at least two Enron attorneys had serious concerns about the company’s financial conduct, but were stymied in their efforts to respond by other Enron lawyers or managers. A case in point involves a September 2000 memo by an Enron North America attorney that expressed concern about the possibility that “the financial books at Enron are being ‘cooked’ [. . .] to eliminate a drag on earnings that would

⁴⁵⁵Final Report of Neal Batson, Court-Appointed Examiner, “Appendix C: Role of Enron’s Attorneys,” In re Enron Corp. (no 01-016034 (Bankr. S.D.N.Y., 4 Nov. 2003) online: <<http://www.enron.com/corp/por/examinerfinal.html>>, 190 at 190-202 [Batson Report], cited in Regan, *supra* note 27.

⁴⁵⁶ April Witt & Peter Behr, “Losses, Conflicts Threaten Survival” *Washington Post* (31 July 2002) A01. See also Mike France, “What About the Lawyers?” *Business Weekly*, (23 December 2002) 59.

⁴⁵⁷ Batson Report, *supra* at 92-96.

⁴⁵⁸ See American Bar Association, “Model Rules of Professional Conduct” (Chicago: American Bar Association, 2001) at Rule 1.7(b), Comment 6, Rule 1.8(a).

⁴⁵⁹ William C. Powers, *Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp.* (1 February 2002) at 94, online: FindLaw <<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/enron/sicreport/sicreport020102.pdf>> [Powers Report].

otherwise occur under fair-value accounting.”⁴⁶⁰ More senior attorneys who received the memo doubted the factual assertions on which the memo’s conclusions were based, but conducted no investigation to verify their belief and took no further action. A second example involves an Enron attorney who reportedly asked the law firm Fried Frank Harris Shriver & Jacobsen to review the legality of the partnerships and SPEs. After Fried Frank recommended that Enron halt the practice, the Enron attorney sent written internal memoranda to company executives to that effect.⁴⁶¹

The failure by more senior counsel and Enron executives to follow such advice or to investigate its factual basis suggested greater problems with the Enron corporate culture and later underpinned subsequent U.S. reforms that require up-the-ladder reporting by individual lawyers, even in the face of corporate reluctance to act. For 41 U.S. law professors who sought even more significant reform than what the SEC imposed, the culture at Enron underscored the need for “noisy withdrawal” as one way to ensure that lawyers could assist in preventing instances of corporate malfeasance.⁴⁶²

⁴⁶⁰ *Powers Report, ibid.* at 109; see also April Witt & Peter Behr, “Dream Job Turns Into a Nightmare” *Washington Post* (29 July 2002) at A01.

⁴⁶¹ Committee on Energy and Commerce, News Release, “Tausin, Greenwood Want Law Firm Review of Enron’s Related-Party Transactions” (29 January 2002), online: Committee on Energy and Commerce <http://energycommerce.house.gov/107/news/01292002_478print.htm>; see also Richard A. Oppel, Jr., “Enron’s Many Strands: Early Warnings; Lawyer at Enron Warned Officials of Dubious Deals” *New York Times* (7 February 2002) at A1; Peter Behr & April Witt, “Visionary’s Dream Led to Risky Business” *Washington Post* (28 July 2002) at A01.

⁴⁶² See Susan P. Koniak, Roger C. Cramton, and George M. Cohen, “Re: Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 CFR 205” (17 December 2002), online: Securities and Exchange Commission <<http://www.sec.gov/rules/proposed/s74502/skoniak1.htm>> [Koniak Submission]; William H. Simon, “Re Proposed Rules on Standard of Professional Conduct for Attorneys under Section 317,” (13 December 2002): online: <http://www.sec.gov/rules/proposed/s74502/simon121302.htm> (last accessed December 2007); also Susan P. Koniak, Roger C. Cramton, and George M. Cohen, “Re: Final and Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys, 17 CFR 205” (7 April 2003), online: Securities and Exchange Commission <<http://www.sec.gov/rules/proposed/s74502/lawprofs040703.htm>>. For a discussion of the corporate culture at Enron, see James Larnder, “Why Should Anyone Believe You?” *BUSINESS 2.0* (March 2002) at

These developments in the responsibilities of in-house lawyers have been part of the focus on “gatekeepers” in corporate governance. Professor Reiner Kraakman is credited with first use of the term *gatekeeper* to describe the role of the professionals in corporate reporting and the capital markets. He used the term to describe the function of outside directors, accountants, lawyers and underwriters in using their good reputation to prevent corporate misconduct. As third parties, they are uniquely placed to act as private-party monitors on behalf of the market, by withholding a specialized good, service or certification.⁴⁶³ Professor John Coffee revitalized this conception of gatekeeper in the context of the Enron debacle, concluding that the failure of Enron was more a failure of gatekeepers than of the Enron board.⁴⁶⁴ The notion of gatekeeping is anchored in the public interest, identified as “the role of independent attorneys in protecting the public against corporate malfeasance.”⁴⁶⁵ The idea of “preventive lawyering” by in-house corporate lawyers is not new, although it has received more attention in the aftermath of recent corporate scandals.⁴⁶⁶

40. For consideration of the lessons of Enron in the Canadian context see Janis Sarra, “Rose-Colored Glasses, Opaque Financial Reporting, and Investor Blues: Enron as Con and the Vulnerability of Canadian Corporate Law” 76 *St. John’s L. Rev.* 715 (2002).

⁴⁶³ See Reiner Kraakman, “Gatekeepers: Anatomy of a Third-Party Enforcement Strategy,” 2 *J.L. Econ. & Org.* 53 (1985); also Reiner Kraakman, “Corporate Liability Strategies and the Costs of Legal Controls” 93(5) *Yale L.J.* 857 (1984); Bonnie Fish, “Pointing the Finger at Professionals” in Poonam Puri and Jeffrey Larsen, *Corporate Governance and Securities Regulation in the 21st Century* (Toronto: Butterworths, 2004) 97 at 99-102; Anita I. Anand, “The Regulation of Auditors After Enron” in Anita I. Anand & William F. Flanagan, eds., *Conflict of Interest in Capital Markets Structures, Queen’s Annual Business Law Symposium 2003* (Kingston: Queen’s Annual Business Law Symposium, 2004) 197 at 200-201.

⁴⁶⁴ John C. Coffee, Jr., “Understanding Enron: It’s About the Gatekeepers, Stupid” 57 *Bus. Law* 1403 (2002) at 1403-05 (“characteristically, the gatekeeper essentially assesses or vouches for the corporate client’s own statements about itself or a specific transaction”), 1412 and 1419; also Lisa M. Fairfax, “Spare the Rod, Spoil the Director: Revitalizing Directors’ Fiduciary Duty Through Legal Liability” 42 *Hous. L. Rev.* 393 (2005); R. William Ide, “Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight” 54 *Mercer L. Rev.* 829 (2003), 841-843.

⁴⁶⁵ Miller, *supra*, at 1106 (seeking to explain “why the gatekeeper function – that is, the role of independent attorneys in protecting the public against corporate malfeasance—seems to have broken down in recent cases”).

⁴⁶⁶ See Robert Gordon and William Simon, “The Redemption of Professionalism” in Robert Nelson, David Trubek and Robert Solomon, eds., *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American*

The ABA's Task Force on Corporate Responsibility distinguished between lawyers and auditors as gatekeepers, concluding,

lawyers for the corporation – whether employed by the corporation or specially retained -- are not “gatekeepers” of corporate responsibility in the same fashion as public accounting firms. Accounting firms’ responsibilities require them to express a formal public opinion, based upon an independent audit, that the corporation’s financial statements fairly present the corporation’s financial condition and results of operations in conformity with generally accepted accounting principles. The auditor is subject to standards designed to assure an arm’s-length perspective relative to the firms they audit. In contrast, [. . .] corporate lawyers are first and foremost counselors to their clients. Except in clearly defined circumstances in which other considerations take precedence, an alternative view of the lawyer as an enforcer of law may tend to create an atmosphere of adversity, or at least arm’s-length dealing, between the lawyer and the corporate client’s senior executive officers that is inimical to the lawyer’s essential role as a counselor promoting the corporation’s compliance with law.⁴⁶⁷

While it is understandable that the ABA would seek to restrict the role of lawyer as gatekeeper (and indeed, the ABA established the Task Force on Gatekeeper Regulation and the Profession, focused in particular on money-laundering)⁴⁶⁸ there has been little such hesitation in respect of auditors.⁴⁶⁹ Both auditors and lawyers, however, were affected by *Sarbanes-Oxley* legislative reform: lawyers were subject to S-OX Section 307, which directs the U.S. SEC to pass rules that set “forth minimum standards of professional conduct” for attorneys who appear and practice before the Commission, discussed further below.⁴⁷⁰

Legal Profession (Ithaca : Cornell University Press, 1992) 230 at 252-253. See also Christine Parker, “A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics” (2004) 30 *Monash U.L. Rev.* 49 at 63-64 (discussing “responsible lawyering” for in-house counsel).

⁴⁶⁷ American Bar Association, *Report of the American Bar Association Task Force on Corporate Responsibility* (Chicago: American Bar Association, 2003), online: American Bar Association <http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf>.

⁴⁶⁸ See American Bar Association, “Task Force on Gatekeeper Regulation and the Profession” online: American Bar Association <<http://www.abanet.org/crimjust/taskforce/home.html>>.

⁴⁶⁹ See Bonnie Fish, *supra*, for a more detailed argument in support of the position that lawyers ought not to function as gatekeepers in a corporate governance context, with particular reference to the Canadian context.

⁴⁷⁰ A detailed discussion of lawyer conduct rules and requirements under Section 307, is set out in the next section below. See also Paul D. Paton, “But Where are the Professionals? -- Director & Officer Liability:

Misconduct by in-house counsel is not a uniquely U.S. phenomenon, but instances of prosecution in Canada are scant. A search of LSUC cases between 2001 and 2006 revealed no instances of disciplinary action against in-house counsel by the Law Society. Indeed, in one case, a lawyer who pleaded guilty to professional misconduct suggested that he would be suitable for in-house counsel positions and that “such a form of practice would not place onerous supervisory burdens on the Law Society.”⁴⁷¹ In another case, a lawyer who acted as a sole practitioner ran into problems (including failure to pay suppliers) was only reprimanded, as he had received an offer of an in-house counsel position; but if not for this offer, the lawyer would have been suspended for six months.⁴⁷² There were few cases in the previous decade in which corporate counsel were disciplined.⁴⁷³

A curious omission from the recent list is any disciplinary action by the LSUC arising from a 2004 case in which the Ontario Securities Commission (OSC) sanctioned a lawyer at ATI Technologies for misconduct. The misconduct included misleading the OSC, an action that would appear to have violated the LSUC Rules of Professional

Federal and Provincial Reform Initiatives” in *Crime in the Corporation, 11th Queen's Annual Business Law Symposium 2004* (Kingston: Queen's Annual Business Symposium, 2005); Philip Anisman, “Regulation of Lawyers by Securities Commissions: Sarbanes-Oxley in Canada,” (Toronto: Capital Markets Institute, March 2003), online: Capital Markets Institute

<<http://www.rotman.utoronto.ca/cmi/news/LSUCpaper.pdf>>.

⁴⁷¹ *Law Society of Upper Canada v. Francesco Antonio Sabetti*, 2004 ONLSP 18, online: CanLII

<<http://www.canlii.org/on/cas/onlshp/2004/2004onlshp18.html>>.

⁴⁷² *Law Society of Upper Canada v. Richard Scott Michna*, 2005 CanLII 26308 (ON L.S.H.P.), online: CanLII <<http://www.canlii.org/on/cas/onlshp/2005/2005onlshp10007.html>>.

⁴⁷³ See *Re Flak*, 1995 CanLII 1927 (ON L.S.D.C.), online: CanLII

<<http://www.canlii.org/on/cas/onlsdc/1995/1995onlsdc10084.html>> [in-house counsel for an entertainment company misappropriated funds and was permitted to resign]; *Re Graham*, 1994 CanLII 1227 (ON L.S.D.C.), online: CanLII <<http://www.canlii.org/on/cas/onlsdc/1994/1994onlsdc10031.html>> [lawyer subject to six formal complaints over a number of years, some while in-house, was suspended in the face of tragic personal circumstances].

Conduc.⁴⁷⁴ In both Canada and the United States, a curious feature of recent developments is the willingness of securities regulators to step in to address malfeasance by lawyers, both on their own initiative and at the direction of legislators.

Up-the-Ladder Reporting Requirements and Securities Regulation of Lawyer Conduct

Debates over where the balance between candor and confidentiality ought to lie are important for all professionals in corporate practice. The particular challenge for regulators and for the profession after Enron lies in resolving the choice between disclosure to public officials of corporate misconduct and the traditional requirement of loyalty to the organizational client. In the United States, there was a firestorm over Section 307 of the *Sarbanes-Oxley Act* of 2002, as well as in response to the ABA Model Rules of Professional Conduct that pertain to the organization as client (MR 1.13) and confidentiality (MR 1.6). However, an amendment to the Rules of Professional Conduct in Ontario in March 2004⁴⁷⁵ received little public input.⁴⁷⁶

⁴⁷⁴ *In the Matter of the Securities Act, R.S.O. 1990., C. s-5, as amended, and In the Matter of Sally Daub, Settlement Agreement*, online: Ontario Securities Commission <http://www.osc.gov.on.ca/Enforcement/Proceedings/2004/set_20041214_daub-sally-ati.pdf> (Daub was Patent Counsel and was reprimanded by the OSC and made to pay \$5000 in costs to the OSC in respect of her involvement in preparing a misleading letter to the OSC from ATI); see also Ontario Securities Commission, *Perspectives* 6:2 (Spring 2003), online: Ontario Securities Commission <http://www.osc.gov.on.ca/About/Publications/2003_v6-i2_perspectives.pdf> at p. 10.

⁴⁷⁵ Law Society of Upper Canada, *Amendments to Rules 2.02 and 2.03 re: Role of Lawyers in Corporate Governance, as approved by Convocation* (Toronto: Law Society of Upper Canada, 2004), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/rule_amends_march2504.pdf>; see also Law Society of Upper Canada, *Minutes of Convocation* (Toronto: Law Society of Upper Canada, 25 March 2004) online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/convmar04_minutes.pdf>.

⁴⁷⁶ 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* (Toronto: Law Society of Upper Canada, 2004) at paras 14-18, online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/convmar04_prc_report.pdf> [LSUC Report to Convocation].

The *Sarbanes-Oxley Act* of 2002 introduced the most substantial reform of corporate governance in the United States in decades.⁴⁷⁷ Unlike many of its other provisions, Section 307 has from the start been seen as clear, if extremely controversial.⁴⁷⁸ It has two dimensions. First, Section 307 of the Act instructs the SEC to adopt a rule of practice that establishes “minimum standards of professional conduct” for lawyers who “[appear] or [practice] before the Commission.” Second, the Section specifically directs the SEC to include a rule that requires all such lawyers to report evidence of fraud and other misconduct in the companies they represent “up the ladder” to the company’s senior management, and, if necessary, to the board of directors. The Act required the final rule on this section to be issued on or before January 26, 2003.⁴⁷⁹ On January 23, 2003, the SEC passed rules that implemented Section 307.⁴⁸⁰

Regardless of the contours of the final rule, the fact the SEC would begin regulating attorney conduct represented a significant shift away from deference to the self-regulatory tradition of the Bar. It was also a signal that lawyers were attracting

⁴⁷⁷ Roberta Romano, “The Sarbanes-Oxley Act and the Making of Quack Corporate Governance,” (2005) 114 *Yale L. J.* 1521 (2005) at fn2 [citing Senator John Corzine’s statement that Congressional legislation enacted in response to the scandals in 2002 was the “most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt”]

⁴⁷⁸ 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” *ABA Journal Ereport*, (2 August 2002) online: American Bar Association <<http://abanet.org/journal/ereport/au2corp.html>> Richard B. Schmitt, “Lawyers Pressed to Report Fraud Under New Law” *Wall Street Journal*, (25 July 2002), B1.

⁴⁷⁹ The SEC adopted final rules implementing Section 307 on 23 January 2003, and released the text of the rules the following week. See Securities and Exchange Commission, News Release, “SEC Adopts Attorney Conduct Rules Under Sarbanes-Oxley Act” (23 January 2003), online: Securities and Exchange Commission <<http://www.sec.gov/news/press/2003-13.htm>>; For final rule text see Securities and Exchange Commission, “Final Rule: Implementation of Standards of Professional Conduct for Attorneys” (5 August 2003), online: Securities and Exchange Commission <<http://www.sec.gov/rules/final/33-8185.htm>> [SEC Final Rule on Attorney Conduct]. As noted below, a significant element (“noisy withdrawal”) was deferred for a further 60-day comment period.

⁴⁸⁰ SEC Final Rule on Attorney Conduct, *ibid.*

critical attention in the aftermath of the collapse of Enron and that legislators view the public interest to be best served by having lawyers more responsible for their clients' conduct.⁴⁸¹ Senator Michael Enzi, an accountant and a cosponsor of the amendment to *Sarbanes-Oxley* that became Section 307, noted:

As we beat up on accountants, one of the thoughts that occurred to me was that probably in almost every transaction, there was a lawyer who drew up the documents involved in that procedure. It seemed only right [that] there ought to be some kind of an ethical standard put in place for the attorneys as well.⁴⁸²

While exhaustive analyses of the proposal and Final Rule have appeared elsewhere,⁴⁸³ a few features merit comment in considering the application of the new regime to U.S. and Canadian lawyers. The Rule casts a very wide net, defining "appearing and practicing before the Commission" to include those "preparing, or participating in the process of preparing" anything incorporated into any communication with the SEC. The definition also includes advising a party that something should *not* be filed with the Commission. The ABA criticized the definition as "inappropriately encompass[ing] non-securities specialists who do no more than prepare or review limited

⁴⁸¹ These issues are explored in detail in Rhode and Paton, *supra*; see also Patti Waldmeir, "Keeping the Lawyers on the Level" *Financial Times*, (11 December 2002).

⁴⁸² Quoted in Jonathan D. Glater, "Round Up the Usual Suspects. Lawyers, Too?" *New York Times* (4 August 2003). See also Karl A. Groskaufmanis, "Climbing 'Up the Ladder': Corporate Counsel and the SEC's Reporting Requirement for Lawyers," 89 *Cornell L. Rev.* 512 (2004) at 512 (noting the attention turning to lawyers after scrutiny of the role of accountants in corporate misconduct)

⁴⁸³ See, for example, Cramton, *supra* at 31-36; Kim, *supra*, at 1034-1052; Stephen M. Bainbridge and Christina J. Johnson, "Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307" (2004) *Mich. St. L. Rev.* 299; Roger C. Cramton, George M. Cohen, and Susan P. Koniak, "Legal and Ethical Duties of Lawyers After *Sarbanes-Oxley*" 49 *Vill. L. Rev.* 725 (2004); A. P. Carlton, "Letter re: Implementation of Standards of Professional Conduct for Attorneys" (18 December 2002), online: Securities Exchange Commission <<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 (12 December 2002), online: Securities Exchange Commission <<http://www.sec.gov/rules/proposed/s74502/rwpainter1.htm>> [Painter Submission]; Koniak Submission, *supra*. This last letter was also signed by 54 law professors who in signing indicated their accord with its general direction and approach, though not necessarily its detail.

portions of a filing, lawyers who respond to auditors letters or prepare work product in the ordinary course unrelated to securities matters that may be used for that purpose, and lawyers preparing documents that eventually may be filed as exhibits.⁴⁸⁴ Others criticized the Rule as not going far enough because it did not include law firms and individual lawyers in the Commission's disciplinary sights.⁴⁸⁵ These critics encouraged the SEC to broaden the scope to impute knowledge within law firms and to hold the law firm responsible for the acts of its lawyers as agents of the law firm.

The fact that the definition also applies to foreign lawyers on an equal basis prompted additional cause for concern. In particular, the International Bar Association raised the specter that foreign lawyers would be required to violate their domestic Bar rules or risk breaching the SEC rules, and issued a strong call to the SEC to exempt non-U.S. lawyers from the proposed Rule.⁴⁸⁶ This concern was partly self-motivated, as the ABA worried "that subjecting foreign attorneys to regulation by the SEC could result in foreign agencies' seeking to regulate the conduct of U.S. attorneys [who were] representing U.S. companies abroad or foreign companies."⁴⁸⁷

Others were uncompromising in supporting the proposal's extraterritorial reach. The submission to the SEC by three leading law school professors, endorsed by at least 53 others, unapologetically applauded the rule, which reflected a "U.S.-first" mood not limited to Section 307 alone: "*No foreign country, lawyer or corporation has a 'right' to*

⁴⁸⁴ ABA Submission, *ibid.*

⁴⁸⁵ Koniak Submission, *supra* at 4, 28-33; Painter Submission, *supra* at 11-12; See also Ted Schneyer, "Professional Discipline for Law Firms?" 77 Cornell L. Rev. 1 (1991).

⁴⁸⁶ International Bar Association, "International Bar Association Calls on U.S. Securities and Exchange Commission to Exempt Non-US Lawyers from Sarbanes-Oxley Rules," Press Release (13 November 2002), online://<http://archive.ibanet.org/news/NewsItem.asp?newsID=73>; also Bob Sherwood & Nikki Tait, "IBA Presses SEC Over New Rules" *Financial Times* (18 November 2002).

⁴⁸⁷ ABA Submission, *supra* note 58 at 36-37.

*participate in our securities markets on their own terms. They have a choice: to play by our rules or not.*⁴⁸⁸ The professors argued that exempting foreign lawyers would simply open a loophole for many large corporations to skirt the SEC's rules, which would result in "harm to the domestic securities Bar who would be placed at a competitive disadvantage vis-à-vis their foreign counterparts." They concluded:

The arguments made by foreign Bars are virtually indistinguishable from those made by the ABA to ward off SEC regulation of domestic lawyers. What we know of foreign enforcement efforts against securities lawyers suggests that their arguments are as illusory as those advances by domestic lawyers in the effort to ward off effective federal regulation. The Commission should maintain its [. . .] stance to regulate foreign and domestic lawyers equally.⁴⁸⁹

The particularly vexing part of the proposed rule (and the legislation) for both domestic and foreign lawyers was a proposal that would have required "noisy withdrawal." In addition to requiring a lawyer to report potential violations "up the ladder" within a company to its chief legal officer or CEO and then to the audit committee, an independent committee or the board of directors, the original proposal for Part 205 mandated that a lawyer take further steps if the company failed to rectify the situation. In cases in which a lawyer believed that the company had not adequately responded to reported "evidence of a material violation" of the securities laws, "a material breach of fiduciary duty or a similar material violation," the lawyer would then be required to 1) withdraw from representation; 2) notify the SEC of the withdrawal, indicating that it was based on professional considerations; and 3) disaffirm any filing with the SEC that the attorney has prepared or assisted in preparing that the attorney

⁴⁸⁸ Koniak Submission, *supra* at 28. [emphasis added]

⁴⁸⁹ *Ibid.* at 27-28.

believes is or may be materially false or misleading.⁴⁹⁰ The ABA criticized this proposal as “almost deputiz[ing] attorneys to become quasi-governmental inspectors.”⁴⁹¹ It also suggested it would turn all “lawyers into junior regulators, surveillance operatives [and] whistle-blowers.”⁴⁹² The ABA claimed that the rule contradicted legislative intent. Senator John Edwards (one of the principal architects of Section 307) said that in *Sarbanes-Oxley*, there “is no obligation to report anything outside the client—the corporation.”⁴⁹³ The President of the American Corporate Counsel Association noted, “There’s a very real fear that the rules will change the relationship [with the client].”⁴⁹⁴

These comments overlooked the fact that even in the absence of the “noisy-withdrawal” requirement, lawyers in forty-one states were, at the time, permitted (but not obliged) to report evidence of a continuing crime or fraud by a client.⁴⁹⁵ Before this point, the ABA had twice rejected proposals by its own Ethics 2000 Commission to tighten this requirement.⁴⁹⁶ The SEC proposal would have made this conduct mandatory; a more rigorous SEC standard would preempt state rules.

⁴⁹⁰ *Sarbanes-Oxley*, *supra* at ss. 205.3(d)(i); the definitions of “material violation” and “appropriate response” are in ss. 205.2(i) and (b). The proposed rule also provides that a company may create a Qualified Legal Compliance Committee to which a lawyer may report violations. The QLCC would then have the responsibility to act upon the information given to it by the lawyer. See ss. 205.2(j).

⁴⁹¹ See Renee Deger, “Lawyers Gird for Fight Over New SEC Rules: Biggest Fear is that Attorney-Client Privilege May be Compromised” *San Francisco Recorder* (7 November 2002).

⁴⁹² Lisa Girion, “Corporate Reform Bill a Defeat for Bar Assn.” *Los Angeles Times* (26 July 2002) C1.

⁴⁹³ American Bar Association, News Release, “ABA Urges SEC Not to Exceed Sarbanes-Oxley Mandate Without Extended Comment Period” (18 December 2002)(on file with the author)

⁴⁹⁴ Glater, *supra*,

⁴⁹⁵ ABA Model Rule 1.6 Comment 16: “After withdrawal the lawyer is required to refrain from making disclosure of the client’s confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.” See also MR 1.2(d) and Comment 6-9 (restriction on assisting a client in conduct that the lawyer knows is criminal or fraudulent).

⁴⁹⁶ Rhode and Paton, *supra* at 32-33.

Other provisions in the Rule further exacerbated these concerns about the attorney–client relationship. Section 205.3(e)(2) allows an attorney to disclose confidential information to the Commission without the issuer’s consent:

- i) to prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of the issuer or investors;
- ii) to prevent the issuer from committing an illegal act that the attorney reasonably believes is likely to perpetrate a fraud upon the Commission; or
- iii) to rectify the consequences of the issuer’s illegal act in the furtherance of which the attorney’s services had been used.

Section 205.3(e)(1) allows an attorney to use any report under this section in self-defense.

Section 205.3(e)(3) provides that sharing of information with the Commission by an issuer through its attorney does not constitute a waiver of any privilege or protection as to other persons. The ramifications of this part in respect of the lawyer–client relationship are significant and fundamental: the traditional conception of loyalty and fealty to the client may be infringed upon for the public good.

The final Rules to implement Section 307 of *Sarbanes-Oxley* on attorney conduct took a different turn from the original proposals and constituted a major retreat by the SEC. The Final Rule maintained the “up-the-ladder” reporting requirement for evidence of material violations of securities laws, but changed the test for “evidence of a material violation” from a relatively straightforward determination to a standard that is more difficult to enforce because the definition of what constitutes “evidence of a material violation” is more complex than that in the proposed rule. The proposed rule provided: “Evidence of a material violation means information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to

occur.” The final version states: “Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is occurring, or is about to occur.”⁴⁹⁷ Further, even if a lawyer finds such evidence, he or she can back down from pressing the company to change the behavior if another lawyer opines that there is a “colorable defense” for the company’s actions.⁴⁹⁸

The SEC Commissioners also backed down on the “noisy withdrawal” requirement advocated by the group of law professors and resisted by the practicing Bar. The SEC extended the comment period on this issue for a further 60 days, and suggested a possible alternative rule that would require a lawyer to withdraw from representation, but would require the client, rather than the lawyer, to publicly disclose that the lawyer did not receive an appropriate response to a report of a material violation. The CBA called the changes positive, but insisted that they did not go far enough to preserve lawyer–client relationships. The CBA press release signaled again a more fundamental debate: “The CBA stresses that it is unacceptable for a government agency to dictate ethical standards for Canadian lawyers.”⁴⁹⁹

⁴⁹⁷ See Jonathan D. Glater, “SEC Adopts New Rules for Lawyers and Funds” *New York Times* (24 January 2003) 1, quoting Professor Roger Cramton suggesting that the version of the definition the SEC passed “does have that odor, boy, you’ve really got to go over the line to have made a misjudgment.”

⁴⁹⁸ See the discussion in Floyd Norris, “No Positives in this Legal Double Negative” *New York Times* (24 January 2003) 1.

⁴⁹⁹ Canadian Bar Association, News Release, “CBA Calls New U.S. Securities and Exchange Commission Proposals a Positive Step” (24 January 2003), online: Canadian Bar Association <http://www.cba.org/CBA/News/2003_Releases/sox.aspx>.

For Canadian lawyers, as well as U.S. lawyers, then, the potential exposure and responsibility under the proposed SEC rules for their own conduct, the conduct of their clients and the conduct of others within their organizations are enormous. The SEC recognized the controversy surrounding the extension of reporting rules to foreign attorneys and asked for comments on the application of the proposed rules to foreign lawyers. It hosted a roundtable meeting to discuss the matter on December 17, 2002.⁵⁰⁰ The proposal brought the role of the lawyer (in particular the in-house lawyer) as professional charged with acting in the public interest closer to the duties ascribed to auditors by the U.S. Supreme Court in *Arthur Young*.⁵⁰¹

Implementation in Canada and the Crime or Fraud Exception

The direct, long-term impact on Canadian practice of U.S. developments and regulation of lawyer conduct by securities regulators in the United States is presently unclear, even though the “up-the-ladder” reporting obligations have been implemented by the Law Society of Upper Canada through a change to the Rules of Professional Conduct

⁵⁰⁰ See U.S. Securities and Exchange Commission, News Release, “SEC Roundtables on International Impact of Proposed Rules on Auditor Independence, Attorney Conduct Set for Dec. 17” (5 December 2002), online: U.S. Securities and Exchange Commission <<http://www.sec.gov/news/press/2002-175.htm>>. The Ontario Securities Commission was on the list of participants, but at time of writing a transcript of the OSC submission and comments was not available.

⁵⁰¹ *United States v. Arthur Young & Co.*, (1984) 465 U.S. 805 at 818, 104 S.Ct. 1495 at 1503, 79 L.Ed 2d 826 [comments that CPAs must “maintain total independence” and act with “complete fidelity to the public trust” when serving as independent auditors] See also *Edenfield v. Fane*, (1993) 507 U.S. 761, 113 S.Ct. 1792 at 1800. See also, Linda Galler, “The Tax Lawyer’s Duty to the System” 16 Va. Tax Rev. 681 (1997); Randolph W. Thrower, “2001 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Is the Tax Bar Going Casual – Ethically?” 54 Tax Law. 797 (2001); Audrey I. Benison, “The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants” 13 Geo. J. Legal Ethics 699 (2000); Camilla E. Watson, “Tax Lawyers, Ethical Obligations, and the Duty to the System” 47 U. Kan. L. Rev. 847 (1999).

in Ontario.⁵⁰² Canadian securities regulation of lawyer conduct is uneven, with different approaches in Ontario and British Columbia.⁵⁰³

In *Wilder v. Ontario (Securities Commission)*, the Ontario Court of Appeal affirmed the right of the OSC to regulate the conduct of lawyers who appear before it.⁵⁰⁴ At issue was the right of the OSC to issue a notice of hearing to determine whether it was in the public interest to reprimand a lawyer. In the course of his client's prospectus review, Wilder had written to the OSC and had referred to a series of favorable due-diligence results. The OSC alleged that the reference was deliberately misleading. Both Wilder and the Law Society of Upper Canada, which intervened in opposition to the OSC's actions, sought to halt the OSC proceeding on the grounds that the Law Society had exclusive and exhaustive powers over the regulation of the professional conduct of lawyers. The court allowed the OSC hearing to proceed and held that the Commission was not usurping the role of the Law Society, but rather was properly exercising its powers under the Ontario *Securities Act* to control its own process and remedy a breach of that *Act*.⁵⁰⁵ Lawyer conduct would therefore be within the ability of Ontario securities regulators to control.

⁵⁰² Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2004) at Rule 2.02 (5.1) and (5.2), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/rule_amends_march2504.pdf>.

⁵⁰³ Unlike the United States, where securities regulation is conducted through a single federal regulator – the SEC – in Canada thirteen different securities regulators have jurisdiction over Canadian capital markets. The extraterritorial application of the SEC Rule is thus complicated by variations in approaches and rules used by Canadian securities regulators. As discussed herein, the BCSC has attempted to move closer to the approach adopted and upheld in Ontario.

⁵⁰⁴ *Wilder v. Ontario Securities Commission*, (2000) 47 O.R.(3d) 361, 184 D.L.R. (4th) 165, 131 O.A.C. 369 (Ont Ct. Gen. Div.), affd (2001) 53 O.R. (3d) 519, 197 D.L.R. (4th) 193, 142 O.A.C. 300 (Ont. C.A.).

⁵⁰⁵ *Ibid.* (per Swinton J. (Gen. Div.):“In proceedings such as these, the Commission is not usurping the role of the Law Society, as its objective is not to discipline the lawyer for professional misconduct; rather, its concern is to remedy a breach of its own Act which violates the public interest in fair and efficient capital markets, and to control its own processes.” at para. 20.

The scope of the British Columbia Securities Commission's (BCSC's) ability to control lawyers' conduct remains at issue. The BCSC released a concept paper entitled "New Concepts for Securities Regulations" in early 2002. This paper proposed, *inter alia*, "to prohibit professionals from engaging in [practice that involved] that Commission if the professionals' conduct related to trading in securities is so egregious or grossly incompetent as to be contrary to the public interest."⁵⁰⁶ The concept paper recommended granting the BCSC powers similar to those of the SEC, including the ability to order that a professional, including a lawyer, not appear before it or prepare documents that are filed with it. Building upon the concept paper, the BCSC later released "New Proposals for Securities Regulation: A New Way to Regulate," which reduced the scope of its concept proposal to prohibit instead "a professional from [practicing] before the Commission if the professional has intentionally contravened the securities legislation or has intentionally assisted others to do so." While the Law Society of British Columbia lauded this change, it remained "concerned with the Commission's proposal that it have the power to prohibit a lawyer from [practicing] law before the Commission."⁵⁰⁷ Echoing the ABA's resistance to the SEC proposals, the British Columbia Law Society's primary concern was that the proposal would adversely affect the independence of the Bar.

The inclusion of lawyer-conduct requirements in *Sarbanes-Oxley* reflects a new reality and a continuing dissatisfaction that the Bar has failed to protect the public

⁵⁰⁶ Law Society of British Columbia, "Submissions to the Securities Commission Re: New Proposals for Securities Regulations" (September 2002), online:<http://lawsociety.bc.ca/publications_forms/report.committees?02-09_Securities2.html [LSBC Submission]

⁵⁰⁷ LSBC Submission, *ibid.*.

interest.⁵⁰⁸ Rather than attempting to preempt needed reforms, the Bar might be well-advised to recognize the signals from the Ontario courts and from the U.S. that traditional self-regulatory preserves are unsustainable.⁵⁰⁹

ABA Model Rules and The Crime or Fraud Exception

Pre-*Sarbanes-Oxley*, the sources of professional regulation of corporate lawyers in the United States were primarily to be found in the state Bar rules. Most state Bar rules are based in large part on the ABA Model Rules of Professional Conduct, which have “symbolic importance and salience to practicing lawyers that may even exceed that of formally applicable ethics rules of individual states.”⁵¹⁰ Model Rule (MR) 1.2(d) provided that a lawyer “shall not counsel a client to engage or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” MR 1.13 views the organizational entity—and not its individual constituents—as the client.⁵¹¹ Although criticized as “incoherent,”⁵¹² MR 1.13(b) reiterated that a lawyer had a duty to take steps to protect the corporation:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law [that] reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is

⁵⁰⁸ Indeed, Section 307 has its origins in a 1996 article comparing professional accountability of lawyers and accountants under U.S. securities laws and calling for reform: see Richard W. Painter and Jennifer E. Duggan, “Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation” 50 *SMU L. Rev.* 225 (1996).

⁵⁰⁹ Rhode and Paton, *supra* at 33.

⁵¹⁰ Lawrence A. Hammermesh, “The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct” 17 *Geo. J. Legal Ethics* 35 (2003) at 56.

⁵¹¹ Kim, *supra*, at 1044–1045.

⁵¹² William H. Simon, “Whom (Or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict” 91 *Cal. L. Rev.* 57 (2003) at 80

reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include amongst others:

- a. asking reconsideration of the matter
- b. advising that a separate legal opinion on the matter be sought for presentation to the appropriate authority in the organization; and
- c. referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

The old MR 1.6(a) provided that “a lawyer shall not reveal information relating to the representation of a client,” subject to certain exceptions. Those included one that permitted lawyer disclosure to prevent “death or substantial bodily harm” that the client or someone else is “reasonably certain” to cause. Before reconsidering MR 1.6(b) in August 2003, the ABA had considered and rejected in 1983, 1991 and 2002 proposed changes to the Model Rules that would have mandated or at least permitted disclosure to prevent criminal financial fraud. The ABA Model Code of Professional Responsibility preceded the Model Rules, and all states but California had incorporated the Model Code into state law. The old Model Code permitted disclosure of otherwise confidential information about “the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.” When the Model Code was replaced by the Model Rules, over 40 states retained the Model Code exception, or something close to it,

instead of the narrower version in the Model Rules.⁵¹³ Finally, however, in August 2003, under pressure from its own ABA Task Force on Corporate Responsibility, and after a “highly visible battle,”⁵¹⁴ the ABA adopted changes that allowed a lawyer to disclose information that the lawyer reasonably believed necessary

to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another [. . . and] [MR 1.6(b)(2)]

to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud [. . .]. [MR 1.6(b)(3)]

In the result, Model Rule 1.6 was changed to allow disclosure of client fraud that involved grave future or ongoing harm. Model Rule 1.13 was amended to require the lawyer under certain circumstances to inform the highest authority within an organization when responsible officers failed to take action and to permit that lawyer, under certain circumstances, to disclose confidential information outside the organization when the highest authority within the organization failed to address that violation.

Experts criticized the ABA changes to the Model Rules as an effort to derail any further federal regulation of lawyer conduct.⁵¹⁵ Others said the ABA simply confused matters by making it difficult for lawyers to figure out “how firms should organize themselves so as to comply with both the ABA provisions and with *Sarbanes-Oxley* and

⁵¹³ See ABA Task Force on Corporate Responsibility, “Preliminary Report of the American Bar Association Task Force on Corporate Responsibility July 16, 2002” 58 *Bus. Law* (2002) 189.

⁵¹⁴ Hammermesh, *supra* at 36-37.

⁵¹⁵ Cramton et al., *supra*, at 729-733.

its implementing regulations.”⁵¹⁶ However, 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 other 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.”⁵¹⁷ 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.⁵¹⁸

In contrast, Canadian lawyers receive no such support from their rules of professional conduct. 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.⁵¹⁹

⁵¹⁶ 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).

⁵¹⁷ ABA Task Force on Corporate Responsibility Preliminary Report, *supra*, at 206

⁵¹⁸ Hammermesh, *supra* at 36; Kim, *supra* at 1040-1041

⁵¹⁹ LSUC Report to Convocation, *supra* at paras. 25- 32.

The CBA's Ethics and Professional Issues Committee began its six-year process of reviewing the CBA Code of Professional Conduct that led to the August 2006 release of the new CBA Code of Professional Conduct in 2000–2001 and released a consultation paper in February 2002, but the question of changing confidentiality rules to permit a crime or fraud exception was not included.⁵²⁰ Its second request for input, in May 2003, incorporated consideration of whether the Code's Chapter IV "should be amended to require, or permit, the disclosure of confidential information where it is necessary to do so [. . .] to prevent either (i) an imminent risk of substantial financial injury as a result of a client's fraud; or (ii) an imminent risk of harm to the administration of justice, for example, because of the suborning of perjury or jury tampering by the lawyer's client."⁵²¹ In its Final Report in March 2004, the CBA Standing Committee on Ethics and Professional Responsibility recommended no change, noting that "[i]t was apparent from the submissions received that there was no clear consensus that the exceptions to the confidentiality rule should be expanded and that there was considerable concern about the prospect of the important principle of confidentiality being undermined if further exceptions were permitted."⁵²²

The final version adopted at the CBA's August 2004 meeting thus included no crime-fraud exception and reiterated that the general rule was that the lawyer shall hold

⁵²⁰ Canadian Bar Association, "Modernizing the CBA Code of Professional Conduct – A Consultation Paper" (Ottawa: Canadian Bar Association, 2002), online: Canadian Bar Association <<http://www.cba.org/cba/EPIIgram/february2002/PrintHtml.aspx?DocId=44174>>.

⁵²¹ Canadian Bar Association, "Modernizing the CBA Code of Professional Conduct: Seeking Your Input" (Ottawa: Canadian Bar Association, 2003), online <<http://www.cba.org/cba/EPIIgram/May2003/PrintHtml.aspx?DocId=52476>>.

⁵²² Canadian Bar Association, "Modernizing the CBA Code of Professional Conduct: Final Report of the Standing Committee on Ethics and Professional Responsibility" (Ottawa: Canadian Bar Association, 2004), online <<http://www.cba.org/CBA/EPIIgram/Mar2004/PrintHtml.aspx?DocID=55562>>.

the client's information in strict confidence, subject to very limited exceptions. The commentary attempted to provide guidance should the lawyer become aware that an organization was engaged in or might commit an act that was "dishonest, fraudulent, criminal or illegal." In such cases, the commentary directed the lawyer to

ask that the matter be reconsidered, and should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization, despite any direction from anyone in the organization to the contrary. If these measures fail, then it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation.⁵²³

Unlike their private law-firm counterparts in Canada, then, corporate counsel are effectively left in the uncomfortable position of taking best efforts to ensure compliance and potentially being left in the position both of not being able to report fraudulent activity without breaching confidentiality rules, and of losing the client and their livelihood. This invites continued questioning about how legal self-regulation serves the public interest. Professor Bill Simon noted,

The denial of a duty to go outside in cases of egregiously harmful illegality is hard to square with plausible notions of professional duty. If the organizational client is being harmed, and disclosure would mitigate the harm, it arguably follows that disclosure is appropriate. The [B]ar resists this conclusion on grounds of confidentiality. It argues that, as a general matter, clients will not consult lawyers without confidentiality safeguards, and that, since legal advice promotes compliance with the law, this will be socially costly. But the argument is implausible.

Simon notes that corporate decisionmakers have incentives for consulting lawyers that do not depend on confidentiality and that there are instances in which a corporate lawyer must insist on disclosure of information from corporate managers that the

⁵²³ Canadian Bar Association, "Resolution 04-01-A-Annex I (August 2004) Chapter IV: Confidential Information" (Ottawa: Canadian Bar Association, 2004).

organization is legally required to disclose (for example, to securities regulators), even when it is harmful for the manager personally. He concludes, “it has always been irrational for a corporate manager to make a disclosure to the organization’s counsel that he would not have been willing to make in the absence of any confidentiality guarantee. Thus, the likely effect in terms of reduced disclosure to counsel, from requirements that increase disclosure by counsel, is trivial.”⁵²⁴ This position is contested by attorneys’ claims that clients will withhold relevant information in the absence of confidentiality protections. One empirical study concluded, though, that attorneys almost never inform their clients about rules governing confidentiality. It is not entirely clear that clients would provide information to their lawyers differently in the absence of confidentiality protection.⁵²⁵

Further, a general rule with this impact on corporate counsel opens the question of whether one set of rules is appropriate for all practice contexts, despite Law Society and bar assertions of the “commonality of the profession, its knowledge base and its values.”⁵²⁶ Securities regulators and governments are now engaged in the business of regulating lawyer conduct. The legacy of *Sarbanes-Oxley* is an indictment by legislatures that self-regulation by the legal profession in the public interest has been inadequate.

⁵²⁴ Simon, “Introduction” *supra*, at 949-950. See also Lisa H. Nicolson, “Sarbox 307’s Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place” *Mich. St. L. Rev.* 559 (2004) at 563, note 12 [discussing SEC expectations that lawyers will ensure client compliance with federal securities laws and quoting *In re Fields*, 45 S.E.C. 262, 266 n. 20 (1973): “This is a field where unscrupulous lawyers can inflict irreparable harm on those who rely on the disclosure documents that they produce. Hence we are under a duty to hold our Bar to appropriately rigorous standards of professional honor.”]

⁵²⁵ Rhode, *In the Interests of Justice*, at 111, citing Fred C. Zacharias, “Rethinking Confidentiality,” 74 *Iowa L. Rev.* 351 (1989) at 382-383; Leslie C. Levin, “Testing the Radical 1 Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others,” *Rutgers L. Rev.* 47 (1994) at 81, 122.

⁵²⁶ Francis, *supra*, at 186

In addition to the other changes noted above, in January 2003, as part of the response of the U.S. Justice Department to the Enron scandal, then-Deputy Attorney General Larry Thompson issued a memorandum, “Principles of Federal Prosecution of Business Organizations,” which identified nine factors that federal prosecutors should consider in deciding whether to charge an organization. These factors included its willingness to cooperate in the investigation, even if that involved the waiver of attorney-client privilege and work-product protection.⁵²⁷ Amendments to U.S. federal sentencing guidelines relating to corporations and other organizations went into effect November 1, 2004, including commentary to section 8C2.5 of the guidelines, which “authorizes and encourages the government to require entities to waive their attorney-client and work-product protections in order to show ‘thorough’ cooperation with the government and thereby qualify for a reduction in the culpability score -- and a more lenient sentence -- under the sentencing guidelines.”⁵²⁸

On December 12, 2006, U.S. Deputy Attorney General Paul McNulty issued a memo entitled “Principles of Federal Prosecution of Business Organizations,” revising the charging guidelines for federal prosecutors under the Thompson Memorandum. The fundamental nature of the Thompson Memo directive to take waiver of privilege into account for charging and sentencing was not in essence altered. McNulty introduced a “tiered” approach to approval requirements with which federal prosecutors must comply

⁵²⁷ Bruce A. Green and David C. Clifton, “Feeling A Chill” 91 ABA Journal 60 (2005) at 63. See also Larry D. Thompson, “Principles of Federal Prosecution of Business Organizations” (20 January 2003), online: U.S. Department of Justice <http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm>. For earlier consideration of the threats, see Lance Cole, “Revoking Our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)” 48 Vill. L. Rev. 469 (2003).

⁵²⁸ Robert D. Evans, “Comments on Notice of Proposed Priorities -- Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege” (15 August 2005), online: American Bar Association <<http://www.abanet.org/poladv/commentlettertoussc.pdf>>.

before they can request that corporations waive privilege. The McNulty Memo also limits but does not preclude a prosecutor from considering a refusal to provide such material when making the decision to charge a corporation with criminal misconduct.⁵²⁹

The dynamic of disclosure is thus already changing, regardless of bar rules to restrict the ability of lawyers to identify client misconduct. For corporate counsel, the stakes are high and the “moral maze” difficult. An appreciation of the position and ethical challenges that these lawyers face is just a starting point.

Corporate Counsel as Moral Compass—Lawyer as “Corporate Conscience”

In addition to the increasingly complex array of strategic and legal challenges that corporate counsel face, they must also confront the fact that they and their corporate clients are “morally interdependent.” As Richard Painter has noted, the actions of lawyers and clients are

not always easily distinguished. Often, lawyers and clients accomplish objectives together, not separately. They each exercise some independent judgment, but they work together and not always in distinct roles; lawyers do more than render discrete legal advice or advocacy. Lawyers therefore cannot always deny moral responsibility for their clients’ conduct.⁵³⁰

⁵²⁹ US Department of Justice, “U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud,” Press Release, (12 December 2006), online: http://usdoj.gov/opa/pr/2006/December/06_odag_828.html; US Department of Justice, Office of the Deputy Attorney General, “Principles of Federal Prosecution of Business Organizations,” (12 December 2006), online: http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf (last accessed 12 December 2007)

⁵³⁰ Richard W. Painter, “The Moral Interdependence of Corporate Lawyers and Their Clients” 67 S. Cal L. Rev. 507 (1994) at 511.

For Painter, this interdependence translates into a number of situations: lawyer as “monitor” and as “dealmaker.”⁵³¹ Both roles require the lawyer to negotiate through a morass of various corporate constituencies and preexisting relationships—“regulator and regulated, shareholder and management, debtor and creditor, and employee and employer.”⁵³² While lawyers will be required to monitor the “legally defined borders” of these relationships, lawyers more often than not will be directly engaged in those relationships, making moral interdependence with their clients more likely and retaining independence that much more difficult. These challenges are especially great for corporate counsel, whose internalized ethical norms may be overridden by organizational priorities.

However, remain independent they must. The CBA Code of Professional Conduct and the LSUC Rules of Professional Conduct that pertain to independence carve out no exemption for in-house counsel. Recognizing that the client is the corporation, rather than the individual manager or director, means that in addition to defining the borders, the lawyer in an in-house or corporate context must be able to sustain the personal and professional distance required to escape the “cognitive dissonance” particularly dangerous for anyone in an in-house role.⁵³³

Although there are challenges, there are also particular opportunities. As Deborah Rhode has noted,

⁵³¹ *Ibid.*, at p. 518-558 [discussion of “Lawyer as Monitor”]; at p. 543-553 [discussion of “Lawyer as Dealmaker”]

⁵³² *Ibid.* at p.543-544.

⁵³³ Langevoort, “Where Were the Lawyers?”*supra*, . Also Mackenzie, *supra*, at s.20.5

One of lawyers' most crucial contributions involves helping individuals live up to their [. . .] deepest moral values. That role requires advocates who are willing to pass judgment and to identify ways of harmonizing client and public interests. Even highly profit-driven businesses often need and want counselors who can provide a "corporate conscience."⁵³⁴

The ability for a lawyer in an in-house position to have a broader and more complex influence on corporate decision making is both enticing and dangerous: where should the line get drawn between legal advice and business advice in such a context? The goal of regulators and the profession should be to assist corporate counsel in negotiating their way through these issues. This is where reviewing the Rules of Professional Conduct and their application to the unique challenges that corporate counsel confront should be a first-order priority.

Nonetheless, more rules may not be the answer. Concerns have already been expressed that the SEC's new standards of professional conduct "may come to be seen as just another set of rules whose neutralization, avoidance or manipulation is entirely consistent with the prevailing organizational morality."⁵³⁵ Understanding the underlying personal and professional pressures is the necessary prerequisite to informing thoughtful rule development and encouraging compliance. Rules alone are not enough. Instead, it should be recognized that "all systems and organizations that seek to inculcate absolutes are dependent upon the moral courage of those within [. . .]. Nurturing individual strength for that fortitude becomes a critical function."⁵³⁶

⁵³⁴ Rhode, *In The Interests of Justice* at 65; See also Robert Gordon, "The Independence of Lawyers" 68 B.U.L. Rev. 1 (1988).

⁵³⁵ Sargent, "Moral Maze" *supra*, at 868.

⁵³⁶ Marianne M. Jennings, "The Disconnect Between and Among Legal Ethics, Business Ethics, Law and Virtue: Learning Not to Make Ethics So Complex" U.S.T. L.J. 995 (2004) at 1020.

Highlighting the need to recognize the unique ethical challenges that corporate counsel in Canada face, acknowledging the increasing importance of corporate counsel in the Canadian legal ethical discourse and taking constructive steps to support them as they face their personal and organizational tests are all part of the solution. In the end, lawyers, corporations and the public will all be better served by corporate counsel who have the broader Bar's understanding of and empathy for the reality that they occupy within the often-crossed fiduciary and professional responsibilities to their clients, on the one hand and the responsibilities that they have to the public, on the other, as gatekeepers in the post-Enron era.

Chapter Six

The Future of Self-Regulation – Lessons for Canada from Abroad

Introduction

In considering the future of self-regulation of the legal profession in Canada in 1995, 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.”⁵³⁷ His 1996 article setting the stage for this study, referenced in Chapter One, expanded on that argument by querying whether the legal profession in Canada could survive with its present regulatory structure given the pressures of the “new economy.”⁵³⁸ Arthurs pointed to globalization and external influences as critical determinants of the way forward.

Predictions of the death of self-regulation in Canada may have been premature, but the influence of globalization and external pressures on self-regulation of the legal profession in Canada remains important. Canadian complacency about a “global tsunami against self-regulation” is unwarranted.⁵³⁹ As one Canadian author concluded in a study to be published in 2008 recommending “calibrated regulation”, reforms in Australia, the United Kingdom, New Zealand, Ireland and South Africa justify the conclusion that there has been “widespread rejection of self regulation as a defensible model of governance,”

⁵³⁷ Harry Arthurs: “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?” 33 Alta. L. Rev. 800 (1995) at 809

⁵³⁸ Arthurs and Kreklewich, *supra*

⁵³⁹ Richard F. Devlin and Porter Heffernan, “The End(s) of Self Regulation,” 43 Alta. L. Rev. (2008) [forthcoming]

and the prediction that Canada may “soon be the only country in the Commonwealth where the profession remains self-governing.”⁵⁴⁰

This Chapter situates the case studies presented in Chapters Three, Four and Five in international context by detailing recent developments in England and Australia that represent the effective end of self-regulation in those jurisdictions. The lessons from those Commonwealth jurisdictions with which Canada shares a direct tradition and heritage, as well as the cautionary tale about self-regulation in the United States presented in Chapter Four, are important. They combine to confirm that the intransigence of the Law Society of Upper Canada and its failure to regulate in the public interest is out of step with international developments and should lead government to reconsider the Law Society’s self-regulatory authority. 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. The experience with the SEC in the United States detailed in Chapter Five similarly points to closer involvement of government or government agencies in lawyer regulation, despite opposition from the bar about threats to the independence of the profession. All send signals about the way forward to Canadian legislators and regulators considering whether the public interest is best served by the status quo.

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

⁵⁴⁰ *Ibid.*, at 23, 27

them in line with other professional services in the 21st century.”⁵⁴¹ Proclaimed into law on October 30, 2007, the Act removes the authority of the traditional self-regulatory bodies for lawyers in England and implements a regulatory model and structures more closely tied to government. 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.”⁵⁴² 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.”⁵⁴³ 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 model rejected in North America and detailed in Chapter Three.⁵⁴⁴ 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:

⁵⁴¹ *Legal Services Act 2007* c. 29 (U.K.), online: http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf; also <http://www.justice.gov.uk/publications/legalservicesbill.htm>; see also Department of Justice (U.K.), “Legal Services Act given royal assent,” 30 October 2007, online: <http://www.justice.gov.uk/news/newsrelease301007a.htm> [Legal Services Act Press Release]

⁵⁴² Legal Services Act Press Release, *supra*

⁵⁴³ Legal Services Act Press Release, *supra*.

⁵⁴⁴ Also Maute, *supra*

- (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;
 - 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.”⁵⁴⁵ While the three substantive elements – OLC, LSB and ASB -- merit particular attention as possible templates for Canadian 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.⁵⁴⁶ The OFT report concluded that many of the restrictions on the provision of legal services were not

⁵⁴⁵Department of Constitutional Affairs (U.K.), “Competition and Regulation in the Legal Services Market,” July 2003, online:< <http://www.dca.gov.uk/consult/general/oftreptconc.htm>> at para 70

⁵⁴⁶Office of Fair Trading (U.K.), “Competition in Professions” (March 2001), online: http://www.offt.gov.uk/shared_offt/reports/professional_bodies/oft328.pdf. The OFT is the UK government’s consumer and competition authority; see <http://www.offt.gov.uk/about/>. Its Canadian equivalent is the Competition Bureau: <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>

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.⁵⁴⁷ 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.⁵⁴⁸ 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 the public effective redress for bad service.”⁵⁴⁹ The July 2002 paper also evaluated restrictions on provision of conveyancing and probate services, multidisciplinary practices, legal professional privilege, and the Queen’s Counsel system.

The U.K. Department of Constitutional Affairs released a paper entitled “Competition and Regulation in the Legal Services Market” in July 2003.⁵⁵⁰ Together

⁵⁴⁷ “Competition in Professions”, *supra*, at paras 29-32

⁵⁴⁸ 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, online: <<http://www.dca.gov.uk/consult/general/oftrept.htm>>

⁵⁴⁹ “Competition and regulation in the legal services market,” *supra*, at paras 18-20.

⁵⁵⁰ *Ibid.*

with an attaching Scoping Study, an economic evaluation of the regulatory system for legal services, the paper concluded that the regulatory status quo was unsustainable.⁵⁵¹ The report supported in principle the opening of the legal services market to new business entities such as multidisciplinary practice. There would be no change to legal professional privilege, however; privilege would continue to apply only to exchanges between clients and their legal advisors, and not be expanded to clients and other professional advisors. 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.⁵⁵² 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.⁵⁵³

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

⁵⁵¹ Ibid. The Scoping Study is Appendix B to the Report. See the Scoping Study Executive Summary, online: < <http://www.dca.gov.uk/consult/general/oftss/pp3-9.pdf>>; also Scoping Study, at p. 85

⁵⁵² Ibid, at para 71

⁵⁵³ Ibid.

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.⁵⁵⁴ 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.⁵⁵⁵ 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 provided to the public by increasing freedom and competition in the market.⁵⁵⁶ 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.⁵⁵⁷ The paper further suggested that self-government or self-regulation should be narrowly defined and monitored by a new committee, the Advisory Committee on Legal Education and Conduct, which would be comprised mainly of lay

⁵⁵⁴ Robin C.A. White, *The English Legal System in Action*, 3rd ed. (New York: Oxford University Press, 1999) at 392

⁵⁵⁵ *Ibid.*, at 395

⁵⁵⁶ 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); 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 [Hansard]; 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* (New York: Oxford University Press, 2003) 37

⁵⁵⁷ Michael Burrage, *Revolution and the Making of the Contemporary Legal Profession* (New York: Oxford University Press, 2006) at 558

people appointed by the government.⁵⁵⁸ 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 the second and third proposals 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.⁵⁵⁹ 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*⁵⁶⁰ was a comparatively “modest measure”.⁵⁶¹ 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.⁵⁶²

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

⁵⁵⁸ Ibid.

⁵⁵⁹ Maute, *supra*, at 7

⁵⁶⁰ *Courts and Legal Services Act 1990*, c. 41 (U.K.); online: <http://www.opsi.gov.uk/ACTS/acts1990/ukpga_19900041_en_1>

⁵⁶¹ Burrage, *supra*, at 561

⁵⁶² *Courts and Legal Services Act, 1990*, *supra*, at ss 22(5); Maute, *supra*, at 8

representative bodies were “best placed to speak for the public interest no longer had any constitutional standing or, as the rapturous press support for the Green Papers indicated, any public credibility.”⁵⁶³ The surest indication that a cultural change had occurred is the fact that the move for reform did not end with the change from a Conservative to a Labour government. 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.⁵⁶⁴

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.”⁵⁶⁵ The stage was thus set for what would be nothing short of revolutionary reform. The idea that alternative business structures could

⁵⁶³ Burrage, *supra*, at 563; see also Abel at 35-38

⁵⁶⁴ See Department of Constitutional Affairs (U.K.), “Wide-ranging review aims to open up competition” 24 July 2003 (DCA Press Release 310/03)

⁵⁶⁵ *Ibid.*

be used for the delivery of legal services was no longer a question of “if”, but “how”. Clementi was charged with figuring out how best to ensure that such business structures could be implemented while still respecting essential legal professional protections in the public interest.

Clementi released a consultation paper on March 8, 2004.⁵⁶⁶ 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.⁵⁶⁷ With respect to self-regulation, 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 in the system of regulation.⁵⁶⁸ In response, Clementi endeavored to articulate a set of objectives and principles of a regulatory framework for legal services that would provide a strategic approach and the cohesion the system lacked. The principled approach articulated in his report is worth noting for its consumer focus:

A decision to regulate a market (in this case the legal services market) arises from the decision that leaving the activity unchecked could lead to undesirable consequences and that the benefits that will flow from regulation will outweigh the costs of that regulation. Because any regulatory system will involve the

⁵⁶⁶ Sir David Clementi, “Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales,” March 2004, online:< <http://www.legal-services-review.org.uk/content/consult/review.htm>>[Clementi Consultation Report]

⁵⁶⁷ See also the helpful summary in Judith L. Maute, “Revolutionary Changes to the English Legal Profession or Much Ado about Nothing?” 17(4) *The Professional Lawyer* (2004) 1 at 10

⁵⁶⁸ Clementi Consultation Report, *supra*, at para 7

application of rules giving guidance as to acceptable standards of conduct within the area being regulated, it can lead to an increase in trust and confidence in institutions and the sector generally. And allied to the issue of trust and confidence, regulation can also lead to greater certainty of outcome for both consumers and providers. But beyond simply engendering confidence in the market, regulation has an important role to play in protecting the consumer, ensuring there are no unjustifiable restrictions on competition, that appropriate standards of education, training and conduct are maintained, and that there are appropriate redress mechanisms.

But there is a potentially negative side to regulation in that it can be inefficient, with rules resulting in not much more than an increase in bureaucracy and additional costs for providers and ultimately consumers, disadvantaging smaller operations which have fewer resources to deal with additional obligations.⁵⁶⁹

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 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-

⁵⁶⁹ Ibid., at para 8-9

regulation, on the other.⁵⁷⁰ 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.⁵⁷¹ He also made reference to the need to harmonize domestic regulatory processes with international obligations, including General Agreement on Trade in Services requirements.⁵⁷² 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.⁵⁷³

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 complex and inconsistent; and that clear underlying objectives both existed and needed to be more clearly

⁵⁷⁰ Ibid., at Chapter B.

⁵⁷¹ Ibid. See Questions B1-B6

⁵⁷² Ibid., at Chapter B, para 31

⁵⁷³ Maute, *supra*, at fn 139

articulated. He also found that the complaints system was inefficient and had failed to secure consumer confidence.⁵⁷⁴ 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.⁵⁷⁵ 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.⁵⁷⁶ 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 MDPs could be potentially viable “if at subsequent juncture the regulatory authorities considered that sufficient safeguards could be put in place.”⁵⁷⁷

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

⁵⁷⁴ Sir David Clementi, “Report of the Review of the Regulatory Framework for Legal Services in England and Wales, Final Report,” (December 2004), online: <http://www.legal-services-review.org.uk/content/report/index.htm> [Clementi Final Report]

⁵⁷⁵ Clementi Final Report, Chapter B, paras 70-71

⁵⁷⁶ Clementi Final Report, Chapter C.

⁵⁷⁷ Clementi Final Report, Chapter F, and in particular para 104 (MDPs)

What happens next is a matter for Ministers. Whilst some lawyers will continue to argue that the current system 'ain't broke', I believe there is strong evidence of the need for major reform: (i) to the regulatory framework which, as described in the Government's own Scoping Study, is flawed; (ii) to the complaints system which needs change to benefit the consumer; and (iii) to the types of business structures permitted to provide legal services to the consumer, which have changed little over a significant period. It is for Ministers to determine whether they wish to press ahead with reform.

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.⁵⁷⁸

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 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 tortuous path through both the House of Commons and the House of Lords.⁵⁷⁹ This was despite the fact that the government broadly accepted Clementi's recommendations and incorporated a number of amendments into a prior version of a draft Bill prior to first introducing it in the House of Lords.⁵⁸⁰ Despite these attempts at pre-emptive change, the Lords then defeated the government on a number of other amendments, including one

⁵⁷⁸ Clementi Final Report, Foreword, paras 32-34

⁵⁷⁹ 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

⁵⁸⁰ See the detailed discussion in Maute, *supra*, at 12-13

which required the appointment of the Chair of the Legal Services Board (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.⁵⁸¹ 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 it. The final result is a move in England and Wales away from self-regulation towards something even closer to government regulation than an ordinary co-regulatory scheme might incorporate. 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.⁵⁸² The new legislation in essence deemed that generation of reform insufficient and instituted a strict bifurcation

⁵⁸¹ Catherine Fairbairn, “Legal Services Bill [HL] Committee Stage Report,” House of Commons Library Research Paper 07/61, 11 July 2007, at 2-3, online:<<http://www.parliament.uk/commons/lib/research/rp2007/rp07.061.pdf>

⁵⁸² See Legal Services Ombudsman and Legal Services Commissioner, “Legal Services Reform – a perspective,” (June 2007), online:<http://www.olso.org/publications/legal_services_reform_2007.asp at 8, cited in Devlin, *supra*, at 25

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 in emphasizing that the Board would be “required to separate their regulation side from their representation one to remove conflict of interest.”⁵⁸³

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. A report and recommendations are scheduled to be released before the end of 2007.⁵⁸⁴ 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.

⁵⁸³ Legal Services Act Press Release, *supra*

⁵⁸⁴ Letter from Richard Taylor, Deputy Commissioner of Competition (Civil Matters Branch), (Canada) May 17, 2007.

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.⁵⁸⁵ The end result is a system more focused on regulating in the public interest.⁵⁸⁶

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.⁵⁸⁷ The extent to which

⁵⁸⁵ Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Toronto: Oxford University Press, 1999) at 168; see also Steve Mark, New South Wales Legal Commissioner, "Is State Regulation of the Legal Profession Inevitable?" (4 October 2003), online:

http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_heron; Devlin, *supra*, at 24

⁵⁸⁶ 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," (September 2005) at 2

⁵⁸⁷ Austl., Commonwealth, Law Council of Australia, Submission to the Standing Committee of the Attorneys-General: Towards National Practice (October 2001) at 4 [Submission to SCAG]

government or the legal profession has been involved 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.⁵⁸⁸ That patchwork of state regulatory regimes was felt to impede interstate competitiveness and frustrate clients with interstate and national interests.⁵⁸⁹ 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.⁵⁹⁰ Further, the development of national standards would improve client service and client protection.⁵⁹¹

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 which existing state structures could aspire to meet.⁵⁹² Soon afterward, New

⁵⁸⁸ Austl. Commonwealth, Law Council of Australia, Submission to the Standing Committee of the Attorneys-General: Towards National Practice (October 2001) at 4 [Submission to SCAG]

⁵⁸⁹ Submission to SCAG, at 3

⁵⁹⁰ Submission to SCAG, at 3, Austl., Commonwealth, Law Council of Australia, "Framework for a National Legal Services Market: National Legal Profession Model Reforms," (September 2005) at 1 [Pamphlet]

⁵⁹¹ *Ibid.*, at 1

⁵⁹² Law Council of Australia, "National Practice -- The Model Laws Project," online: <http://www.lawcouncil.asn.au/natpractice/modellawproject.html>; see also Law Council of Australia, "National Practice – National Legal Profession Bill and Model Regulations," online: <http://www.lawcouncil.asn.au/natpractice/currentstatus.html>; also Linda Haller, "Imperfect Practice under the Legal Profession Act 2004(Qld)", " 23 U. Queensland L.J. (2003) 411 at 417

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.⁵⁹³ 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.⁵⁹⁴

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 in question, and relaying the solicitor's response to the complainant."⁵⁹⁵ This was cause enough for reform.

⁵⁹³ Reid Mortensen and Linda Haller, "Legal Profession Reform in Queensland," 23 U. Queensland L.J. 280 (2004) at 281

⁵⁹⁴ Australia, New South Wales, Law Reform Commission Report 99 (2000) – Complaints Against Lawyers: An Interim Report, at para. 7.19; online: Lawlink New South Wales, <http://www.agd.nsw.gov.au/lrc.nsf/pages/r99chp7> [Report 99]

⁵⁹⁵ Mortensen and Haller, *supra*, at 281

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.⁵⁹⁶ The Legal Profession Act of 2007, effective on September 21, 2007, further refined these reforms.⁵⁹⁷

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

⁵⁹⁶ Haller, *supra*, at 417.

⁵⁹⁷ See Queensland, Legal Profession Act 2004 [repealed]; Queensland, Legal Profession Act 2007, online: <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/L/LegalProA07.pdf>; "Legal Profession Act to impact administrative practices," University of Queensland, online: <http://www.law.uq.edu.au/legal-profession-act-to-impact-administrative-practices>;

professional misconduct) on the other.⁵⁹⁸ 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.”⁵⁹⁹ 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*.⁶⁰⁰

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 the professional bodies. A quasi-judicial administrative tribunal heard actual complaints about lawyers.⁶⁰¹ 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. 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 coregulation, however. They submitted that the involvement of the profession in complaints proceedings against lawyers, however well-

⁵⁹⁸ Austl. New South Wales, Law Reform Commission, Report 70 (1993): “Scrutiny of the Legal Profession: Complaints Against Lawyers”, online: LawLink New South Wales <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R70CHP7> [Report 70]

⁵⁹⁹ Report 99, at para 1.4

⁶⁰⁰ See the Legal Profession Act 2004 (NSW-Austl), Part 7.3, online: http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/ for a present description of the powers of the Legal Services Commissioner.

⁶⁰¹ Report 99, at para 7.5

intentioned and fair, would always be suspect because of the inherent conflict of interest given the Law Society and Bar Councils' representative roles.⁶⁰²

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 end result has been a significant curtailment of the Law Society's regulatory authority and a bifurcation of the ability of the profession to grant entry, on the one hand, and to discipline, on the other. This has been interpreted as the effective end of self-regulation, prompted by the failure of the Law Societies to adequately consider and respond to the public interest.⁶⁰³

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

⁶⁰² Report 99, at para. 7.13

⁶⁰³ Brad Wright, "The Indispensable OBA," *Briefly Speaking* (May–June 2007) at 23

by and exercised at the pleasure of the independent regulator.⁶⁰⁴ 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.

Conclusions

In 1993, the Supreme Court of Canada noted that a provincial Act creating a Law Society as a “self-regulating professional body with the authority to set and maintain professional standards of practice” required that the Law Society “perform its paramount role of protecting the interests of the public... [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.”⁶⁰⁵ The lessons from both England and Wales and from Australia 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 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

⁶⁰⁴ Devlin, at 57-58; see also Legal Services Board (Victoria), “About the Board”, online:<http://www.lsb.vic.gov.au/about.asp>; Legal Services Commissioner (Victoria), “Our Approach,” online:<<http://lsc.vic.gov.au/OurApproach.htm>>

⁶⁰⁵ *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 36

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. As noted in Chapter Five, 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.⁶⁰⁶

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.⁶⁰⁷ The Multidisciplinary Practice model so fiercely resisted by the Law Society of Upper Canada, as detailed in Chapter Three, is part of both Australian and English experience. Globalization and trade in legal services, discussed in detail in Chapter Four, 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.

This study has sought to document the reaction of the Law Society of Upper Canada to threats to its traditional self-regulatory authority during the period 1998-2006 and on all fronts has found the response of the Law Society wanting. The Law Society’s

⁶⁰⁶ 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)

⁶⁰⁷ Richard Lloyd, “British Firms Watch Australia’s Law Firm IPOs with Interest,” *American Lawyer* (June 6, 2007), online: law.com: < <http://www.law.com/jsp/article.jsp?id=1181034331105>>

shameful politicking around the issue of multidisciplinary practice, the instrumental rejection of initial proposals for liberalized trade in legal services at the General Agreement on Trade in Services, and the failure to implement a crime-fraud exception to confidentiality in response to the unique challenges faced by corporate counsel and others in the post-Enron era lay the foundation for a serious reconsideration of the self-regulatory authority granted to the Law Society to act in the public interest. While the 2006 Access to Justice Act broadened the self-regulatory authority of the Law Society by granting it responsibility for regulating paralegals in the province, that should not be the end of the story. A comprehensive review of self-regulation is warranted, particularly in light of both the responses documented here and international developments.

For different but complimentary reasons, the recent call for a Sponsors' Table on the Regulation of the Legal Profession in Canada is one possible solution.⁶⁰⁸ As the English experience suggests, and as Sir David Clementi feared, reform is likely to be slow and fiercely resisted by the profession itself. In England, Australia and the United States it took a confluence of forces and events – scandal, strong political leadership, and intense public scrutiny – to produce meaningful change. It will similarly take legislative interest and commitment, and sustained effort, to produce in Canada a response that more carefully and deliberately makes the public interest the paramount consideration in regulation of the legal profession. Identifying the problem, as this study has endeavored to do, is the start.

⁶⁰⁸ Devlin, *supra*, at 70-71. Devlin proposes such a task force to “consider the present state and future possibilities for the recalibrated regulation of the Canadian legal profession(s).”

The task is then for the profession itself to acknowledge that there is a problem and 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. A legal profession that fails to act runs the risk of having solutions imposed upon it, to the detriment of both itself and the broader public interest it is supposed to serve. This study therefore stands as both a cautionary tale and hopefully an inspirational one, from a period of remarkable and significant change. Challenging the profession and regulators to do better, and to do more, is the foundation for finding solutions in the public interest.