RE-ENVISIONING REGULATION: "CANADIAN LAWYERS IN THE 21ST CENTURY"

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I. INTRODUCTION

The articles in this issue represent the legacy of the Law Society of Alberta's 100th Anniversary Conference, held in Edmonton, 26-27 October 2007. The conference was conceived by the Law Society of Alberta (LSA) in the belief that its centenary presented the occasion not only for celebration of the profession's 100-year history in Alberta, but also for reflection on its future. The conference would be the vehicle for the generation and dissemination of serious thinking about what it means to be a member of the Canadian legal profession today and in the years to come. Hence the conference title which, after much casting about for a clever phrase, was chosen for its descriptive precision: Canadian Lawyers in the 21st Century.

The importance of the 100th Anniversary Conference as part of the Law Society's commemorative year is reflected in its gestation, which involved more than two years of planning and engaged the intellect and enterprise of a large number of people. The process was led by a conference planning committee composed of Peter Freeman, former Executive Director of the LSA; Frederica Schutz, a partner at Emery Jamieson in Edmonton; Professors John Law and Tamara Buckwold of the University of Alberta, Faculty of Law; Professors Iwan Saunders and Alice Woolley of the University of Calgary, Faculty of Law; and the LSA's Director of Communications, Sheila Serup. The members in turn drew upon the experience and expertise of an advisory committee of lawyers, judges, and academics from across the country and beyond.

The principal work of the planning committee was the identification of the content of the conference. The program that ultimately emerged was the product of an extensive, multi-phase inquiry. The committee began with a comprehensive literature review, spanning Canada, the United States, the United Kingdom, and Australia, designed to determine the issues of current importance within the profession, and the individuals who were thinking and writing about them. The material produced by that review was distilled into categories representing a range of themes, each of which included a selection of more specific topics regarded as being of significant interest and consequence from which the subject matter of the conference would be selected. A preliminary list of speakers linked to the defined themes was assembled at the same time. This foundational work was synthesized and presented to the advisory committee, whose members responded with their views on the relative importance of the themes and topics identified, with additional suggestions for consideration by the planning committee, and with the names of individuals who would be outstanding conference participants. Finally, the planning committee selected the conference themes, topics, and presenters on the basis of this extensive body of information and knowledgeable opinion.

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Publication of the conference proceedings was made possible by the fine work of the Editorial Board of the *Alberta Law Review*, who responded with enthusiasm to the planning committee's proposal that these articles be released as a special issue. The production of this issue, which increases the *Alberta Law Review*'s regular publication output, required the recruitment of a special editorial subcommittee and added greatly to the work of the Co-Editors-in-Chief. We thank them for their efforts and are delighted with the result.

The outstanding quality of the conference program and the roster of presenters whose words appear in the pages that follow can be attributed in part to the thorough work of the conference planning committee. However, the success of the 100th Anniversary Conference is due largely to the inherent merit of the exercise and the keen engagement of its participants. Almost all of those invited to present responded positively, and the few who were obliged by conflicting commitments to decline did so with regret. The themes and topics addressed in these papers are of immediate and significant importance; equally so in the halls of the legal academy and in the offices and courtrooms of the profession.

II. RE-ENVISIONING REGULATION: RECURRING THEMES IN "CANADIAN LAWYERS IN THE 21ST CENTURY"

Although the conference was organized around four relatively distinct areas — "Diversity and Demographics," "Access to Legal Services," "Professional Competence," and "Regulation and the Legal Profession" — there were recurring areas of interest and inquiry. The remainder of this introduction will identify and reflect on the most significant of these recurring conference themes, focusing in particular on how the papers contained in this issue contribute to their development.

A. INPUTS AND OUTPUTS

Not surprisingly for a conference sponsored by a regulatory body, all of the recurring themes relate in some way to the question of lawyer regulation. However, the themes address that question from quite distinct directions. These directions reflect the broad scope of substantive issues raised by the general issue of professional governance, and the joint academic and practical nature of the conference. Thus, the recurring themes reflect a mix of concrete and more abstract concerns.

The first theme addresses one of the more concrete problems faced by regulators: should the regulation of the legal profession be primarily concerned with "outputs" (the work which lawyers do for consumers of legal services) or should it be primarily concerned with "inputs" (the licensure and certification of legal practitioners at the outset of their legal careers)? Michael J. Trebilcock's article frames this issue.[1] Trebilcock notes the historical tendency for professional regulation to be disproportionately concerned with input regulation and to be insufficiently concerned with the output regulation that is actually most likely to protect consumer interests. The issue is most substantively addressed, however, by the papers on competence — which from a consumer perspective is arguably the most significant of the

[1] Michael J. Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alta. L. Rev. 215.

lawyer outputs that may be regulated. The articles by Avrom Sherr and Alan Paterson,[2] and Gavin MacKenzie[3] introduce attempts that have been, or are being, made in the U.K. and Ontario to proactively regulate lawyer competence.

As discussed by Sherr and Paterson, in "Professional Competence," the context for these initiatives in the U.K. is the economically significant funding of an extensive legal aid program. Lawyers working in the legal aid program are now required to submit to a form of peer review. Through this peer review process, lawyers are assessed by experienced counsel on the basis of defined competence standards. Upon completion of the peer review process, lawyers with identified competence issues are required to either improve their competency or, in extreme cases, are removed from the legal aid roster. The larger regulatory significance of these initiatives is as yet unclear — that is, their significance for regulators of the profession, as opposed to organizations that are, in essence, employers of lawyers — but they may suggest the possibility for innovation and progress towards a more output-orientated form of professional regulation.

In Ontario, as discussed by MacKenzie, active competence regulation is being undertaken for the first time. MacKenzie notes the various ways in which competence has traditionally been regulated. These methods have been relatively limited, and have tended to be reactive rather than proactive. The new approach represents, therefore, a considerable shift in approach. Its genesis, or precursor, lies in the "spot audits" of lawyers' trust accounts that the Law Society of Upper Canada (LSUC) has used successfully to improve accounting practices in the profession. The competence regulation will take the form of peer review of lawyers with fewer than eight years at the bar. These reviews will occur on a random basis and will be directed at the spectrum of lawyers practising in Ontario; that is, at lawyers working in the full array of practice settings. The impact of this initiative will likely be significant, if only in suggesting a material shift in regulatory emphasis. Not only does it reflect a shift of concern from inputs to outputs, but it also suggests a focus on a very different type of output (and of lawyer) than that which has previously been the focus of regulatory attention. As noted by Harry W. Arthurs in his seminal 1996 assessment of the "ethical economy" of the legal profession, the focus of Canadian regulators when engaged in output regulation has generally been on lawyers in small firms or sole practice who have committed a few typical offences — most frequently misappropriation or mishandling of client funds or failure to communicate with the law society.[4] A concern with competence across the profession represents a radical departure from the typical and somewhat targeted approach. As acknowledged by MacKenzie, however, the actual impact of the Ontario initiative will need further analysis and assessment once the project has been in place for a period of time.

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2 Avrom Sherr & Alan Paterson, "Professional Competence Peer Review and Quality Assurance in England and Wales and in Scotland" (2008) 45:5 Alta. L. Rev. 151 ["Professional Competence"].

3 Gavin MacKenzie, "Regulating Lawyer Competence and Quality of Service," (2008) 45:5 Alta. L. Rev. 143.

4 Harry W. Arthurs, "Why Canadian Law Schools Don't Teach Legal Ethics" in Kim Economides, ed., *Ethical Challenges to Legal Education* (Oxford: Hart, 1998) 105; Trebilcock also notes in his article the tendency for regulators to be passive or reactive in their regulation of outputs rather than active.

Ultimately, the question of whether regulation is most appropriately oriented towards inputs or outputs, and which outputs should be the primary focus of legal regulators requires further development. Observing the effects or the competence initiatives of the LSUC and of the legal aid bodies in the U.K. provides an interesting test case through which this analysis can occur.

B. MORALITY OR ECONOMICS?

The second theme is more abstract, and arises somewhat tangentially from the articles and conference discussion: to what extent do the ethical duties and responsibilities of lawyers arise as a matter of moral imperative flowing from their unique role in the legal system and to what extent do they arise as a matter of the economic position which lawyers enjoy? That is — and at its broadest expression — is legal ethics a question of ethical and moral decision-making or is it a question of economic regulation of participants in the market for legal services, or is it both?

The articles by W. Bradley Wendel and myself exemplify these two distinct approaches to legal ethics within the context of the problem of access to justice. Together, they consider whether as a matter of moral imperative or as a matter of appropriate economic regulation lawyers have a special and particular obligation to foster access to justice.

In his article, Wendel focuses on the lawyer's role as an advocate of clients within the legal system and on the conception of the lawyer's ethical obligations that follow from that role. In particular, he assesses the specific (and occasionally conflicting) duties placed on lawyers in relation to matters such as direct obligations to foster justice, protection of confidentiality in relation to prevention of fraud, and client selection, and identifies the conception of the ethical lawyer which flows from those duties. In Wendel's view, it is clear that the lawyer's role is multi-faceted — both "private" and "public" — and incorporates ethical duties both to clients and to the legal system within which lawyers work: "The law governing lawyers, in short, has elements of the hired gun ethic as well as the notion that lawyers are officers of the court."[5] Given this, and in particular the public role of lawyers, it would be impossible to deny the existence of their general obligation of fidelity to the legal system and, specifically, to "aim at justice." He also, though, concludes that it is inappropriate to translate that general obligation into any specific duty on lawyers with respect to pro bono representation. Being a lawyer engages a variety of conceptions of what it means to be a good lawyer in a number of contexts, and leaves individual lawyers with the choice as to which conception (or conceptions) they wish to pursue. Imposing a unitary model of pro bono representation on all lawyers is inconsistent with the plurality of possible responses to the lawyer's general obligation of fidelity to the legal system.

I approach this question differently. After questioning the validity of a number of moral and structural arguments in favour of lawyers' special obligation to foster access to justice, I consider whether this obligation can be grounded instead in the imperfections associated with the market for legal services. I argue that when operating together, the various imperfections in the market for legal services have the potential to significantly undermine

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5 W. Bradley Wendel, "Lawyers as Quasi-Public Actors" (2008) 45:5 Alta. L. Rev. 83 at 102.

the functioning of that market. It is therefore conceptually possible for lawyers to extract economic rents by charging higher prices than are warranted by the quality of the services they provide. I conclude, however, that substantiating these economic rents is not possible at this time; as a matter of economic regulation, imposing an obligation on lawyers to foster access to justice is conceptually but not yet empirically justified. Until sufficient empirical evidence is collected, any public policy initiatives to give effect to lawyers' special obligation to foster access to justice must be modest in scope.

These different analyses of a single ethical question — the obligation to foster access to justice — demonstrate the potential power of analysis based in both moral norms and economics to illuminate questions of legal ethics and lawyer regulation. They create, however, the troubling possibility for these two forms of discussion to talk across rather than with each other. They leave unanswered whether one or the other mode of analysis is more convincing and, more fundamentally, if legal ethics must necessarily incorporate an understanding of both moral norms and economic functions, how those fundamentally distinct ways of thinking about the legal ethics can work together in a coherent fashion. That is, how can both of these modes of analyses be harnessed to create a coherent and effective system of lawyer regulation. These comments are not intended as a substantive criticism of either article. Rather, it is to suggest that, beyond their specific analysis of the access to justice problem, both raise the need for work on this broader question.

The consideration of professional regulation through the alternating lenses of morality and economics was also evident in the articles, and most particularly in the discussion, around diversity. In assessing the challenges of diversity in the organization and practices of the legal profession, the moral imperative in favour of such attempts, but also the potential for economic power to both foster and thwart them, was evident. We can assert the validity of diversity as a professional norm, but translating that norm into meaningful change requires working through economic systems both positive (corporate requirements for diversity in their law firms) and negative (the ability of existing money and power structures to reproduce themselves). The diversity discussion reinforces, then, the point that the tension (or uncomfortable union) of morality and economic forces within the regulation of the legal profession will ultimately need to be confronted more directly.

C. UNIFORMITY OR DIVERSITY?

The third recurring theme, and also the most overtly critical, is whether the project of professional regulation, or self-regulation, is best understood not as regulation undertaken in the broader public interest, but rather as an exercise in lawyer self-identification and self-preservation.

This question was raised clearly by the papers addressing the question of diversity and demographic change in the profession. In his article "Cowboy Jurists and the Making of Legal Professionalism,"[6] W. Wesley Pue suggests that the early history and development of regulation of the legal profession in the Canadian West can be best understood as a project

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[6] W. Wesley Pue, "Cowboy Jurists and the Making of Legal Professionalism" (2008) 45:5 Alta. L. Rev. 29.

of self-definition and collective promotion by the lawyers who initiated it. It was in many ways how the profession made its contribution to certain cultural, political, and social values — the "preservation of constitutional monarchy, liberal governance and Britishness."[7] The project cannot be solely understood as a straightforward pursuit of those lawyers' economic self-interest; it was, however, a project that "originated in [their] desires to contain diversity, to exclude inappropriately socialized individuals who were deemed unsuited to professional life."[8] While Pue qualifies his assessment of the professionalism project by noting that different explanations for the origins of regulation may exist in different times and places, his analysis requires us to consider troubling possibilities about our current regulatory purposes and structures. By identifying the historical commitment of professional regulation in Canada to perpetuating a specific set of values of importance to the profession, Pue's analysis prevents us from simply assuming the public interest legitimacy of our current regulatory project. Further, it requires us to consider how challenges such as diversity and demographic change can be handled within a professional structure whose self-conscious design was the promotion of one set of values, one professional culture, and the preclusion of diversity.

Similar difficult questions are posed by Charles C. Smith in "Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession."[9] Smith identifies the real and emerging diversity in the legal profession and in Canadian society as a whole, and the challenge confronting traditionally "white" professions to reflect the diverse society within which they exist. Smith's paper is, however, not a simple indictment of the larger regulatory project. While noting the need for greater leadership from regulators, law firms, and law schools in responding to and promoting diversity, Smith identifies some tangible approaches that have the potential to lead the legal profession "to reflect the makeup of the population" from which its members are drawn.[10] Again, though, one can ask about the potential of these approaches to produce effective results within broader structural and regulatory systems that have traditionally been oriented toward uniformity over diversity. The agents of change are difficult to harness effectively.

This challenge to the assumptions underlying the regulatory project, and to its ability to be an effective agent of change, are taken up at a broader level in the final conference theme — what is the future of lawyer regulation?

D. DEAD PARROTS?

In 1994, a conference was held in Calgary in conjunction with the opening of the University of Calgary, Faculty of Law's new building — "A New Look: A National Conference on the Legal Profession and Ethics." At that conference, Arthurs presented "The

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7 *Ibid.* at 43.

8 *Ibid.* at 51.

9 Charles C. Smith, "Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession" (2008) 45:5 Alta. L. Rev. 55.

10 *Ibid.* at 72.

Dead Parrot: Does Professional Self-regulation Exhibit Vital Signs?"[11] and argued that none of the traditional rationales offered in favour of self-regulation have much merit. Further, and more substantively, he questioned the entire project of professional regulation — suggesting that professional conduct does not emerge from regulation but is rather "shaped by three important factors — the personal characteristics of the lawyer, the professional circumstances of his or her practice and the ethical economy of the profession."[12]

The question posed by Arthurs in 1995 as to the lifespan, goals, and ultimate efficacy of lawyer regulation is the final recurring theme of the conference. It is also the most significant. It underlies the themes previously identified — the effectiveness of output versus input regulation, legal ethics as a matter of moral or economic norms, and the professionalism project as one of exclusion — in addition to being an important point of discussion in its own right.

It was with this theme that the conference began, fittingly enough, with Arthurs' keynote speech, "Will the Law Society of Alberta Celebrate its Bicentenary?" reproduced at the beginning of this issue.[13] In his speech, Arthurs builds on this and other works, although now the death knell rings for regional regulation of lawyers in any form, and perhaps even for the concept of "law" as an autonomous profession. He identifies the enormous changes that have occurred, and that are continuing to occur, within the legal profession: a radical shift in its demographics; its growing stratification and fragmentation with distinct practice areas and specialties; disparate client populations, service models, and revenues; the advent of national and transnational markets for legal services with national and international law firms; and the ability for non-lawyers to compete in providing legal services and the concomitant growth of multi-disciplinary "law" practices. Arthurs suggests that the role of a provincial law society, which evolved at a time when all lawyers within its jurisdiction operated in small or sole law firms serving local individual clients, only fits awkwardly, if at all, into this new demographic reality. He suggests that "developments external to the legal profession are leading to internal changes which are likely to threaten its knowledge base, its monopoly, its governance structures, and perhaps its very existence."[14] The dead parrot, it appears, is being joined by the demise of the aviary.

Duncan Webb's article "Are Lawyers Regulatable?" takes a similarly pessimistic view of the future of lawyer regulation.[15] The basis for Webb's pessimism is, however, quite different from that of Arthurs. Webb's central observation is not that the nature of legal practice has shifted such that the task of regulating lawyers has become untenable; rather, he posits it may simply be that the project of lawyer regulation always and inescapably contains the conditions for its own failure. Lawyers' professional training as rule-makers and skeptics make them a challenging subject for regulatory governance by set norms. The complexity, opaqueness, and power of lawyers' work, and of their relationship to clients, creates

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11 H.W. Arthurs, "The Dead Parrot: Does Professional Self-regulation Exhibit Vital Signs?" (1995) 33 Alta. L. Rev. 800.

12 *Ibid.* at 803.

13 Harry W. Arthurs, "Will the Law Society of Alberta Celebrate its Bicentenary?" (2008) 45:5 Alta. L. Rev. 15.

14 *Ibid.* at 27.

15 Duncan Webb, "Are Lawyers Regulatable?" (2008) 45:5 Alta. L. Rev. 233.

difficulties in establishing appropriate regulatory oversight of that work, particularly in light of the universal problem of balancing between "fair rules and clear rules"[16] in establishing a regulatory structure. Finally, while self-regulation is difficult to justify — and suffers from fundamental weaknesses arising from lawyers' often conflicting roles — alternate regulatory structures also suffer from weaknesses related to regulatory capture and like problems. Ultimately, Webb concludes that "[g]iven who lawyers are, what they do, and the natural inclination to self-interest, regulation is difficult at best and arguably impossible to achieve in any meaningful way."[17]

Trebilcock's perspective on lawyer regulation is less pessimistic, although he by no means underestimates the magnitude of the regulatory challenge.[18] After briefly overviewing the traditional rationale for professional regulation, Trebilcock reviews different policy instruments through which such regulation can take place. As previously noted, Trebilcock relates the traditional reliance of regulatory bodies on input regulation through devices such as licensure requirements, specialty certification, and mandatory continuing education and periodic re-qualification. In general, Trebilcock expresses skepticism about the ability of input regulation to best serve or protect the interests of consumers. He then considers output regulation such as negligence liability, the establishment of regulatory standards, and professional discipline. He notes, in keeping with Arthurs' analysis of the ethical economy of the legal profession, that, in general, the emphasis of output regulation has been on professional misconduct rather than either passive (in response to problems) or active (prior to specific problems arising) concerns with lawyer competence. Trebilcock suggests, again, that this orientation is insufficient to ensure the maximization of consumer welfare. While no single regulatory approach is likely to be appropriate for all practitioners, a more targeted focus on lawyer competence should be undertaken. Finally, Trebilcock considers different models through which lawyer regulation can be achieved, ultimately concluding that a modified form of self-regulation is the most desirable.

In "The End(s) of Self-Regulation," Richard F. Devlin and Porter Heffernan adopt a less supportive view of self-regulation.[19] They note a "top ten" list of examples of regulation in the Canadian legal profession — ranging from the inability of regulators to answer satisfactorily the ethical question of what a lawyer should do if she receives physical evidence of a crime, to unethical billing, to the overstated and declining nature of pro bono activities — which together suggest that complacency in the efficacy of self-regulation is unwarranted. They also assess regulation in other commonwealth jurisdictions and observe that Canada is now an outlier in its reliance on a self-governing model of regulation. In England and Wales, Scotland, Australia, Ireland, and New Zealand, governments are shifting towards greater non-lawyer involvement in the governance of lawyers. Devlin and Heffernan thus pose this question: if self-regulation in Canada is notable for a number of significant failures, and it is out of keeping with the approach of other commonwealth jurisdictions, is it a model to be abandoned? To assess this question they consider not only the traditional justifications in favour of self-regulation, but also the compelling conceptual critiques levied against it. In addition, they assess why in Canada there has been relatively little discussion

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16 *Ibid.* at 240.

17 *Ibid.* at 253.

18 *Supra* note 1.

19 Richard F. Devlin & Porter Heffernan, "The End(s) of Self-Regulation" (2008) 45:5 Alta. L. Rev. 169.

or debate around self-regulation of the profession. Ultimately, while not prescribing any specific regulatory framework for adoption, they argue that self-regulation should be replaced by "calibrated regulation" in which governance of the profession occurs through a "hybrid and nuanced constellation of civil society/market/state-based regulatory instruments that can be synergistically deployed (in an increasingly intensified way from co-operation to coercion) in a contextually sensitive manner."[20] To this end, they suggest that the Federation of Law Societies establish a task force to consider the present state of, and future possibilities for, governance of the Canadian legal profession.

Together these articles open a series of questions on lawyer regulation that require further consideration and development: Is regulation a useful activity for governments to undertake or should market forces simply be left to operate? Should regulation shift its focus to account for the changing nature of the legal profession and legal practice? With what type of lawyer conduct should regulators be most concerned? Who should be the regulator? It is likely that these questions defy definitive answers and, also, in many cases meaningful practical responses. In engaging with professional governance it is important to be alive to the uncertain and changing environment in which that governance takes place, and to the possibility for there to be better ways of doing so.

E. WHERE FROM HERE?

Participating in this conference was a remarkable privilege, and as almost every speaker noted, the LSA is to be strongly commended for its willingness to encourage critical debate about the regulatory project with which it has long been engaged. Through its next centenary, the Law Society will be forced to grapple with intractable challenges, particularly those related to the transformation of the profession and practice, and the changing models of professional regulation.

The magnitude of those challenges was expressed forcefully and eloquently in the speech given by A. Anne McLellan, former Deputy Prime Minister, at the closing dinner for the conference, and which is also reproduced in this issue.[21] McLellan frames her speech around the question, "Where have all the women gone?" which was first asked of her with respect to women in politics, but which she cogently argues could apply equally to women in many aspects of legal practice. She notes the significant and now long-standing entry of women into the legal profession, but questions why that entry has not translated into either power or place within the profession. Women have yet to make sustainable and significant gains in the high-status world of private legal practice, making their mark instead in government, as in-house corporate counsel (who are arguably marginalized within the corporate world), and in academia. McLellan suggests that the culture and practices of private law firms, with their emphasis on business and profit, have made it next to impossible for women to succeed in such an environment, and have taken their toll on men as well. She does not — nor could she — offer simple solutions to this deeply rooted dilemma, but she does clearly present it as a continuing and growing issue with which law societies, as regulators and leaders of the profession, must continue to grapple.

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20 *Ibid.* at 196-97.

21 A. Anne McLellan, "Where Have All the Women Gone?" (2008) 45:5 Alta. L. Rev. 259.

Alberta's legal profession today would be almost unrecognizable to the gentlemen who founded the LSA one hundred years ago. In the ensuing century, the Law Society has adapted and has refined its regulatory roles and responsibilities. More adaptation and refinement will inevitably be required; hopefully the ideas contained in this issue will provide both a context and a dialogue through which that process can begin.