

RHETORIC AND REALITIES: What Independence of the Bar Requires of Lawyer Regulation

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ABSTRACT

The Canadian legal profession is largely self-regulating. Provincial law societies governed by lawyers elected by their peers set the standards for admission to the profession and for ethical conduct, and investigate, prosecute and adjudicate allegations of professional misconduct by lawyers. Advocates for this regulatory structure rely on the concept of “independence of the bar”, the idea that lawyers must be free from any external interference with their representation of clients. Critics of the regulatory structure, meanwhile, argue that independence has a broader meaning than the advocates suppose and that, in any event, the self-regulatory structure of the Canadian profession is not necessary to ensure independence.

This paper presents the varying interpretations of independence of the bar and suggests that while the advocates for self-regulation have a more justifiable understanding of independence than do critics, the concept of independence of the bar is not itself central to assessing the validity of any particular regulatory scheme. Rather, the things that independence should protect – the ability of lawyers to be zealous advocates for clients within the bounds of legality – should be used to assess the adequacies of any regulatory scheme. Does regulation ensure that lawyers fulfill their duty of zealous advocacy? Does regulation ensure that lawyers remain within the bounds of legality? Does regulation ensure access to justice?

With these criteria in mind, and using recent changes to the regulation of lawyers in England and Wales as a comparator, the paper then analyzes the adequacy of regulation of Canadian lawyers with respect to competence, the general structure of professional regulation and access to justice. Based on this analysis, the author proposes changes to improve lawyer regulation in Canada. These changes do not abandon self-regulation. However, they include separating the adjudicative function of the law societies into a distinct dispute resolution entity with expanded regulatory powers in relation to hearing complaints brought directly by the public, addressing a broader range of matters in relation to competence and client service, and providing remedies beyond sanctioning lawyers. The changes would also include the creation of a legal regulatory review office in each province, governed by lawyers and non-lawyers alike, to exercise some constrained oversight and review of law society activities. Finally, the changes propose a variety of ways to enhance access to justice such as focusing law society activities on improving the functioning of the market for legal services through providing greater information to clients.

¹ Professor of Law, Faculty of Law, University of Calgary. I would like to thank Randal Graham, Richard Devlin and the anonymous reviewer for their very helpful comments on this paper, Brynne Harding for her research support and also the School of Public Policy for their financial support of the research associated with its preparation.

I. INTRODUCTION

The Supreme Court of Canada has stated that “independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society;”² lawyers must be “free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.”³ Independence of the bar is constitutionally protected.⁴

Lawyers in Canada rely on the constitutional principle of independence to justify the self-regulatory powers they enjoy, emphasizing the importance of ensuring lawyers are free from unwarranted state interference in the representation of their clients.⁵ The former president of the Law Society of British Columbia, Gordon Turriff, has, for example, identified independence of the bar as requiring that lawyers “be free of all influences that might impair their ability to discharge the duty of loyalty they owe each of their clients.”⁶ He has argued that the significance of this independence is such that the legislative grant of power to the provincial law societies is not the source of lawyers’ self-regulatory authority, but is rather an irrevocable legislative recognition of that authority:

The staunchest independence champions maintain that the statute does not *give* lawyers independence and does not extend them the *privilege* of self-governance. Rather, we say that the statute was enacted to aid us in acting independently and as a recognition of self-governance as a necessary condition of independence. If independence were a gift of the legislature, not a constitutional imperative, it would be a gift that could be taken back by legislators who were unhappy with challenges lawyers made to state action, and if self-governance were a privilege, it would be a privilege that could be revoked if the self-governors offended the state.⁷

Not every one accepts this perspective on what independence of the bar means or requires, however. Academics writing about independence generally recognize its importance, but view conventional descriptions of such independence, including the type of descriptions given by the Supreme Court, as too one-sided.⁸ They argue that as much as independence from the state, lawyers require independence from their clients, and from the corrupting influence of market forces. Pressures from the market lead lawyers to favour advocacy for power and the status quo,

² *Canada (Attorney General) v. Law Society of British Columbia* [1982] 2 S.C.R. 307 at 336.

³ *Pearlman v. Manitoba Law Society Judicial Committee* [1991] 2 S.C.R. 869 at 887, quoting from the *Report of the Professional Organizations Committee* (1980).

⁴ Patrick J. Monahan, “The Independence of the Bar as a Constitutional Principle in Canada” in *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada’s Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Law Society of Upper Canada, 2007) p. 117.

⁵ In Québec the Barreau du Québec is under the jurisdiction and governance of the Professions Office.

⁶ Gordon Turriff, “Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia” (Vancouver: Law Society of British Columbia, 2009).

⁷ [emphasis in original] *Ibid.* See also, 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, “Protecting the Public Through an Independent Bar: The rights guaranteed to all Canadians are dependent upon an independent bar;” Herman J. Russomanno, “An Independent Bar and Judiciary: As American as Baseball and Apple Pie” (2001) 75 *Fla. Bar. J.* 4.

⁸ See, for example, Randal Graham, *Legal Ethics: Theories, Cases and Professional Regulation*, 2d ed. (Toronto: Emond Montgomery Publications, 2011) p. 435.

rather than advocacy for the truly disadvantaged or vulnerable.⁹ Pressures from clients lead lawyers to simply do what they are asked to do, without independent consideration of what the law, understood purposefully, would permit. To be sufficient, a definition of independence of the bar must include independence from any force that will undermine the lawyer's fulfillment of her legal and ethical obligations:

As an advocate, a lawyer must sometimes resist state authority and public opinion to resolve ambiguities in favor of preserving her client's rights. I call this 'client motivated' independence. As an officer of the court, on the other hand, the lawyer must sometimes resist any public or private actor, including her client, who seeks to pressure her into resolving an ambiguous legal command in a manner that undermines its fundamental purposes or otherwise damages the legal framework. I call this "publicly motivated" independence.¹⁰

Further, those skeptical of self-regulation suggest that independence of the bar does not lead inexorably to self-regulation as a model for governance of the legal profession. Given the use of different regulatory models in other liberal democracies, self-regulation cannot be demonstrated to be necessary for the accomplishment of an independent profession and it cannot plausibly be suggested that different regulatory models will inevitably create improper interference with lawyer independence.¹¹

In general the academics and skeptics (who I'll collectively call 'the critics') appear to have the better of this argument. They acknowledge that independence is important, but they complicate the analysis of what independence means, and they point out the empirical weakness in any simplistic connection between independence and self-regulation. There are, however, problems with their analysis as well. Most significantly, while the critics are correct that independence of the bar must involve more than freedom from state interference, their own analysis and articulation of independence of the bar rests on a particular conception of the ethical and legal duties of the lawyer, one which is at best more controversial than the critics acknowledge, and at worst is both inconsistent with the norms of our system of laws and does not properly respect the authority and legitimacy of law as a form of social cooperation. Indeed, the dispute between independence-championing lawyers like Turiff and the critics is, at heart, a dispute about the nature of lawyers' legal and ethical duties, not about independence of the bar at all. And the problem with the dispute is that on the one hand the lawyers (and even the Supreme Court) do not articulate or defend the underlying legal and ethical duties of the lawyer on which they rely sufficiently, and on the other hand the critics do not articulate those duties in a way that is descriptively accurate or normatively justifiable.

⁹ Philip Girard, "The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities" in *In the Public Interest*, note 3, *supra* at 75-79: "a study of the ideals and aspirations of the Bar in the early decades of the twentieth century suggests a climate in which bar leaders defined the proper province of the legal profession as the defence of the state, business interests, and the status quo" (77).

¹⁰ David Wilkins, "Who Should Regulate Lawyers?" (1992) 105 *Harv. Law Rev.* 801 at 865. See also, W. Wesley Pue, "Death Squads and 'Directions over Lunch': A Comparative Review of the Independence of the Bar" in *In the Public Interest*, note 3, *supra* at 84;

¹¹ See: Harry Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995), 33 *Alta. Law Rev.* 800 at 801; Wilkins, *ibid.* at 854; Duncan Webb, "Are Lawyers Regulatable" (2008) 153 *Alta. Law Rev.* 233 at 244; Richard Devlin and Porter Heffernan, "The End(s) of Self-Regulation?" (2008) 45 *Alta. Law Rev.* 169 at 192.

Further, while critics of self-regulation acknowledge that independence of the bar is relevant to the assessment of any regulatory scheme, they tend either to not articulate very clearly what independence of the bar might mean or, if they do, their identification is connected to their problematic identification of the ethical and legal duties of the lawyer, and as such is not especially helpful.

In this paper I argue that in critiquing lawyer regulation, or designing regulatory change, ensuring respect for independence of the bar *does* matter, but that independence of the bar is not, in and of itself, a normative principle against which the adequacy and sufficiency of lawyer regulation should be assessed. Rather, lawyer independence is a mechanism for achieving the normative principles that constitute and underlie lawyers' legal and ethical obligations. Specifically, lawyers are zealous advocates within the bounds of legality, and they have that role because it is essential for permitting a system of laws to fulfill its purpose as a scheme of social cooperation. It is *those* normative principles that regulation must protect, and against which the adequacy of any regulatory scheme governing lawyers should be assessed.

Section II defends this perspective on independence of the bar, and the identification of the lawyer's role as a zealous advocate within the bounds of legality as essential to the accomplishment of the law's ends. Section III identifies the specific set of metrics for assessing lawyer regulation that follow from the identification of the relationship between independence of the bar and the normative content and foundations of the lawyer's role. Finally, Section IV undertakes an extended analysis of three specific issues with respect to the regulation of lawyers in Canada: 1) ensuring lawyer competence; 2) institutional reform, including self-regulation and 3) access to justice. I evaluate and critique the current regulatory approach to each in light of the metrics identified in Section III, using as a comparator recent regulatory changes in England and Wales. I conclude by advocating for structural changes to permit better regulation of lawyer competence and misconduct, as well as steps that should be taken to reduce the significant and increasing gap between legal needs and legal services.

II. DEFINING INDEPENDENCE OF THE BAR

To demonstrate that independence of the bar is important only as a mechanism to protect the normative content and foundations of the lawyer's role, this section begins by describing the traditional justifications for lawyer independence. It shows how those traditional justifications note the relationship between independence and the lawyer's role, but provide a weak articulation of the content of that role. It then outlines the more critical perspectives on independence and demonstrates how those critical perspectives depend on an explanation of the lawyer's role as one of "public-minded counseling."¹² Finally, it critiques public-minded counseling as a description of the lawyer's role, explaining why the lawyer's role is better understood as one of zealous advocacy within the bounds of legality and what that means for the role of independence in critiquing and evaluating lawyer regulation.

¹² Robert Gordon, "The Independence of Lawyers" (1988) 68 *B.U.L. Rev.* 1 at 38.

A. Traditional Understandings

In defending self-regulation through the principle of independence, Gordon Turriff begins by suggesting that the rule of law “is the keystone for order, and the key to prosperity, in all our communities. The rule of law is a conception, a shared commitment to a set of interdependent propositions about how people can live together under arrangements that guarantee fairness in all respects.”¹³ He suggests that one of the propositions underlying the rule of law is the ability of lawyers to be “free of all influences that might impair their ability to discharge the duty of loyalty they owe each of their clients”¹⁴ – i.e., independence of the bar. Turriff thus invokes the rule of law and the lawyer’s duty of loyalty as underpinning lawyer independence, as both what explains independence and what independence protects. He does not, however, suggest much in the way of content for those principles, the ways in which they might be complicated in practice or how they might need to be balanced with other duties. How far, for example, does loyalty go? What, if anything, constrains it? Why would the rule of law be of value unless the substantive norms of the legal system are themselves fair and just? How these questions are answered matters for determining what it is that independence is and what it serves to protect.

In its consideration of independence of the bar, the Law Society of Upper Canada Task Force on Independence of the Bar invokes more than the lawyer’s duty of loyalty, noting as well the lawyer’s “duty of integrity and honesty as an officer of the court.”¹⁵ The Task Force suggests that these values require independence of the bar, that lawyers be able to “exercise independent judgment” in reconciling their duty to the court and to the client and that a lawyer must “remain free of external manipulation, state interference or ulterior influence in performing his or her duties.”¹⁶ Again, however, the Task Force does not delve into the meaning of the principles that they say mandate independence. What is the content of the duty of integrity? Is it integrity between the lawyer’s professional role and her personal moral values?¹⁷ Or is it integrity in the lawyer’s identification and interpretation of her various legal obligations?¹⁸ What attitude to the law is embedded in the notion of “officer of the court?” Is the lawyer to seek to fulfill the law’s underlying purposes, or may the lawyer rely on technical interpretations of the law to fulfill a client purpose that the lawyer believes to be immoral? How these questions are answered determines what independence means and requires.

As noted at the outset of the paper, the Supreme Court of Canada has also recognized the constitutional significance of an independent bar for the functioning of the legal system and the protection of the rule of law. Further, the Supreme Court has recognized the constitutional significance of individuals being given effective assistance of counsel in criminal cases and has noted in various cases the lawyer’s duties of confidentiality, of loyal advocacy and to be free

¹³ Turriff, note 5, *supra*.

¹⁴ Turriff, note 5, *supra*.

¹⁵ Law Society of Upper Canada Task Force Report, note 6, *supra* at 7.

¹⁶ *Ibid* at 8.

¹⁷ See, Gerald Postema, “Moral Responsibility and Professional Ethics” (1980) 55 *N.Y.U. Law Rev.* 63; Alice Woolley, “Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer” (1996) 9 *Cdn. Jour. of Law and Juris.* 61.

¹⁸ Perhaps in a Dworkinian sense, in which the lawyer, like Dworkin’s judge Hercules, tries to “decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.” Ronald Dworkin, *Law’s Empire* (Cambridge: Harvard University Press, 1986) at 255.

from conflicting interests.¹⁹ In general, though, the Court has not itself recognized the interconnection between the lawyer's ethical duties and independence of the bar, or the extent to which the meaning of independence of the bar might follow from, or be informed by, how we understand the lawyer's ethical responsibilities. Independence of the bar is simply an abstract principle, like freedom, liberty, democracy or, relatedly, the rule of law, invoked by the Court on its way to making a determination on some particular matter at issue, such as the ability of law societies to regulate advertising.²⁰ The principle may in some way inform the decision, but the connection between the principle and any particular lawyerly duty, or doctrinal requirement – i.e., what it serves to protect – is not very clear.

B. Critical Assessments

For Turriff, the Law Society Task Force and the Supreme Court of Canada, independence exists to protect something of value – the lawyer's ethical obligations and the rule of law – but what specifically it protects is not well explained. This creates some problems, even within the internal argument of the Task Force Report. For example, the Task Force purports to adopt the four meanings of independence of the bar outlined by Robert Gordon in his seminal paper, “The Independence of Lawyers,”²¹ including the requirement that lawyers’ “personal and political convictions cannot be purchased or coerced” and that “a part of the lawyer’s professional persona must be set aside for dedication to public purposes.”²² Yet in his article, Gordon reaches and justifies this aspect of independence through defending a view of lawyers’ legal and ethical duties that is not consistent with that generally identified by the Task Force and which, I venture to guess, the lawyers on the Task Force would reject.

Gordon is, in fact, the person writing about independence of the bar who best engages with the relationship between independence and the ethical duties of the lawyer. In so doing, Gordon rejects the “liberal advocacy” model of the lawyers’ duties in which the emphasis is on loyalty to the client with only the “barest obligations” to the system of laws.²³ He argues instead that the duties of lawyers include an active duty to protect the functioning of the framework of law. In general, lawyers “should feel free, and on some occasions even obliged, to promote legal viewpoints and policies differing from those which their clients might perceive to be in their immediate interests.”²⁴ Gordon endorses in this respect the arguments of David Luban and William Simon against the traditional model of liberal advocacy. Luban argues that every lawyer retains personal moral agency and duties with respect to the work she does for a client, and that to the extent a client wishes to pursue ends which are legally permitted but morally wrongful, the lawyer has a duty not to assist the client in pursuing those ends.²⁵ Simon argues

¹⁹ The Supreme Court’s jurisprudence on these matters is discussed cogently by Patrick Monahan, note 3, *supra* at 121-133.

²⁰ E.g., *Canada (Attorney General)*, note 1, *supra*.

²¹ Gordon note 11, *supra*

²² *Ibid.* at 7.

²³ *Ibid.* at 20.

²⁴ *Ibid.* at 30.

²⁵ *Ibid.* at 20, footnote 59. My summary draws on Luban’s later work, and in particular *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007).

that every lawyer has a duty to do that which, in each case, is most likely to promote legal merit, with legal merit defined in a rich natural law sense – the true purpose and function of a particular law, rather than its technical meaning.²⁶ In a footnote Gordon cites Luban and Simon and states:

I have to admit that some weariness descends at the prospect of having to explain again, as many have far more ably than I have done in the past, why the Adversary-Advocacy model of lawyering, outside of certain highly structured contexts, is severely deficient as a practical method of realizing any theory of the goals of universal access, even-handed administration of the laws, or simply the goal of client autonomy, in a liberal legal system... But this model [of Adversary-Advocacy] continues to dominate lawyers' public discourse about ethics, often without any accompanying recognition of the arguments that may be made against it.²⁷

Gordon's rejection of the Adversary-Advocacy model leads him to emphasize the importance of independence from clients, rather than independence from the state. It is clients, not the state, who are most likely to push lawyers away from this public interest conception of the lawyers' duties. He argues that the environments within which lawyers work, their own motivations and the professional culture, must facilitate a "public-minded counseling model of lawyers' work."²⁸ Gordon recognizes the difficulty in establishing such a model but suggests that working towards that project, even incrementally through "modest steps,"²⁹ is worth doing:

What is most puzzling to Eastern European dissidents like (Vaclav) Havel, who have so little power and freedom but make every use of it they can, is why Western intellectuals and professionals, who seem to have so much, do so little with what they have and claim to have none. What is needed to produce the 'independent life of society' is the will, reflection on how best to use it, collaboration with others, and action.³⁰

This rejection of the Adversary-Advocacy model also appears to animate David Wilkin's scholarship on the independence of the bar. In his oft-cited article "Who Should Regulate Lawyers?"³¹ Wilkins acknowledges that independence of the bar is relevant for assessing the merits of a particular regulatory initiative and defines independence as including independence both from the state and from the client. In so doing he does not expressly reject the Adversary-Advocacy model; however, he argues that lawyers have an obligation to "dissuade recalcitrant clients from undermining long-term legal values"³² and that they must take both client interests and "the public purposes underlying relevant legal restrictions"³³ into account when advising clients. These statements of lawyers' duties clearly invoke – and I think are meant to invoke – the same public-orientated model of the lawyer's role advocated for by Gordon.

²⁶ Unless technical meaning will generate the most justice, a possibility which Simon expressly contemplates. See, in general, William Simon, "Ethical Discretion in Lawyering" (1988) 101 *Harv. Law Rev.* 1083.

²⁷ *Ibid.*

²⁸ *Ibid.* at 38.

²⁹ *Ibid.* at 82.

³⁰ *Ibid.* at 83.

³¹ Note 9, *supra*.

³² *Ibid.* at 860.

³³ *Ibid.* at 862.

C. Zealous Advocacy Within the Law and Independence of the Bar

As suggested earlier, Gordon and Wilkins' public-oriented model is fundamentally inconsistent with how Canadian lawyers identify their legal and ethical obligations. In Canadian legal culture lawyers understand themselves to be zealous advocates, pursuing the goals of their client without judging the merits or virtues of those client goals.³⁴ Trevor Farrow has stated that the dominant cultural understanding of the lawyer's role is "to advance zealously the client's cause with all legal means; to be personally neutral vis-à-vis the result of the client's cause; and to leave the ultimate ethical, personal, economic and social bases for the decision to proceed in the hands of the client."³⁵ Lawyer advocacy understood in this way is not unbridled; as the Task Force suggests, lawyers see themselves as having obligations to the court and to the system of laws. However, those obligations, although real and significant, are also defined and limited and generally focus on the lawyer's obligation to ensure that a client comply with the requirements of the law.³⁶ Thus, if the law allows a landlord to evict a tenant, the lawyer may ethically assist the landlord to do so even if the tenant is poor and vulnerable and the landlord's reasons are morally unappealing. A lawyer may cross-examine an honest person to make that person appear dishonest, provided the lawyer does so somewhat respectfully and without lying to the court. A lawyer may help a corporate client resist the application of environmental standards to its manufacturing plant in a facilities approval hearing, even if doing so successfully will result in degradation of the water supply to a local community. The lawyer may make legal arguments in court that the lawyer thinks would, if accepted, make Canadian law less just, less fair or less coherent. Doing these things is not morally uncomplicated, but it is both consistent with, and is sometimes required by,³⁷ the lawyer's role as perceived by Canadian lawyers.

Moreover, while not well explained by the lawyers and judges who invoke it, the role of lawyers as zealous advocates within the bounds of legality can be normatively defended in ways that Gordon in particular dismisses too quickly. Zealous advocacy is not only accepted in Canadian legal culture, it's also consistent with the principles and structure of Canadian law and can be morally justified. Lawyers are zealous advocates within the bounds of legality because the morally and socially valuable purposes of a system of laws cannot be fulfilled unless lawyers play that role.³⁸

³⁴ See, Alice Woolley *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis, 2011) at 22-23; Graham, note 7 at 47-53; David Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 *Dalhousie L.J.* 267 at 271; Allan C. Hutchinson, "Calgary and Everything After: A Postmodern Re-Vision of Lawyering" (1995) 33 *Alta. L. Rev.* 768 at 770.

³⁵ Trevor Farrow, "Sustainable Professionalism" (2008) 46 *Osgoode Hall L.J.* 51 at 63. Farrow rejects the normative validity of the dominant conception.

³⁶ *Ibid.*

³⁷ The "sometimes" follows from three points. First, a lawyer never has an obligation to take on a particular client or case. Second, a lawyer may attempt to dissuade a client from doing something the lawyer believes to be immoral. Third, in some circumstances a lawyer may be permitted to withdraw from a representation. If, however, a lawyer has taken on a case, the client is not dissuaded and the client's goals are permitted by law, then the lawyer's obligation is to assist the client to achieve those goals, regardless of their immorality.

³⁸ The arguments I make here are set out in more detail in *Understanding Lawyers' Ethics in Canada*, note 33, *supra*, Chapter 2. See also, Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Burlington: Ashgate Publishing Company, 2009); W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010).

A system of laws exists as a form of social cooperation. It permits people who have significantly divergent opinions on the right way to live to set out the terms for their peaceful co-existence, and to settle their disputes without violence:

Law is a public measure by which one can measure one's own as well as other people's behaviour. It helps to secure social cooperation not only through its sanctions providing motivation for conformity but also through designating in an accessible way the patterns of behavior required for such co-operation.³⁹

The law allows people to overcome barriers for collective action, to regulate conduct that the market cannot regulate effectively⁴⁰ and to implement social policies that the community believes to be of value and importance. Under a system of laws, people can live freely, pursuing their own conception of the good within what the law permits, requires or enables. As suggested by Tim Dare, law is a response to the problem of pluralism, to the fact that citizens in a society will have deep conflicts about what constitutes the right way to live. Peaceful co-existence requires a system of rules and principles that reflect the compromise or general will about how those conflicts should be resolved.⁴¹ That system is what we call law, and within its confines citizens are free to live the life they choose;⁴² moreover, they may not be denied the benefits that the law provides.

The substantive principles of Canadian law reflect this perspective on the role of law in a free and democratic society. Across a variety of contexts, the Supreme Court of Canada has held that the state may not act against individuals without legal authority, that the law must be applied in a way that is procedurally fair and that benefits granted by the law cannot be denied to those entitled to them.⁴³

In order to achieve these ends, however, laws must be accessible by the citizenry; people must know what the law permits, enables or requires, in order to live freely within it. The law must be accessible if it is to overcome barriers to collective action, to regulate or to allow the implementation of public policy. Unless it is accessible, the law can achieve little.

Making the law accessible requires lawyers. The law is complex and sometimes opaque and often its meaning can only be settled through some sort of adjudicative or regulatory process. People need individuals who are legally trained to explain what the law means and to assist them in challenging the law or resisting its improper application. Lawyers have no power to achieve for the citizenry more than the law provides or to do more for citizens than those citizens could lawfully do for themselves, but within the boundaries of the law lawyers zealously advocate for the accomplishment of their clients' goals and wishes. They do not substitute their own moral assessments for those of their clients; were they to do this, it would replace the social compromise of the rule of law with rule by lawyers. Instead, they work competently, effectively and diligently – zealously – to help clients pursue their own ideas about how to live within the bounds of the law.

³⁹ Joseph Raz, *The Authority of Law*, 2d. ed. (Oxford: Oxford University Press, 2009) at 51. See also, H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1994) p. 87, where he describes law as a system of rules “necessary to the maintenance of social life or some prized feature of it.”

⁴⁰ I am assuming here a market as considered apart from the law, rather than considering the law as constituting the market in some contexts, i.e., that the law affects the market, but does not constitute it.

⁴¹ Dare, note 33, *supra* at 57.

⁴² *Ibid.* at 72.

⁴³ See *Understanding Lawyers' Ethics in Canada* at 25-31.

Canadian law also recognizes these principles. The Supreme Court has recognized the need for people to have access to lawyers and the role that lawyers play in the legal system.⁴⁴

This justification for the lawyer as a zealous advocate itself dictates the limits on that advocacy. The lawyer's role is not to obtain for the client whatever the client wants. The lawyer is not a gunman for hire. Rather, the lawyer helps the client pursue her conception of the good *within the bounds of the law*. The lawyer must be able to engage in good faith interpretation of the law, to determine the difference between what the law provides and what the law can simply be made to give.⁴⁵ The lawyer cannot be a morally blinkered technocrat, ignoring the meaning of the law, interpreted reasonably and in good faith. A lawyer may not engage in quasi-legal subterfuge. While the law can be subject to varying interpretations and does not always dictate a single response or answer, it also has a core meaning, interpretations that it does not permit and that cannot be reasonably sustained. As suggested by Marty Lederman in discussing H.L.A. Hart's example of the meaning of a statute forbidding vehicles in the park, we may not know prior to adjudication of the matter whether vehicles include a stroller or an ambulance, but we certainly know that the statute prohibits driving a souped-up Corvette through the park.⁴⁶ Lawyers have an obligation to restrict their advocacy for clients to these legal boundaries.

Again, this view of the law as being a legitimate source of guidance to people, as complex but susceptible to meaningful interpretation, is one that Canadian law itself incorporates. In its administrative law jurisprudence, for example, the Supreme Court has suggested that while in some circumstances the meaning of law is sufficiently ambiguous to lend itself to more than one reasonable interpretation, there are interpretations that are too unreasonable to be permitted, that fall outside the range of meanings that the law can bear.⁴⁷

If the law can have a range of meanings, though, then why is the role of the lawyer not more broadly conceived along the lines of the public interest counselor? Why should the lawyer be viewed as a zealous advocate within the bounds of legality rather than as someone who has additionally the obligation to ensure that the true purposes of law are achieved and the principles of morality respected? The fundamental problem with giving lawyers the role of public interest counselors is that, however much its advocates try to finesse this point, it makes lawyers moral gatekeepers in the relationship with their clients. It requires lawyers to go beyond good faith interpretation of the law to make moral assessments of the law's purpose and, if following Luban, to refuse to pursue client goals which, although lawful, the lawyer views as morally wrongful. Yet the idea of law as rules that permit social cooperation necessarily contemplates that individuals, within the rules, will make their own assessment of the right way to live. It recognizes that on important moral questions people disagree, and that

⁴⁴ *Ibid.* at 32-33.

⁴⁵ An example of something the law can be made to give but which the law does not actually provide, is where a lawyer sends a demand letter asserting a legal claim that is not valid in order to make another person do what the lawyer's client wants, or where a lawyer uses delay to prevent a matter from proceeding. On the other hand, pleading a limitation period to avoid a just debt is something that the law does actually provide, not something that it can simply be made to give.

⁴⁶ Marty Lederman, "Sorry, Ben, but Judge Mukasey Can (and Should) Answer the Question" October 29, 2007, Balkinization. <http://balkin.blogspot.com/2007/10/sorry-ben-but-judge-mukasey-should.html>

⁴⁷ *Dunsmuir v. New Brunswick* [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.); *Understanding Lawyers Ethics in Canada*, note 33, *supra* at 31-32.

the only legitimate restrictions imposed on individuals within the system of social cooperation are the ones that the system itself imposes. This necessarily requires that at points of moral uncertainty the client, not the lawyer, should make decisions.⁴⁸

This does not eliminate the moral complexity of the things that a lawyer may do in any particular case. A lawyer who makes an honest person look like a liar may not feel content with the morality of that act, or that having done so is consistent with achieving a life well-lived. The lawyer may subjectively experience her conduct as immoral. She may do so because, were she to do those things outside her role as a lawyer, they would not be morally justified. Nonetheless, as suggested by Dare, the explanation and moral justification for the lawyer's role means that the lawyer's actions are moral, objectively speaking.⁴⁹ The objective morality of a lawyer's acts arises institutionally and systemically; the objective moral question asked about the conduct of an individual lawyer is only whether that conduct is consistent with the institutional and systemic requirements of the role, not whether it would be considered moral if performed outside of that morally justified role and not how a particular lawyer experiences the actions that her role requires.⁵⁰

⁴⁸ The problem with this argument arises with immoral laws in wicked legal systems. Where, to use an example discussed in the Hart-Fuller debate, a judge makes a statement that a person has committed treason, where the statutory definition of treason is indefensible and, in any event, there is no legitimate reason to believe the person has violated that definition. That judicial statement is not, Fuller argues, law at all, and the question of whether to respect that law in the face of a competing moral claim raises no legitimate moral dilemma; it is the equivalent of choosing between giving food to a starving man and "playing mimsy with the borogroves" (Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1957) 71 *Harv. Law Rev.* 630 at 656). Is that sort of "law" something that a lawyer could zealously advocate for, or may argue shields his advocacy from any other moral assessment? In my view it does not. While I enter into uncertain territory in taking sides between the positivists and the non-positivists, I am willing to suggest that any claim the law makes to legitimacy and authority has to be based on some minimum moral content of the sort outlined by Fuller and, more recently, by Nigel Simmonds (Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007)). Legitimacy does not require that the law have any particular substantive content and I may even disagree strongly with the moral position embedded in particular laws. However, to claim legitimacy a legal system or pronouncement must comply with the basic indices of the rule of law, such as publicity, clarity, coherence and consistency between stated rules and their application. Without that legitimacy, the claim made for law here does not stand and does not provide any moral justification for the lawyer who works within it. And even from a positivist point of view, I would note that in *The Authority of Law*, Joseph Raz argues that while in a legal system which grants meaningful rights to political participation there is no moral right to civil disobedience, such a right does exist in a system which does not grant the opportunity for meaningful political participation: "members of the illiberal state do have a right to civil disobedience which is roughly that part of their moral right to political participation which is not recognized in law" (at 273). In such circumstances, lawyers would have a similar right to civil disobedience and could not claim law as an authority to justify acts that might otherwise be considered immoral.

⁴⁹ In this context subjective means "how I experience the act" and objective means "can a reasoned justification be given for my actions." It is a distinction employed by Bernard Williams in the context of utilitarianism. Williams argues, for example, that a person who kills one person to save 20 may be able to objectively justify the morality of doing so, but will nonetheless subjectively experience doing so as fundamentally immoral. For that reason, Williams suggests, objective moral principles have a limited role in guiding or evaluating human conduct. (Bernard Williams, *Ethics and the Limits of Philosophy* (Oxford: Routledge, 2006 (first published 1985)). Daniel Markovits has explored in detail the implications of this point of view for lawyer's ethics and has tried to articulate a modality of lawyering that unites the subjective and the objective (Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton: Princeton University Press, 2008). Markovits' analysis is problematic in a variety of ways. And my point is that our concern, in articulating the meaning of independence of the bar and its ethical foundations, is only with the objective morality of the lawyer's role (see: Alice Woolley, "If Philosophical Legal Ethics is the Answer, What is the Question?" (2010) 60 *UTLJ* 983 and Alice Woolley "Truth or Truthiness: A Modern Legal Ethics' Understanding of the Lawyer and her Community" (2010) 13(2) *Legal Ethics* 231)

⁵⁰ For a similar analysis of the lawyer's role see Graham, note 7, *supra* at 47-53 and 69-73.

If this analysis of the lawyer's legal and ethical obligations is correct, then how do we understand independence of the bar? Nothing in this argument directly indicates that the functioning and point of a system of laws requires lawyer independence; the argument shows only that the functioning and point of the system requires lawyers be legally and ethically obligated to act as zealous advocates within the bounds of legality. Independence of the bar follows from these obligations just to the extent their fulfillment requires it – to the extent lawyers will be zealous advocates within the bounds of legality only if free from external pressures that might lead them, on the one hand, to abandon their zealous advocacy for clients or, on the other hand, to try and achieve for those clients more than the law properly provides.

Further, if we understand regulation of legal services as properly directed towards ensuring that lawyers fulfill their legal and ethical obligations in circumstances where market forces will not achieve that result, then that is the normative end of regulation and the measure against which regulation should be assessed. Independence of the bar is relevant to the assessment of regulation insofar as regulation should ensure, and should be able to ensure, that lawyers are free from external pressures that might distort their fulfillment of their legal and ethical obligations. Independence of the bar is, in other words, a mechanism to permit regulation to achieve its normative ends – the fulfillment of lawyer's legal and ethical obligations.

How to assess regulation in this way and what it means in particular for the asserted (or challenged) relationship between independence of the bar and self-regulation is considered in the next section.

III. INDEPENDENCE OF THE BAR METRICS FOR ASSESSING REGULATION

With its relationship to the lawyer's ethical and legal obligations established, independence of the bar's significance for assessing the regulation of lawyers can be more fully articulated. Regulation of legal services does not need to protect the "independence of the bar" *per se*, but it does need to encourage lawyers to fulfill their duties within the system of laws and prevent interference with their accomplishment of those duties. This leads to five principles against which to assess any particular regulatory scheme:

1. Does the regulation encourage zealous advocacy? Does it create, for example, proper incentives to ensure lawyers are diligent and competent in their service to clients?
2. Does it avoid and prevent initiatives or structures that may discourage or inhibit lawyers' zealous advocacy?
3. Does it provide incentives to ensure lawyers restrict their advocacy to the boundaries of the law, whether in the context of litigation or not?
4. Does it avoid and prevent initiatives or structures that may encourage lawyers to exceed the boundaries of the law?
5. Does it help ensure that individuals can find lawyers to represent them, without impediment either from the unpopularity of their cause or the modesty of their economic means?

These principles do not necessarily run in the same direction at the same time; an initiative which creates incentives to encourage lawyers to stay within the boundaries of legality may arguably discourage lawyers from zealous advocacy, depending on where lines are drawn with specific rules or in particular circumstances. Moreover, these principles must in all cases be

balanced with the overarching regulatory principles of efficiency and effectiveness, and with recognition that regulation should work in conjunction with market forces which may sometimes be better able to achieve the same ends. A regulatory initiative intended to encourage zealous advocacy that is exorbitantly expensive and of dubious effectiveness, or which ignores the effect of the market on the behaviour of lawyers and clients, does not become a positive regulatory initiative simply because its intentions are otherwise normatively justifiable.

It must also be noted that these criteria can be used to assess any regulatory initiative in relation to the regulation of legal services. Barry Barton has defined regulation as:

a process intended to alter activity or behaviour...often by restricting behaviour, but at times enabling or facilitating behaviour that would otherwise not be possible. It is goal-oriented, even if there are multiple goals, and even if the goals get forgotten.⁵¹

Barton further suggests that regulation is institutionalized, involves discretionary judgment, is deliberate and operates in the public sphere.⁵² This means that regulation can include not only traditional regulatory structures like law societies, but also other regulatory activities that affect how lawyers intersect with clients and with the legal system. These would include facilitative activities like the funding of legal aid and judicial decisions about the duties and obligations of lawyers. While some of these regulatory activities may have additional normative principles they need to satisfy, since they involve more than the regulation of lawyers, they should also be assessed in light of the regulatory criteria.

It should further be acknowledged that the fifth principle is distinct from the first four. The first four principles follow from the role of the lawyer, instantiating the basic point that if lawyers are required to be zealous advocates within the bounds of legality, then regulation should be designed to encourage them to fulfill that role and to reduce pressures that inhibit fulfillment of the role. The fifth point asserts instead the critical importance of access to justice. It follows not from the lawyer's role but rather from the reason why the lawyer's role exists. As set out in Section II, the system of laws exists to solve the problem of pluralism. It establishes the ground rules through which social cooperation is possible. Given, however, the complexity and occasional opacity of those rules and the need in many cases to have them applied through adjudication, they cannot meaningfully be accessed most of the time without the help of a lawyer. What that means is that, in effect, if people do not have access to lawyers they do not have access to the law. What happens to them will not necessarily be the application of a social compromise of legality. It may instead be the application of the power of the judge who applies the law to facts that may not reflect what actually happened, or without account for all of the relevant legal rules and principles; of the power of a bureaucrat who either does not understand or does not care what the legislation and regulation actually require in a particular case or, most commonly, of the power of those with financial resources and market power who know that no individual without a lawyer can require them to fulfill their legal obligations. In the clichéd expression, lawyers level the playing field – only the law is not a game and the wins and losses on the scoreboard do not relate only to what happens to the people affected by a particular injustice. The loss when a person experiences an injustice that a lawyer would have prevented is one inflicted on the legal system as a whole and on its ability to claim authority over our conduct.

⁵¹ Barry Barton, "The Theoretical Context of Regulation" in *Regulating Energy and Natural Resources*, Barry Barton, Lila K. Barrera-Hernandez, Alastair Lucas and Anita Ronne eds. (Oxford: Oxford University Press, 2006) pp. 13-14.

⁵² *Ibid.*

This is not to suggest an apocalyptic version of how the law is applied to anyone without a lawyer. Much – perhaps most – of the time, companies comply with the law when dealing with consumers, bureaucrats apply the law fairly to the people with whom they interact and judges manage to sort out what actually happened and what the law requires with respect to the unrepresented litigants appearing before them. Many of our regulatory systems and even some of our courts are designed to facilitate access for the unrepresented. Further, it may not be that the individuals intersecting with power are always best positioned to determine when the law was improperly applied; if everyone had access to a lawyer whenever they needed one, the people who chose to employ the lawyer and fight might be the most pugnacious, not the most ill-treated.

Having said that, it requires some naivety to believe that those without lawyers receive the benefit of the law in the same way and to the same extent as those who have lawyers, and the ability to access those lawyers' expertise and guidance through regulatory and adjudicative systems. Inequality in access to legal services may reach the point where it destabilizes the social compromise of legality. This is the case even though some inequality in access to legal services may be an inevitable byproduct of a free market economy and of the accomplishment of other public policy priorities such as health care, and may also be consistent with a largely functional legal system. Inequality in access can reach a tipping point; whether in Canada we have yet reached that point or not,⁵³ my argument here is simply that regulation of lawyers should be assessed in general terms to see if it facilitates or inhibits access to lawyers and, as well, to determine whether it facilitates access sufficiently to ensure the fulfillment of the law's function as a system of social compromise.

Finally, a sixth evaluative criterion must be considered. In traditional arguments about independence of the bar the issue, for both proponents and critics, is this: does independence of the bar require that lawyers as a group be shielded from direct government interference? Does it require that lawyers' ethical standards be set and enforced by lawyers – i.e., self-regulation⁵⁴?

The five criteria already identified may preclude specific forms of government intervention, or suggest substantive content for some of the content of lawyer regulation. On the broader question of self-regulation, however, they are agnostic. Regulation by lawyers or by non-lawyers, with a degree of government oversight or with no government oversight could, at least theoretically, each be consistent (or inconsistent) with ensuring lawyers' satisfaction of their ethical obligations. To view a particular stance on self-regulation as necessary for the fulfillment of the five criteria requires an additional supposition: that having non-lawyers involved in regulating lawyers or some degree of government oversight or involvement is likely to undermine satisfaction of the regulatory criteria.

⁵³ Which I discuss below in Section IV, C.

⁵⁴ Other definitions of self-regulation might be possible; I am using this more conventional definition here.

Thus a proponent of self-regulation might argue that because lawyers as zealous advocates must be able to speak truth to power and represent unpopular causes, government involvement will lead inevitably to regulation that dampens rather than facilitates zealous advocacy. Lawyers are, amongst the professions, uniquely required to act in opposition to state interests and wishes in some cases. Conversely, critics of self-regulation might argue that because self-regulation protects lawyers rather than the public, self-regulation is likely to lead to insufficient regulatory attention being paid to lawyer competence and client service, undermining zealous advocacy. They might also argue that traditional self-regulatory models pay little attention to requirements that lawyers remain within the bounds of legality. Instead, the regulatory mechanisms that fulfill that function are external mechanisms such as the judicial authority to govern lawyers' conduct in court and, to the extent it exists, the imposition of liability for harm done by clients to third parties that was encouraged or facilitated by improper legal advice given by the lawyer.⁵⁵

The problem with all of these statements, however, is that they are empirical arguments without evidence, based on presumptions about what will happen if a particular regulatory regime were to be adopted. All seem defensible in some respects but also inconclusive, suggesting that analysis will be more helpful if done in relation to an actual regulatory regime with real rules and with a real record of regulatory successes and failures, to determine whether that regime satisfies the five criteria. Considering the question in the abstract does not elucidate the issue or allow for serious debate of regulatory alternatives. This is in part because arguments of this type do not take into account the full regulatory structure that governs lawyers in most jurisdictions, as suggested by the broad definition of regulation. Canadian lawyers, for example, are self-regulating but are also subject to regulatory incentives and rules imposed by the courts, by other regulatory bodies (such as securities commissions) and by market forces. Whether and in what way that overall regulatory structure fosters or inhibits lawyers' satisfaction of their ethical and legal obligations needs to be assessed in light of empirical evidence and plausible assumptions about the incentives it creates. It may be that, when this is done, it will become apparent that some degree of self-regulation *is* important for satisfaction of the regulatory criteria, but that argument must be demonstrated, not merely posited.

The following section will analyze some specific issues related to the regulation of lawyers in Canada in light of the five criteria, with consideration in particular of whether regulatory changes that have taken place in England and Wales should be adopted here.

IV. REFORMING REGULATION OF CANADIAN LAWYERS

The motivation for Canadian lawyers to talk about independence of the bar and its relationship to self-regulation undoubtedly arises in part from regulatory developments in other common law countries and in particular England, Wales, Australia and New Zealand. In all of those jurisdictions governments have increased non-lawyer involvement in the regulation of lawyers and have introduced consumer-oriented substantive changes to the content of that regulation.

⁵⁵ David Wilkins notes the extent to which different regulatory mechanisms are likely to undermine or foster different types of lawyer independence. See Wilkins, note 9 at 867-873.

Canadian lawyers and regulators appear anxious to avert the possibility of significant regulatory change in part through pre-emptively addressing the concerns changes elsewhere reflect, and by asserting strong normative claims that would justify resisting those changes, the most notable of which is independence of the bar.⁵⁶ In this section I will draw on the regulatory changes in England and Wales and on the five criteria identified to discuss some specific regulatory issues that exist in Canada. In particular, lawyer competence, institutional reform, including self-regulation, and access to justice.

A. Regulation of Competence

Competence is central to zealous advocacy.⁵⁷ A lawyer waving her arms energetically and proclaiming eloquently accomplishes nothing, however stylish her arm waves or well-phrased her proclamations, unless what underlies them is substantively solid. To advocate for a client's interests, the lawyer must understand what the client wants to achieve, know the client's factual circumstances and be able to identify and apply the law relevant to the client's circumstances. The lawyer must be able to take this knowledge and implement it through interviewing, counseling, advising, preparation of documents, negotiation and advocacy. Doing so requires hard work, intelligence and skill – i.e., competence.

Regulatory initiatives ensure the competence of Canadian lawyers in two main ways.⁵⁸ First, tort law imposes liability on lawyers who provide negligent advice or advocacy that results in a client suffering a loss or injury. Lawyers who fail to meet the standard of the “reasonably competent”⁵⁹ lawyer by failing to advise the client of the risks involved in a course of action, to identify the law applicable to what the client proposes to do or to generally provide effective assistance of counsel can be held liable for any losses a client suffers as a consequence of their negligence.⁶⁰ Second, codes of professional conduct require that lawyers provide competent service to clients;⁶¹ lawyers who fail to do so may be disciplined for professional misconduct.⁶² By setting out standards of competence in codes of professional conduct, disciplining lawyers who fall well below them and permitting recovery for clients when lawyer incompetence amounts to negligence, the regulatory system encourages lawyers to do what is necessary to provide zealous advocacy for clients.

⁵⁶ See in general, Richard Devlin and Albert Cheng, “Re-calibrating, Re-visioning and Re-Thinking Self-Regulation in Canada” *Intern. Jour. of the Legal Prof.* (forthcoming). In the article Devlin and Cheng suggest that Canadian regulators can be understood to be engaging in “defensive self-regulation” in response to regulatory developments in other countries.

⁵⁷ *Understanding Lawyers' Ethics in Canada*, note 33, *supra*, pp. 71-72.

⁵⁸ See in general, *Understanding Lawyers' Ethics in Canada*, note 33, *supra* at pp. 71-75.

⁵⁹ *Central Trust Co. v. Rafuse*, [1986] S.C.J. No. 52 at para. 58, [1986] 2 S.C.R. 147 (S.C.C.).

⁶⁰ See: *Graybriar Investments Ltd. v. Davis & Company*, [1990] B.C.J. No. 1239, 46 B.C.L.R. (2d) 164 (B.C.S.C.); *MacCulloch v. McInnes, Cooper and Robertson*, [2001] N.S.J. No. 16, 2001 NSCA 8 (N.S.C.A.); *Frumasa v. Ungaro*, [2005] O.J. No. 2412, 154 A.C.W.S. (3d) 1062 (Ont. S.C.J.), *affd* [2006] O.J. No. 686 (Ont. C.A.); *Hagblom v. Henderson*, [2003] S.J. No. 261, 2003 SKCA 40 (Sask. C.A.).

⁶¹ Canadian Bar Association Model Code Chapter II; Federation of Law Societies Model Code Rule 2.01(1); LSUC Rules of Professional Conduct Rule 2.01(1); Que. Code of Ethics for Advocates Rules 3.01.01 and 3.03.01; Alberta Code of Professional Conduct Chapter 2, commentaries; New Brunswick Code of Conduct Chapter 2, Rule 5; British Columbia Professional Conduct Handbook Chapter 3, Rule 1.

⁶² See, for example, *Law Society of Alberta v. Syed*, [1994] L.S.D.D. No. 211; *Goldberg v. Law Society of British Columbia*, [2009] B.C.J. No. 657, 2009 BCCA 147 (B.C.C.A.).

There are, though, significant limitations with these regulatory mechanisms. Both the law of negligence and disciplinary decisions related to lawyer incompetence deal only with relatively egregious cases. Garden variety incompetence – failure to return client phone calls or simply not being as diligent as the case required – rarely if ever leads to sanctions against the lawyer and is unlikely to be sufficient to ground an action in negligence against the lawyer. Establishing incompetence warranting discipline requires that the lawyer’s incompetence reach the point of professional misconduct. And in order to ground an application in negligence, the incompetence must meet the standard of negligence and the injury to the client must be legally cognizable.

Further, there are disincentives for clients to invoke either of these mechanisms which will result in many (if not most) incidents of incompetence not being addressed by the regulatory system. The law of negligence only arises where the lawyer’s incompetence lead to significant harm for the client. In a case where the injury was not large from a monetary perspective, there is no realistic possibility that the client will pursue civil liability; the cost of doing so will outweigh any benefit that the client will receive.⁶³ With respect to professional discipline, the incentives against client complaints are even more significant. The client receives little direct benefit from bringing a complaint to the law society since the provincial law societies generally have limited or no capacity to provide compensation or other redress to injured clients.⁶⁴ The usual benefit for the client complaining to the law society will be whatever satisfaction she derives from being told that her lawyer was subject to disciplinary sanctions such as suspension or disbarment. It is unlikely that this satisfaction will motivate most clients to access that regulatory scheme.

This makes competence regulation in Canada, both by law societies and through civil liability, a relatively ineffective mechanism for encouraging zealous advocacy. The possibility of professional discipline or civil liability for most lawyers is remote, even for lawyers providing slow, inefficient, expensive or inadequate legal services to clients. Perhaps because of these inadequacies in traditional regulatory mechanisms, one of the key aspects of reform of lawyer regulation in England and Wales was the introduction of the office of the Legal Ombudsman, charged with resolving consumer complaints against lawyers. The Legal Ombudsman’s office is part of a broader re-orientation of lawyer regulation in England and Wales to a consumer protection model as discussed in the following section. Its significance here is its procedural and substantive changes to the regulation of lawyer competence.

The Legal Ombudsman exists alongside traditional competence mechanisms like professional discipline and civil liability. Created by the Office for Legal Complaints,⁶⁵ under the authority

⁶³ Indeed, it is only where the damages are significant that the legal action will be worth pursuing for the client.

⁶⁴ Some law societies may require that fees be reimbursed or that amounts be paid into a compensation fund that benefits wronged clients generally. See, for example, *Law Society Act*, Parts 13 and 14. R.S.O. 1990, c. L.8.

⁶⁵ The Office of Legal Complaints is overseen by the Legal Services Board, which also has regulatory authority over the bodies responsible for regulating solicitors and barristers in England and Wales. The Legal Services Board appoints the Chair of the Office of Legal Complaints. It also approved the Scheme Rules of the Legal Ombudsman that were written by the Office of Legal Complaints and which I have relied upon here in describing what the Legal Ombudsman is empowered to do.

of the *Legal Services Act*, 2007,⁶⁶ the Legal Ombudsman considers complaints by individuals and small businesses⁶⁷ about the quality of the legal services they have received.⁶⁸ The Ombudsman determines an outcome between the lawyer and the client that is “fair and reasonable” taking into account how a court would perceive the relationship between the lawyer and client, the rules of conduct applicable to the lawyer and what the “ombudsman considers to have been good practice at the time of the act/omission.”⁶⁹ The Ombudsman may require the lawyer to apologize, to pay compensation for losses suffered or “inconvenience/ distress” caused, to take action “in the interests of the complainant,” and to put right (or pay to have put right) “any specified error, omission or other deficiency.”⁷⁰ Compensation is capped at £30,000.⁷¹ The Legal Ombudsman may also require the lawyer to refund or waive the fees that were, or were to be, charged to the client.⁷² Clients are required to approach lawyers in the first instance to have the complaint resolved and time limits are imposed on bringing complaints.⁷³ Complaints must be resolved by the Ombudsman in accordance with the requirements of procedural fairness, including a hearing where appropriate.⁷⁴ The Legal Ombudsman may dismiss or discontinue a complaint if, *inter alia*, he or she believes that it has no “reasonable prospect of success” or is frivolous or vexatious; if the complainant did not suffer “financial loss, distress, inconvenience or other detriment;” if the lawyer already offered “fair and reasonable redress;” if the matter would be more appropriately dealt with by a court or “there are other compelling reasons why it is inappropriate for the issue to be dealt with by the Legal Ombudsman.”⁷⁵ The Legal Ombudsman also has other powers such as the right to tell a client that a related complaint could have been brought against another lawyer or law firm,⁷⁶ the power to investigate⁷⁷ and, if the complaint indicates professional misconduct, to advise the regulatory body responsible for that lawyer.⁷⁸ Every time a complaint is made against a lawyer that is not resolved in that lawyer’s favour, the lawyer must pay a £400 “case fee” in addition to any other sanctions the Legal Ombudsman imposes.⁷⁹

⁶⁶ *Legal Services Act*, 2007 (UK) 2007, c. 29

⁶⁷ Legal Ombudsman, *Scheme Rules*, Section 2.1, at: http://www.legalombudsman.org.uk/downloads/documents/publications/23176_OLC_Scheme%20rules_AW%20v4.pdf The Ombudsman’s Scheme Rules are approved by the Legal Services Board, the general body charged with overseeing the regulation of the legal profession in England and Wales.

⁶⁸ *Ibid.* Rule 2.7-2.8.

⁶⁹ *Ibid.* Rule 5.37.

⁷⁰ *Ibid.* Rule 5.38

⁷¹ *Ibid.* Rule 5.43-5.45

⁷² *Ibid.* Rule 5.40.

⁷³ *Ibid.* Rule 4.1, Rule 5.3 and Rules 4.4-4.8.

⁷⁴ *Ibid.* Rules 5.1-5.35

⁷⁵ *Ibid.* Rule 5.7.

⁷⁶ *Ibid.* Rule 5.15

⁷⁷ *Ibid.* Rule 5.19

⁷⁸ The regulatory bodies in England are different for solicitors, barristers and other legal service providers. *Ibid.* Rule 5.59.

⁷⁹ *Ibid.* Rule 6.3-6.4.

When compared to the approach to lawyer competence in Canada, certain features of the Legal Ombudsman's powers stand out. First, the Ombudsman seems to have the power to address a much broader range of service delivery issues than are currently captured by professional discipline or tort law. In particular, the Ombudsman may give a remedy where the lawyer has not met the standard of good practice, which could be conduct that was inadvertent or which would not amount to negligence. The poor service also does not need to have led to financial harm to the client, but may only have caused inconvenience or irritation. Overall, the Ombudsman may remedy any situation which seems unfair or unreasonable. While without a record of decisions or any judicial review of decisions the Ombudsman has made the exact extent of the Ombudsman's powers are not clear, it seems apparent that the Ombudsman can, and is intended to, do more than a court or a traditional disciplinary regulator.

Second, the Ombudsman has power to provide a meaningful and broad variety of redress to clients, ranging from requiring that the lawyer do more legal work to an apology or the payment of compensation. These are remedies that are not available to courts for the most part and are certainly not available to the provincial law societies.

Third, the Ombudsman's process is informal and inexpensive for the client to access, which is distinct from a court.

Fourth, the Ombudsman process provides a clear incentive on lawyers to both provide proper service from the outset and to address client concerns as they arise; even if the lawyer only has to apologize to the client, for example, the complaints process will have cost the lawyer £400. While not a large fee, it is enough to make the lawyer aware of wanting to avoid having to pay it, particularly when coupled with the expense of dealing with a regulatory complaint and the possibility of more significant sanctions if the complaint against the lawyer succeeds.

When assessed against the criteria for effective regulation, the advantage of this regulatory initiative is its encouragement of zealous advocacy, particularly for lawyers who act for clients – individuals and small organizations – who have the least economic leverage against their lawyers. It does not encourage lawyers to stay within the bounds of legality; complaints may only be brought by a person to whom the lawyer provided services, not by a third party affected by the services provided.⁸⁰ It may even create incentives for lawyers to exceed the bounds of legality since arguably a client who has received such assistance from a lawyer is less likely to complain to the Legal Ombudsman than is a client who has been told that the law does not provide the benefit that the client seeks. On the other hand, those incentives are relatively soft, especially since a complaint that the lawyer interpreted the law against the client is quite likely to be viewed as fair and reasonable. Further, as noted by David Wilkins, the clients for whom lawyers will push the limits of the law tend to be larger institutional clients rather than small individual or organizational ones. Individual clients tend to be one-time clients, to be less sophisticated about the difference between good and poor legal services and to pay lower fees. This means that, with respect to those clients, the risk has generally been insufficient lawyer zeal, not excess lawyer zeal. It seems that, overall, the introduction of a legal ombudsman would improve the regulation of lawyers when assessed against the five criteria.⁸¹

⁸⁰ *Ibid.* Rule 2.8. A client could conceivably complain if he lost a case because the lawyer exceeded the law. That seems likely to be exceptional, however.

⁸¹ My only qualification to this is that, as discussed in the following section, I have some discomfort with the extent to which the English regulatory changes seem uninterested in the question of the lawyers' obligations to ensuring the representation of clients stays within the bounds of legality. While lip service is paid to those requirements, they have been de-emphasized in the code of conduct for solicitors and they are always less emphasized than consumer interests.

The problem in Canada, however, is with respect to the cost and practicality of introducing a legal ombudsman into a provincially regulated industry like law. While some provinces like Québec, Ontario and perhaps even British Columbia might warrant the introduction of a new regulatory body, a province like Alberta, which in 2009 had 8457 active Law Society members⁸² would have a more difficult time justifying that expense. The legal ombudsman would only address issues raised by active members working for individuals or small businesses, which is a smaller number again given the prevalence of large law firm and corporate work in the province. Establishing a whole new regulatory structure and system to regulate one aspect of the activities of about 5000 lawyers, when those activities are already partially regulated in another way through civil actions in negligence and professional misconduct hearings, seems unwarranted in a time of fiscal restraint and given other public policy priorities.

It may, however, be possible to use existing regulatory structures to achieve some of the same ends as accomplished by the Legal Ombudsman. In principle, a provincial law society could not only have the statutory mandate of disciplining lawyers for professional misconduct but could also be required to resolve disputes over service between lawyers and clients. This may not currently be practical given that, as discussed in the following section, the provincial law societies are old-fashioned regulatory bodies relying heavily on volunteers or near-volunteers for governance and for the implementation of many of their regulatory functions. Also, the current self-regulatory nature of the law societies may make consumers suspicious about their ability to resolve disputes between lawyers and clients fairly. However, as I also argue in the following section, it is possible to introduce consumer protection similar to that offered by the Legal Ombudsman as part of a broader set of regulatory changes. What that could look like is discussed there.

B. The Law Societies – Reforming Self-Regulation

As argued in Section III, the criteria for evaluating regulation of lawyers do not lead to any definitive stance on the question of whether lawyers should be self-regulating, or as to the general structure and approach that a regulatory regime must take. They do, however, provide a basis for critiquing and assessing regulatory approaches which may have a greater or lesser commitment to self-regulation. In this section, after briefly outlining the basic structure of regulation of lawyers in Canada, I consider whether Canadian regulation could be improved in light of the criteria if it were to adopt structural changes similar to those made in England and Wales. I outline the changes to the regulation of legal services in England and Wales, focusing in particular on changes to the regulation of solicitors. I then identify the key differences between the model for regulation of solicitors in England and Wales with the current regulation of lawyers in Canada, assess the advantages and disadvantages of each in light of the regulatory criteria and propose some modifications to how regulation is done in Canada. In particular, I recommend that the functions of Canadian law societies be divided, with the creation of a separate dispute resolution tribunal staffed by paid and appointed lawyer and non-lawyer tribunal members. The tribunal would have the mandate of adjudicating disciplinary matters and also client service disputes, similar to the function performed in England by the Legal Ombudsman. The existing law societies would focus on other aspects of their regulatory mandate, including more active regulation of law firms and organizations.

⁸² Law Society of Alberta, 2009 Annual Report: http://www.lawsociety.ab.ca/files/financial/Annual_Report_2009.pdf

1. THE STRUCTURE OF REGULATION OF LEGAL SERVICES IN CANADA

The primary bodies charged with regulating the conduct of Canadian lawyers are the provincial law societies. While lawyers' relationships with clients and lawyers' obligations to the administration of justice are also affected by private law (such as negligence actions and breach of contract), other regulatory regimes (like securities regulation) and by the courts' inherent jurisdiction over their own processes, the standards of conduct for lawyers are established and enforced by the provincial law societies. Exercising powers granted by statute, the provincial law societies determine the qualifications and character necessary for admission to the profession, write codes of conduct to be adhered to by lawyers, investigate complaints of lawyer misconduct and, after hearings, impose sanctions for misconduct.

Although each law society has numerous permanent employees to assist in the discharge of its functions, the law societies are governed by volunteer or near-volunteer⁸³ "benchers" elected from the law societies' membership. The implementation of a law society's key functions depends on the benchers. The benchers determine the contents of the code of conduct, chair and direct most law society committees and adjudicate disciplinary matters. In Alberta, for example, the majority of the members on any disciplinary panel are elected benchers; they are not paid for their time in sitting.⁸⁴ Most law societies have some appointed lay benchers and will include lay benchers in disciplinary panels; however, the overwhelming majority of benchers are elected lawyers. Some law societies – most notably the Law Society of Upper Canada – also have regulatory authority over other legal service providers such as paralegals and additionally have benchers elected from the ranks of those other service providers. Law societies are funded by levies from their member lawyers.

Two provinces, British Columbia and Québec, have some non-lawyer oversight of the activities of the law societies. In British Columbia the Office of the Ombudsman has the power to receive and address complaints about the law society's handling of regulatory matters and has the power to make recommendations "to resolve an unfairness."⁸⁵ In Québec there is a distinct regulatory body, the Professions Tribunal, which can review the decisions of the provincial regulator, the Barreau du Québec.⁸⁶ This oversight is limited, however, and does not involve directing its management or policies.

⁸³ Since Ontario benchers are paid for a portion of their law society activities.

⁸⁴ Nor are benchers in British Columbia or Nova Scotia, although benchers in Ontario are paid for hearing disciplinary matters.

⁸⁵ British Columbia Ombudsman, <http://www.ombudsman.bc.ca/what-we-do>

⁸⁶ Devlin and Cheng, note 55, *supra*.

The statutory mandate of the law societies is to act in the public interest, although many provincial law societies also have the express statutory authority to act in the interests of the profession. A typical mandate is that given to the Law Society of British Columbia pursuant to section 3 of the 1998 *Legal Profession Act*:

It is the object and duty of the 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 honour of its members, and
 - (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and
- (b) subject to paragraph (a),
 - (i) to regulate the practice of law, and
 - (ii) to uphold and protect the interests of its members.⁸⁷

While having this mandate of upholding and protecting the “interests of its members,” the Law Society of British Columbia and other provincial law societies do not identify their role as one of advocates for the profession. That representative function is seen as properly allocated to the Canadian Bar Association, a voluntary professional association of Canadian lawyers. Having said that, there is no mandated separation between the two types of organizations; sitting members of Canadian Bar Association committees have run for election as benchers of provincial law societies and the Canadian Bar Association has had an active role in shaping the regulatory approach of the law societies.

2. THE STRUCTURE OF REGULATION OF LEGAL SERVICES IN ENGLAND AND WALES

This basic description of the regulation of legal services in Canada is much the same as the description that would have been given 10, 15 or 20 years ago. By contrast, in England and Wales the regulation of legal services has been structurally transformed over the last 10 years, a transformation statutorily implemented by the *Legal Services Act, 2007*.⁸⁸ The most notable aspect of the *LSA 2007* is its creation of the Legal Services Board, a regulatory body charged with the power to govern all of the entities that regulate English lawyers and legal service providers, including barristers and solicitors.

The Legal Services Board has broad-ranging authority over “approved regulators” of legal services such as the Solicitors Regulation Authority, the Bar Standards Board and the Legal Ombudsman, including the power to govern the standards set and actions taken (or not taken) by those regulators. It has, for example, the power to make rules with respect to the requirements to be met by the approved regulators;⁸⁹ the authority to set performance targets for the approved regulators and to take action if the performance targets are not met⁹⁰ and the authority to take action where an “act or omission” of an approved regulator has had an adverse effect on its accomplishment of the regulator’s objectives.⁹¹

⁸⁷ S.B.C. 1998, c. 9, s. 3.

⁸⁸ Following from the 2004 Clementi Report and the many discussions and consultations that followed that report. The Clementi Report is here: <http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/report/index.htm>

⁸⁹ Note 65, s. 30.

⁹⁰ *Ibid.* s. 31

⁹¹ *Ibid.* s. 32.

The Legal Services Board is itself required to meet a variety of regulatory objectives which include protecting and promoting the public interest, supporting the constitutional principle of the rule of law, improving access to justice, protecting and promoting the interests of consumers, promoting competition in the provision of legal services, encouraging an independent, strong, diverse and effective legal profession and promoting and maintaining adherence to professional principles.⁹² Those professional principles are identified as acting with independence and integrity, maintaining proper standards of work, acting in the best interests of the client and with independence in the interests of justice and maintaining confidentiality.⁹³ In general, the concern of the Legal Services Board seems to be significantly oriented towards consumer protection. In its 2009/2010 Annual Report, the Board has a distinct section on “Regulating in the interests of consumers” and notes that

We are committed to understanding and taking into account consumers of legal services in all of our work. We believe that we can only put consumers and the wider public at the heart of legal services regulation if we understand and are able to articulate their needs, views and concerns. We therefore made it a priority in our first year of operation to put mechanisms in place to ensure consistency and challenge in our approach to consumer issues.⁹⁴

In addition to creating the Legal Services Board, the *LSA 2007* also requires that all regulatory and professional advocacy (representational) activities by lawyers be separated from each other; in England the two roles have historically been located in the same organization – for solicitors in the Law Society and for barristers in the General Council of the Bar. Now the Law Society and General Council may engage in representational activities, while regulatory activities are restricted to the Solicitors Regulation Authority and the Bar Standards Board.⁹⁵

To fully understand how the *LSA 2007* has changed the regulatory landscape in England and Wales, and how lawyer regulation in England and Wales now differs from that in Canada, it is useful to consider the structure and process, including recent changes in its regulatory approach, at the largest of the approved regulators, the Solicitors Regulation Authority (SRA). The SRA is the successor to the branch of the Law Society that was traditionally responsible for the regulation of professional misconduct by solicitors. It has regulatory authority over the approximately 120,000 solicitors licensed to practise in England and Wales and is, since its creation in 2007, structurally independent from the Law Society which continues to have the role of representing the interests of solicitors, much in the way the Canadian Bar Association does in Canada. The SRA is governed by a Board appointed by the Law Society Council but made up of solicitors and lay members who are not themselves on the Law Society Council.⁹⁶

⁹² *Ibid.* s. 1.

⁹³ *Ibid.*

⁹⁴ Legal Services Board Annual Report 2009/2010, para. 38.

⁹⁵ Regulatory activities for solicitors also involve a distinct adjudicative tribunal, the Solicitors Disciplinary Tribunal. For Barristers it appears that the totality of the professional misconduct regulation is done by the Bar Standards Board. See: Bar Standards Board, “The Bar Standards Board’s Complaints Process: Information for Barristers” at: <http://www.barstandardsboard.org.uk/assets/documents/Information%20for%20barristers%20complaints%20070311.pdf>

⁹⁶ The Law Society Council is made up of elected members of the profession of solicitors. See Royal Charters of the Law Society: <http://www.lawsociety.org.uk/documents/downloads/royalcharters.pdf> It appoints the SRA Board and the Chair of that Board sits on a joint Board with the Law Society. See General Regulation, s. 14(1A).

At present the majority of the members of the SRA's Board are solicitors; however, as of 2013 the majority of the Board will be lay members.⁹⁷ As noted earlier, the SRA is subject to regulatory oversight and governance by the Legal Services Board with respect to its discharge of its functions.⁹⁸

The SRA sets the standards that govern the conduct of solicitors. The current SRA Code of Conduct was published in 2007; however, it is to be replaced in 2011 with a new code of conduct. The new code is part of a broader shift by the SRA to what it describes as “outcomes-focused regulation” in which, rather than only responding to specific violations by lawyers of their professional obligations, the regulator will attempt to avoid, identify and remedy circumstances that create a high risk of professional misconduct. As set out in its Policy Statement:

Under the historic approach resources were largely deployed in reacting to crystallized risks, events which had already happened. In addition, those risks were primarily defined as breaches of rules (non compliance), rather than their effect on desired outcomes. This is a very reactive way of working and the result of that approach in the case of the SRA and many other regulators was an insufficient focus on tight authorisation [admission] processes (to reduce scope for unacceptable risks), and the deployment of disproportionate resources in responding to breaches, some of them very minor, rather than in pre-empting unacceptable risks.⁹⁹

Under the new code of conduct solicitors are given “outcomes” with which they are required to comply, as well as non-mandatory indicative behaviours and notes which direct them as to the sort of behaviours likely to prevent or to lead to violation of their professional obligations. The new code is considerably shorter than the previous code and is intended to give direction to solicitors about what to do, rather than simply providing them with a set of rules to follow or – as it was viewed – to work around.

The new code emphasizes client service while giving less specific attention to the obligation of lawyers to stay within the bounds of legality (although asserting its importance).¹⁰⁰ For example, the 2007 code requires that a lawyer cease to act for a client where doing so would involve him in violating the law or his ethical obligations.¹⁰¹ The 2011 draft code eliminates that rule, stating instead that solicitors must “provide services to ... *clients* in a manner which protects their interests in their matter, subject to the proper administration of justice.”¹⁰²

⁹⁷ See Law Society General Regulations, s. 14(6): <http://www.lawsociety.org.uk/documents/downloads/generalregulations.pdf>.

⁹⁸ As described earlier, see notes 87 to 91, *supra* and accompanying text.

⁹⁹ Solicitors Regulation Authority, “Delivering outcomes-focused regulation: Policy Statement”, November 30, 2010, paragraph 45.

¹⁰⁰ The principles at the introduction to the draft Code require that the solicitor “uphold the rule of law and the proper administration of justice” and direct the solicitor to give precedence in circumstances of conflicting principles to the principle “which best serves the public interest... especially the public interest in the proper administration of justice”.

¹⁰¹ [emphasis in original] Solicitors Regulation Authority, Code of Conduct 2007, Rule 2.01(1)(a).

¹⁰² Solicitors Regulation Authority, Draft SRA Code of Conduct, Chapter 1, Outcome O(2).

The rules that directly restrict lawyer advocacy are limited to circumstances when solicitors are appearing before a court or similar dispute resolution body.¹⁰³ It may be that the draft code does not intend to amend solicitors' obligations; however, the elimination of the positive obligation to avoid unlawful or unethical conduct suggests a shift in tone and emphasis. This view is suggested as well by the SRA Policy Statement that:

In the future there will be a greater emphasis on seeking to work with firms to ensure positive outcomes for clients, including constructive engagement with firms seeking to put things right where those outcomes have not been achieved.¹⁰⁴

Indeed, throughout the Policy Statement, the SRA references the need to avoid negative impacts on consumers and, when it mentions a counterweight, references only the need to protect the "public interest," the meaning of which is not defined or addressed.¹⁰⁵

The shift in regulatory style will also have the SRA emphasizing the conduct of firms and organizations delivering legal services rather than only that of individual lawyers. All law partnerships will have to be recognized by the SRA to provide legal services.¹⁰⁶

That is not to suggest that regulation of the conduct of individual lawyers will be abandoned. In particular, in circumstances in which it appears that a lawyer has violated his or her obligations under the new code of conduct, the Authority will continue to investigate, prepare and prosecute cases before the Solicitors Disciplinary Tribunal, a distinct and independent statutory tribunal charged with making decisions about whether a lawyer had engaged in professional misconduct, and as to the appropriate sanction.¹⁰⁷ The Solicitors Disciplinary Tribunal hears cases in which it is alleged by the SRA¹⁰⁸ that professional misconduct has occurred. Cases are heard in public, absent exceptional circumstances, by a panel of three members, two of whom are solicitors and one of whom is a lay member.¹⁰⁹ The process is quasi-judicial in nature.¹¹⁰ The Master of the Rolls (a judge of the Court of Appeal) appoints

¹⁰³ *Ibid.*, Chapter 5.

¹⁰⁴ Policy Statement, note 97, *supra*. p. 7, para. 9.

¹⁰⁵ See, for example, the suggestion at paragraph 22 that the "primary aim [is] achieving positive outcomes for clients," the statement at paragraph 24 that the Handbook they have drafted for lawyers "provides a clear focus on the achievement of positive outcomes for consumers and gives firms flexibility to decide how those outcomes can best be achieved taking into account the particular characteristics of their business and their clients" and the reference in paragraph 32 of lawyer obligations to clients "and the public," while paragraph 33 mentions only the need to "ensure potential negative impacts on consumers are prevented." Paragraph 25 does indicate that the achieving of the outcomes should be "underpinned by a strong ethical framework" and paragraph 53 references "high standards of ethical behaviour." See also paragraph 105 (referencing consumer interests and the public interest).

¹⁰⁶ Policy Statement, *ibid.*, Annex D, Section 2.3.

¹⁰⁷ The Solicitors Disciplinary Tribunal is created by the *Solicitors Act*, 1974 (UK) 1974, c. 47, ss. 46-49. The SRA does say in its Policy Statement that it will respond to breaches in a manner "informed by the relative risk that any breach presents" so that the response is proportionate. In 2011 the SRA will gain statutory power to fine individuals and firms itself in some cases; in those cases it will not need to take cases to the Solicitors Disciplinary Tribunal. Policy Statement, *ibid.*, paragraph 87.

¹⁰⁸ Or, in unusual circumstances, others. Anyone can bring a case before the Disciplinary Tribunal, although normally it is the SRA that does so: Solicitors Disciplinary Tribunal, "Our Constitution and Procedures," at <http://www.solicitortribunal.org.uk/constitution.html>

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

the members of the panel, each of whom is remunerated for their time in sitting, the lawyers at the rate of £575 per day and the lay member at the rate of £265 per day.¹¹¹ Solicitors who are members of the Tribunal must have been solicitors for at least 10 years and “may not be members of the Council of the Law Society or have any connection with the Solicitors Regulation Authority.”¹¹² The Disciplinary Tribunal has broad powers including the power to strike off, suspend or fine a solicitor.¹¹³

3. COMPARING THE REGULATORY REGIMES

Based on this review, there are some identifiable similarities between regulation of lawyers in England and Wales and in Canada. When stated at the general level, the principles underpinning the regulation seem to be the same and include fostering the rule of law, the administration of justice and effective advocacy for clients. Lawyers are still involved in regulatory activities and themselves fund the regulatory structure. In both jurisdictions the regulatory structure is not subject to direct executive or legislative control.

There are, however, some significant differences that have emerged between the jurisdictions. Most obviously, the regulatory bodies governing lawyers in England and Wales are subject to oversight by the Legal Services Board, a regulatory body that is not managed and run by lawyers themselves. While in Québec and British Columbia there is some non-lawyer oversight of the self-regulatory bodies, in most jurisdictions the law societies are subject only to oversight through the process of judicial review of administrative action or legislative amendment.

Second, the lawyers and non-lawyers running the SRA are appointed rather than elected (although they are appointed by elected members of the Law Society), and after 2013 there will be more non-lawyers than lawyers appointed. In Canada the governing bodies of the law societies are elected and are overwhelmingly made up of lawyers.

Third, the adjudication and sanctioning of professional misconduct cases with respect to solicitors in England and Wales is performed by a distinct regulatory body whose members are well-paid, and appointed by a judge of the Court of Appeal.¹¹⁴ In Canada, disciplinary cases are heard by the law society in panels made up of elected benchers who, in most provinces, are not paid for their time.

Fourth, while the general professional obligations owed by solicitors appear to match those owed by Canadian lawyers, the new code of conduct in England and Wales significantly emphasizes client service over obligations the solicitor may have to the functioning of the legal system. This is in keeping with a general orientation of the new regulatory system towards consumer interests as indicated by the statements by the Legal Services Board in its Annual Report, the Policy Statement of the SRA and the creation of the Legal Ombudsman, discussed in the previous section. While there have been a number of regulatory changes in Canada, the overall emphasis has remained on the totality of the lawyer’s ethical obligations and no special attention has been given to consumer concerns. The regulatory model is not generally consumer-oriented in that way.

¹¹¹ *Solicitors Act, 1974*, s. 46. Solicitors Disciplinary Tribunal, “Appointment of Tribunal Members: Further Particulars” at: <http://www.solicitortribunal.org.uk/apply.html>. The lay member rate is said to be under review.

¹¹² *Ibid.*

¹¹³ *Solicitors Act, 1974*, s. 47.

¹¹⁴ Although that is not the case for barristers, as noted at note 93, *supra*.

Fifth, the regulation of lawyers in England is shifting, at least with respect to solicitors, to an outcome-focused model, with emphasis on regulation of firms rather than individual lawyers. No Canadian law society has adopted a similar outcome-focused approach and regulation of firms in Canada is limited.

4. EVALUATING THE REGULATORY REGIMES

When assessed against the normative criteria for evaluating regulation, how do changes of the type instituted in England and Wales fare relative to the traditional Canadian structure? Is there reason to think that adopting them here would improve the ability of Canadian regulation of legal services to achieve the regulatory criteria?

Based on traditional concerns about independence of the bar, one would expect that the changes made in England and Wales would have led to the risk of (or actual) interference with the ability of lawyers to represent clients and to interference with lawyers' ability to act for those clients against state power. One would expect, in other words, that the changes would violate the first two criteria for assessing regulation – that it not discourage, and actually encourage, lawyers to act as zealous advocates for their clients. As stated by the 2005 president of the Law Society of British Columbia, Ralston Alexander, when he noted with concern the pending changes in England and Wales:

Canadians today have privacy and security over their legal matters and they trust that lawyers will keep their confidences. They also trust their lawyers to represent them fully, without improper influences or pressures coming to bear, even if they may be up against a branch of government. But without lawyers who are independent of the state, such confidence would no longer be justified. And without an independent law society, there are no independent lawyers. So the question needs to be asked. How far can government intrude into the profession before that independence is lost?¹¹⁵

Yet, when reviewing the changes in England and Wales, it is very difficult to see any evidence of this risk materializing. Indeed, it appears instead that the result of the changes has been to make the regulatory orientation strongly focused on serving client needs better, with “better” defined in terms of the client’s ability to accomplish the goals the lawyer was helping her with. The changes in England and Wales can be described as putting zealous advocacy first, rather than undermining it. Further, there is no indication in any of the regulatory changes of attempts to suppress lawyer advocacy when directed against the state, or of attempts to undermine the protection given to lawyer-client confidentiality.

That is not to say, however, that the changes in regulatory structure in England and Wales have had a wholly positive effect given the evaluative criteria for regulation. While the changes appear likely to encourage zealous advocacy, they also appear to do so at least in part at the expense of lawyers’ other central ethical obligation: remaining within the bounds of legality. It is true that the regulatory documents repeatedly mention the public interest and the importance of the administration of justice, but that recognition does not lead to strong articulation of the ethical obligations that follow from those principles. Rather, the strong articulation of what

¹¹⁵ Ralston Alexander, “President’s Report: Lawyer independence in the balance” (2005) April-May, *Benchers’ Bulletin*: <http://www.lawsociety.bc.ca/page.cfm?cid=1327&t=Lawyer-independence-in-the-balance>

lawyers should do is with respect to client service and the need for lawyers to provide efficient and effective assistance to their clients. This is most notable in the proposed change to the solicitors' draft code of conduct with respect to relationships with clients. It may be that abandoning the prohibition on representing clients where the representation requires the lawyer to act unlawfully or unethically could be rationalized on the basis that the prohibition asserts an improperly negative view of clients as driving lawyers away from what the law requires. Unfortunately, however, that negative view of clients *is* sometimes accurate. One of the things that lawyers need to be able to do, particularly when representing strong, wealthy and amoral (or immoral) clients, is to remind those clients of what the law requires. Not every client is weaker than the lawyer and the lawyer needs tools – including in the statement of her ethical obligations – to encourage and empower her to resist clients who are more interested in getting what they want than in what the law provides. The constant consumer emphasis in the regulatory structure of England and Wales may undermine its ability to provide these tools, because it does not clearly and expressly articulate the lawyer's obligation with respect to staying within the bounds of the law, creating implicit and explicit pressure on lawyers to focus solely on satisfaction of client interests. This is inconsistent with two of the normative principles that regulation must achieve: ensuring that lawyers stay within the bounds of legality in representing clients and reducing pressure on lawyers to exceed those boundaries.

This point should not be overstated. This current emphasis on the consumer does not necessarily reflect how the regulatory changes will unfold in England and Wales over the next several years. Further, there are other pieces of the regulatory shift in England and Wales that may enhance the ability of regulators there to meet the regulatory criteria, especially considering that the substance of those criteria are recognized in general terms by the statutes and other regulatory documents. Or, at minimum, there are regulatory changes that have been made that are not inextricably linked with a consumer-centric orientation. These other changes include the use of paid and appointed tribunal members to hear disciplinary cases; the extensive involvement of non-lawyers in establishing the regulatory agenda; the oversight powers of the Legal Services Board and regulation of law firms and outcome-based regulation.

With respect to the use of a distinct regulatory tribunal with paid staff to hear disciplinary cases, this seems to create a number of desirable incentives relative to accomplishment of the regulatory criteria. In particular, ensuring that lawyers are encouraged to fulfill their ethical obligations does require that the powers exercised by the regulatory authority be real and that the regulatory authority be willing to take on cases whenever necessary, regardless of their complexity. As repeatedly documented by Harry Arthurs, it is not at all clear that Canadian legal regulators have been willing to do this, focusing their energies instead on cases that are relatively easy to prove against lawyers who are relatively less likely to resist regulatory authority.¹¹⁶ And that fact is not surprising. The main actors at the law societies are volunteers or near-volunteers. While the amount of time they are willing to give is remarkable, there is a maximum capacity that any volunteer-run organization will reach and a likely lower willingness to take on factually or legally complicated cases, particularly when there are highly resourced lawyers on the other side. They are also less likely to be able to respond quickly to

¹¹⁶ See “The Dead Parrot”, note 10, *supra* and Harry Arthurs, “Why Canadian Law Schools Do not Teach Legal Ethics” in *Ethical Challenges to Legal Education and Conduct*, Kim Economides, ed., (Oxford: Hart Publishing, 1998) pp. 112-116.

regulatory changes elsewhere or to innovate in their regulatory approaches, since often benchers will only have a limited number of years of regulatory experience. This means that Canadian regulators are simply less likely to be able to achieve *any* regulatory objective and are less likely to be able to achieve regulatory objectives, such as those I have identified here for regulation of the legal profession, that can conflict and will often require consideration of difficult factual circumstances. Would any Canadian legal regulator be able to effectively address the complicated facts and legal issues raised by the famous US legal ethics scandals such as the role of lawyers in undermining regulators during the 1980s savings and loan crisis, the role of lawyers in enabling Enron's deception of its shareholders or the advice given by lawyers at the Office of the Legal Counsel to facilitate torture by the second Bush administration? It seems very unlikely.

This effect may be exacerbated when you add in that this volunteer corps is also elected, and the people electing them are lawyers, not the public. Complicated cases may be¹¹⁷ ones where the interests of the public and the interests of the profession do not align; there is little incentive for an elected regulator to take on cases or causes where the statutory obligation in serving the public interest may only be achievable at the expense of the happiness of one's electorate. It is more rational, and therefore more to be expected, that elected benchers will focus on matters that will permit them to satisfy their constituency as well as the public interest – that is, on cases where the lawyer's ethical failure is morally unambiguous or the lawyer is professionally marginalized, such that other members of the profession will perceive no threat, and an obvious upside, in disciplining that lawyer.

With respect to the involvement of non-lawyers in governing the profession, if non-lawyer is distinguished from "client," this change may also be capable of improving the accomplishment of the regulatory criteria, although it is not certain to do so. Ultimately, the accomplishment of the regulatory criteria depends on the commitment and energy of the regulatory body with respect to the achievement of the regulatory criteria in substance. There is no over-arching reason to believe that lawyers or non-lawyers are more likely to be committed to those criteria. The key point – and this perhaps underlies some of the concerns of those writing about independence of the bar, both favourably and unfavourably – is that both lawyers and non-lawyers must have some independence from over-identification with any one aspect of those regulatory criteria. If the non-lawyers involved in regulating the legal profession are all clients focused on ensuring that lawyers think most about them, then one can plausibly argue that the resulting regulation is likely to de-emphasize regulatory initiatives designed to encourage lawyers to stay within the bounds of legality. On the other hand, if the non-lawyers involved in regulating the legal profession are all legislators, government officials or judges, one can just as plausibly argue that the resulting regulation is likely to de-emphasize lawyers' role as zealous advocates, particularly in "unpopular" cases. The advantage of lawyers is that they are likely to identify with both aspects of their professional role.¹¹⁸ Codes of conduct and public statements by lawyers generally acknowledge both aspects of what lawyers are to achieve, and my own involvement in regulatory activities of the profession suggests a strong and consistent recognition of both aspects of the lawyer's professional obligations. Ultimately, I would argue that there is no particular virtue or vice in having non-lawyers or lawyers involved in the regulatory process; the key point is that whoever is involved be committed to all of its objectives, without undue emphasis on one over the other. That suggests, perhaps, the desirability of both lawyers and non-lawyers being involved, with emphasis on avoiding "constituency" type governance structures.

¹¹⁷ Although they are not necessarily.

¹¹⁸ Even if some occasionally forget one part during a representation.

With respect to the oversight powers granted to the Legal Services Board, the significant advantages appear to be ensuring additional checks and balances that will orient the approved regulators such as the SRA towards the accomplishment of the regulatory criteria. If you have regulatory objectives that are not directionally consistent, as is the case in regulation of legal services, it seems sensible to think that some sharing of institutional responsibility for the accomplishment of those objectives could be helpful. If one regulator pushes too far in one direction, the other regulatory body can push back towards the other. This is not certain to happen, however, since different regulatory bodies may share emphasis on particular aspects of the regulatory agenda at any time. Further, it is not apparent that those checks and balances necessarily require a body with the breadth of power and regulatory scope of the Legal Services Board, particularly if operating within the far smaller legal services markets represented by each of the Canadian provinces. It seems that bodies similar to those currently used in British Columbia or Québec, which provide some general oversight and counterweight to the power of the law societies, might well achieve that aspect of the Legal Services Board, while not imposing the same costs and cumbersome bureaucratic structure.

Finally, there is the shift to regulating law firms and to outcome-focused regulation. Regulating law firms can be justified on a variety of levels,¹¹⁹ although doing so effectively in Canada requires the adoption of a more professional regulatory structure. Organizational regulation is both complicated and expensive and law firms are far better positioned to resist regulatory action than are individuals. It seems unlikely that effective law firm regulation can occur given the current regulatory structure in Canada. The merits of outcome-focused regulation are more uncertain. While it seems theoretically desirable to focus on avoiding serious harm through reducing the likely circumstances in which harm will occur, doing so in practice requires serious empirical evidence about what circumstances will, in fact, lead to harm. That evidence was not apparent in the regulatory materials that I reviewed, and there seemed to be no real indication as to how acceptable and unacceptable risks of harm would or could be distinguished. It may be that the shift to outcome-focused regulation succeeds; however, it at this point is a regulatory experiment with little detail or clarity, about which no safe conclusions can be drawn. Given that, it seems unlikely to be a desirable change to be implemented here, although it may be that discreet aspects of the regulatory approach could be considered, particularly with respect to law firms. Once the SRA does articulate what it considers to be high-risk circumstances in law firm structure or management, that information may be useful to Canadian law societies regulating law firms or organizations.

When reviewed as a whole, the regulatory changes in England and Wales provide some interesting ideas and a counterexample through which to consider the adequacy of the current approach to regulating lawyers in Canada. In particular, they suggest that Canadian regulation of lawyers could be improved and made better able to ensure that lawyers act as zealous

¹¹⁹ See: Adam Dodek, “Regulating Large Law Firms” (forthcoming).

advocates within the bounds of legality through adopting some specific changes, modeled on changes in England and Wales but modified to reflect the circumstances of regulation here. These include:

- Separating the dispute resolution function of the law societies into a distinct regulatory entity. That entity would be charged with adjudicating disciplinary cases¹²⁰ and with mediating disputes with clients, much as the Legal Ombudsman does in England and Wales. The tribunal members would be paid and appointed by a joint committee of the chief justices of the provincial court of appeal and trial courts, and the elected and lay benchers of the law society. They would be independent from the provincial legislature and appointed for a minimum three-year period. This appointment process would be designed to ensure that there was some breadth of representation, but also that the appointees were not focused only on a constituency or were lacking in independence (since judges are also independent of the state). While most dispute resolution cases would be prosecuted by the law society, private prosecutions and client service complaints could be brought forward directly by clients or other affected parties. Most client-service complaints would be brought forward by clients, not by the law society, although the law society would have the option of supporting a client in a case where it thought appropriate to do so.
- Retaining the current governance structure of the law societies and their power to determine admissions,¹²¹ to set standards of conduct, to hear and investigate complaints and to determine which matters should be prosecuted at the dispute resolution tribunal. The law societies would also have to review competence matters to determine whether they should be brought to the dispute resolution tribunal, although most competence cases would be brought to the dispute resolution tribunal directly by the complainant. The law societies would also be given an express statutory mandate to undertake law firm regulation. If they were unable to do so, then additional structural changes would have to be introduced.
- Introducing a distinct legal regulatory review office in each province akin to that which exists in British Columbia. The regulatory review office would be governed equally by lawyers and non-lawyers and would have the power to make recommendations to the provincial law society when it believes that the law society has failed to discharge its legislative mandate fairly and properly. The regulatory review office would not have the power to direct the law society to reach a specific conclusion on matters of policy or in specific cases.

These changes are relatively modest and incremental. They largely involve a re-allocation of functions from the law society to a distinct body that will be able to focus on dispute resolution, both in disciplinary matters and with respect to service to clients. They retain a strong commitment to independence of the bar, traditionally understood, with structural independence from the executive and legislative branches of government. It is hoped, however, that these changes would provide a greater capacity in legal regulators to decide difficult cases and to foster the accomplishment of all of lawyers' ethical obligations, without being limited to consideration only of obvious violations by marginalized members of the profession. The intention would be to broaden consideration of client concerns and failures of lawyers to be sufficiently zealous, while maintaining emphasis on the need to ensure that, in all cases, the lawyer's representation remains within the bounds of legality.

¹²⁰ Including decisions about whether an applicant for law society admission should be denied admission because of concerns with "character."

¹²¹ Although if review of applicant's character is retained – which is not desirable, but perhaps inevitable – hearings on character would take place at the disciplinary tribunal. See: Alice Woolley, "Tending the Bar: The Good Character Requirement for Law Society Admission" (2007) 30 *Dal. L.J.* 27.

C. Access to Justice

In setting out the criteria for evaluating regulation of legal services, I included the requirement that access to lawyers be sufficient to permit the law to function as a scheme of social cooperation. Not everyone needs to have a lawyer and not every occasion of intersection with the legal system requires one. However, if access to lawyers is sufficiently compromised, then the force applied to people intersecting with the legal system risks becoming force *simpliciter* rather than force legitimately authorized.

There is reason to be concerned that in Canada, access to lawyers has reached that critical point. In a March 2011 Public Commission Report on the Status of Legal Aid in British Columbia, the Commissioner concluded that the significant cuts to legal aid in that province mean that “we are failing the most disadvantaged members of our community.”¹²² He stated that the gap between legal needs and legal services in the province have “grown into a wide chasm resulting in human suffering and related social and economic costs borne by our community.”¹²³ The Commissioner detailed the extensive testimony evidencing the absence of sufficient legal services in some criminal cases, mental health proceedings, immigration matters, family law and poverty law. With respect to mental health proceedings, the Commissioner noted:

Over 400 individuals who are involuntarily detained in provincial mental health facilities have been denied legal assistance and representation in statutorily guaranteed proceedings to review their detention...

These mental health patients are left in the unenviable situation of choosing between proceeding without representation or extending their period of involuntary detention. In many cases, the detained patients elect not to proceed when assistance is unavailable or ask for an adjournment part way through hearings in which they are unrepresented. It almost goes without saying that this is a profound violation of the rights of one of the most vulnerable segments of our community.¹²⁴

Other observers have documented similar problems with access to justice. According to the federal Justice Department, 13 percent of criminally accused appear in court without a lawyer. Not surprisingly, although disturbingly, those accused are more likely to be convicted.¹²⁵ The Report of the Ontario Civil Legal Needs Project in May 2010 stated:

Low and middle-income Ontarians experience many barriers to access to civil justice, including the real and perceived cost of legal services, lack of access to legal aid and lack of access to information and self-help resources. Once again, the poorest and most vulnerable Ontarians experience the greatest barriers.¹²⁶

¹²² Report of the Public Commission on Legal Aid in the Province of British Columbia, “Foundation for Change”, March 2011 p. 7.

¹²³ *Ibid.* p. 12.

¹²⁴ *Ibid.* at pp. 35-36

¹²⁵ Jeremy Hainsworth, “Government budget-slashing cuts into Legal Aid” *The Lawyers Weekly* 30:24 (29 October 2010) 14.

¹²⁶ Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project*, at p. 46, online: <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>.

A variety of studies indicate that the number of litigants who are unrepresented by counsel is growing, particularly in family law matters.¹²⁷

To what extent can the regulation of legal services be blamed for this state of affairs? I suggest a great deal. As noted in Section III, regulation encompasses a broad variety of public activities and includes any intentional state effort to alter activity or behaviour, including the facilitation of behaviour. It thus includes regulation of lawyers by the law societies but also governmental legal aid programs and judicial decisions about the constitutional scope of the right to counsel. Each of these regulatory activities has contributed to the access-to-justice crisis in different ways. In particular, the inevitable gap between legal needs and legal services has been significantly widened by a combination of inadequate funding of legal aid; insufficient attention by law society and other regulators to failures in the market for legal services; and, judicial refusal to recognize a constitutional right to counsel except in a narrow set of circumstances.¹²⁸

The cuts to legal aid in British Columbia are documented by the Public Commissioner's report, which notes that in 2002 legal aid was cut by 40 percent over a three-year period. Similar cuts have occurred in other provinces.¹²⁹ Between 1996 and 2006, legal aid funding per capita in Ontario was cut by almost 10 percent, while during the same period spending on health care and on education increased by 30 percent and 20 percent respectively.¹³⁰ Cuts to legal aid appear politically neutral; in Ontario political parties across the spectrum were willing to cut this area of public service and faced relatively little public opposition for doing so.¹³¹ The provinces appear to be trying to do more with less money, shifting service delivery models towards legal clinics, limited purpose retainers and the use of non-lawyers to advise individuals in legal difficulty; based on the Public Commissioners' Report, however, this has not entirely ameliorated the problems caused by the cuts to legal aid funding. Further, to the extent legal aid funding has remained constant, increasing expenses associated with criminal defence work has ensured cuts to the provision of civil legal services, as also documented by the British Columbia Public Commissioner.

¹²⁷ Minister of Justice and Attorney General Saskatchewan, *Unrepresented Litigants Access to Justice Committee, Final Report*, November 2007, summarizing various Canadian studies on the issue, pp. 26-27, online: <<http://www.justice.gov.sk.ca/Final-Report-Unrepresented-Litigants.pdf>>. The Report notes that the extent of the unrepresented litigants problem varies regionally and across groups, and is somewhat difficult to measure. See also, Alberta Law Reform Institute, *Self-Represented Litigants*, March 2005, online: <<http://www.law.ualberta.ca/alri/docs/cm12-18.pdf>>.

¹²⁸ Other factors may have also contributed, including in particular income inequality and the gap between the cost of legal services and the actual income of most Canadians. See, Woolley, note 33, *supra*, Chapter 10. The gap between legal needs and legal services was not created by regulatory deficiencies, and cannot be cured by regulation. However, regulation can ameliorate the gap to some extent, and should be designed so as not to make it worse.

¹²⁹ See: Melinda Buckley, "Moving Forward on Legal Aid: Research on Needs and Innovative Approaches" June, 2010, CBA Discussion Paper, pp. 52-53. At: <http://www.cba.org/CBA/Advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf> Although there is some ambiguity in the numbers. The reports on legal aid all document funding cuts. However, the data from Statistics Canada suggests that legal aid funding and representation increased from 2004-2008. The difference appears to be when the numbers are controlled for population growth. See: <http://www40.statcan.gc.ca/101/cst01/legal18b-eng.htm> Also in general growth in legal aid funding is purely on the criminal side, with the civil side bearing increasing cuts in service to compensate for increased criminal costs (Buckley makes this point).

¹³⁰ Michael Trebilcock, "Report of the Legal Aid Review 2008" for the Attorney General of Ontario, p. 74: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf

¹³¹ Although Ontario legal aid lawyers went on strike in 2010, forcing an increase in the hourly rates of pay.

Legal aid addresses the gap between legal needs and legal services directly by providing financial assistance to poor or indigent clients. The inability to access lawyers exists more generally across society, however, in part because of imperfections in the legal services market.¹³² Regulatory action by law societies to decrease imperfections in the market for legal services could indirectly reduce the gap between legal needs and legal services. The imperfections in the market for legal services relate most significantly to the non-homogeneity of many legal services and legal service providers and the asymmetry of information between lawyers and clients. They have not been meaningfully addressed in regulation by law societies, perhaps because of the structural weaknesses discussed in the previous section. Certainly law societies could have taken regulatory action to ameliorate those imperfections. They could, for example, have engaged in more serious exercises in standard-setting for service provision,¹³³ have played a more active role in regulating lawyer billing practices and information provision¹³⁴ and have taken steps to regulate activities by law firms.¹³⁵ Standard-setting and regulation of billing practices provide consumers with a greater ability to select between lawyers, increase the likelihood of effective price competition between lawyers and thus are likely to reduce the cost of legal services to consumers. Yet in general, law societies have focused the vast majority of their attention on professional misconduct regulation, with particular focus on lawyer trust violations.¹³⁶ As summarized by Michael Trebilcock:

The legal profession must move aggressively in a similar direction [towards setting standards of professional competence]. After all, consumers of legal services are not interested in the quality of service inputs per se, but only the quality of service outputs. This, for most consumers, is properly their bottom line (as in other product and service markets). In short, a more targeted, bottom line, output-orientated regulatory focus is needed, because that is what a consumer welfare perspective demands, particularly in segments of the legal services market that are particularly afflicted by information asymmetries.¹³⁷

With respect to the constitutional right to counsel, in speeches dating back to 2007, Chief Justice of the Supreme Court Beverley McLachlin has raised concerns with access to justice, noting that justice too often ends up being available only to the very wealthy, corporations and those charged with criminal offences, with most legal needs going unmet.¹³⁸ She has suggested that lawyers have a professional obligation to meet this need. Yet at the same time, in 2007, the

¹³² Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2008) 45(5) *Alberta Law Review* 107

¹³³ Michael Trebilcock, "Regulating the Market for Legal Services" (2008) 45(5) *Alberta Law Review* 215 at 225.

¹³⁴ Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Legal Profession and What Should be Done About It" (2004) 83 *Can. Bar. Rev.* 859.

¹³⁵ Dodek, note 117, *supra*.

¹³⁶ Trebilcock, note 131, *supra* at 225.

¹³⁷ *Ibid.* at 226.

¹³⁸ See, for example, March 8, 2007 speech to the Empire Club (here: <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>) and February 2011 speech at the University of Toronto (see, Michael McKiernan, "Lawyers Integral in Making Justice Accessible: McLachlin, Law Times, February 20, 2011, at: <http://www.lawtimesnews.com/201102218262/Headline-News/Lawyers-integral-in-making-justice-accessible-McLachlin>)

Supreme Court of Canada rejected outright the notion of a general constitutional right to access to justice that would prevent the state from taking steps that might inhibit the availability of legal services. In *British Columbia (Attorney General) v. Christie*,¹³⁹ Dugald Christie challenged the constitutionality of a tax on legal services imposed by the government of British Columbia. The tax required that clients pay a seven percent charge on fees for legal services¹⁴⁰ and required that lawyers remit the tax to the government whether or not the client had paid the lawyer's bill. Christie was a poverty lawyer in Vancouver's downtown Eastside. Between 1990-1999, his yearly income was never more than \$30,000 and he represented a largely indigent population, many of whom would not, or could not, pay the bills he rendered to them for his services.¹⁴¹ The net effect of this was, not surprisingly, that Christie owed taxes that his clients did not pay and that he could not pay, and his legal practice became insolvent.¹⁴² Supported by the Canadian Bar Association, Christie challenged the constitutionality of the government's scheme, arguing that there was a constitutional right to access to counsel when a litigant's rights are at issue before a court or tribunal, with which this legislation unconstitutionally interfered.

In a brief unattributed judgment by a unanimous panel, the Supreme Court dismissed Christie's case. It began by characterizing Christie's position in an extreme form, suggesting that the "logical result [of Christie's position] would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice."¹⁴³ It suggested that the financial implications of granting such a right would "place a not inconsiderable burden on taxpayers."¹⁴⁴ The Court then held that the constitution did not grant such a right in general terms, although it might in specific circumstances. The existing Supreme Court case did not support the position that any restriction on access would be unconstitutional.¹⁴⁵ Jurisprudence on the rule of law was unhelpful as well, because while it showed the importance of lawyers in ensuring the rule of law, "general access to legal services is not a currently recognized aspect of the rule of law."¹⁴⁶ Any right to counsel created from the existing case law is specific, not general.¹⁴⁷ Finally, the Court suggested that since many factors might impair the ability of an individual to access counsel, there was reason to doubt the evidentiary sufficiency of linking the British Columbia tax to the ability of people to retain a lawyer.¹⁴⁸

¹³⁹ [2007] 1 S.C.R. 873, 2007 SCC 21

¹⁴⁰ *Ibid.* para. 1. The idea was that the revenues generated by the tax would be used to pay for legal services. However, the revenues were paid into the government's general revenue account, and it was not clear how much of the money was in fact used for legal aid or other access-to-justice initiatives.

¹⁴¹ *Ibid.* para. 3.

¹⁴² *Ibid.*

¹⁴³ *Ibid.* at para. 13.

¹⁴⁴ *Ibid.* at para. 14.

¹⁴⁵ *Ibid.* at para. 17.

¹⁴⁶ *Ibid.* at para. 21.

¹⁴⁷ *Ibid.* at para. 27.

¹⁴⁸ *Ibid.* at para. 28.

The flaws with the Court's judgment in *Christie* are significant. In constitutional terms, courts have always been able to distinguish between interference with rights and state failure to facilitate the exercise of a right. In most cases a failure to facilitate, even of a fundamental right like equality or liberty, is not characterized by the court as constitutionally problematic. Here, the factual issue raised by *Christie* was with a state interference with the ability to obtain counsel; the issue of whether the state was equally required to facilitate a person in obtaining counsel is distinct, was not raised on the facts of the case and, based on past experience, would have been distinguished by the Court were it to arise. The principles of law and of logic do not require that the recognition of one would lead inexorably to the recognition of the other. In addition, for the Court to recognize on the one hand the role of counsel in facilitating the rule of law, yet to suggest that there is no constitutional problem with interfering with the ability to obtain counsel, seems logically flawed. What if the BC tax had required that anyone pay \$20,000 whenever they wanted to obtain a lawyer, provided the matter did not involve fundamental civil rights? The *Christie* judgment suggests that no constitutional problem would be raised by that tax, although I am not sure that the court would see it that way. Finally, the Court's point on evidentiary sufficiency seems difficult to support. Whatever might happen in general cases, *Christie* himself went from practising law for indigent clients to not practising law for such clients, solely because of the impact of the tax. The number of lawyers who are willing to take on a life like *Christie*'s, earning a fraction of their potential income in order to help the poor, is miniscule; the elimination of the ability to practise of one of them seems self-evidently to demonstrate the interference. Certainly the Court has needed far less evidence in other cases to make similar factual determinations.¹⁴⁹

For our purposes, though, the logical inadequacies of *Christie* are less important than its effect on the regulatory environment with respect to legal services. The judgment means that governments experience minimal judicial pressure to fund the provision of legal services, or against interference with the availability of those services, except for in specific cases that impugn significant constitutional rights. Cutting the availability of counsel in family law matters, poverty law matters, immigration matters or in other civil contexts has no general constitutional consequences, and making it even more difficult to access counsel in those cases through the imposition of a tax, will not matter.

If this analysis is correct and the gap between legal needs and legal services is created in part by the method of regulating legal services, then it is also the case that shifts to that regulatory structure can shrink the gap as well. This includes, obviously, restoring legal aid funding to previous levels but also directing regulatory attention towards improving the efficiency of the market for legal services by, as earlier noted, properly regulating billing, providing greater information to clients and helping to standardize lawyer services. The revised structure outlined previously may help create regulatory resources in the law societies sufficient to permit this to happen. It should also include – although this seems unlikely¹⁵⁰ – a greater commitment by the Supreme Court to recognizing the role of access to counsel in ensuring the rule of law. Lawyers do not facilitate the rule of law in the abstract; they facilitate the rule of law in representing actual clients. If clients across a vast spectrum of society cannot access lawyers then the rule of law is impaired. Indeed, it is arguably at this most general level, as much as in important specific cases, that the mischief is done.

¹⁴⁹ See, for example, the law on solicitor-client privilege and the statements in cases like *Smith v. Jones* [1999] 1 S.C.R. 455, where the Court has asserted that without the privilege people will not speak to lawyers.

¹⁵⁰ See, for example, *R. v. Sinclair*, [2010] S.C.J. No. 35, 2010 SCC 35 (S.C.C.); *R. v. McCrimmon*, [2010] S.C.J. No. 36, 2010 SCC 36 (S.C.C.); *R. v. Willier*, [2010] S.C.J. No. 37, 2010 SCC 37 (S.C.C.).

V. CONCLUSION

Independence of the bar does matter. It does not matter as a generic statement that the state should leave lawyers alone, it does not suggest that self-regulation is an untouchable constitutional imperative and it is not itself a normative principle necessary for the accomplishment of law's purposes. But understood through its normative foundations in the role of lawyers in a system of laws, independence of the bar generates important regulatory principles through which the regulation of legal services can be assessed. This paper has touched on a few examples of the regulation of legal services in Canada, suggesting the need for greater regulation of lawyer competence, a more sophisticated regulatory system for regulating the provision of legal services and the need for a more significant state and regulatory commitment to facilitating access to justice. At any point in the regulation of lawyers and legal services, however, these questions should be considered: does the regulatory measure ensure that lawyers act as zealous advocates within the bounds of legality, and that access to justice is protected?

About the Author

Alice Woolley is a Professor of Law at the Faculty of Law, University of Calgary. She is the author of *Understanding Lawyers' Ethics in Canada* and of numerous academic articles related to legal ethics, the regulation of the legal profession and administrative law. Prior to joining the Faculty, Professor Woolley practiced law in Calgary for several years and in 1995-1996 Professor Woolley was a law clerk to the then Chief Justice of Canada, the Right Honourable Antonio Lamer.

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ISSN

1919-112x SPP Research Papers (Print)
1919-1138 SPP Research Papers (Online)

DATE OF ISSUE

June 2011

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