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# Legal Services Regulation in Canada: Plus Ça Change?

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# Legal Services Regulation in Canada: *Plus ça change?*

By Noel Semple<sup>1</sup>

## 1. Introduction

Today's legal services regulatory regimes are diverse and idiosyncratic, as this volume clearly demonstrates. However, a clear pattern emerges when the common law world is surveyed with a wide-angle comparative lens. In common law Northern Europe and in Australasia, a wave of reform has been transforming legal services regulation since roughly 1980. Old structures and approaches, based on the principles of professionalism and lawyer independence, are being replaced in these jurisdictions by new ones that prioritize competition and consumer interests.<sup>2</sup> In the United States this has conspicuously *not* happened, leaving intact a regulatory approach whose broad outlines have changed little in the past 100 years.<sup>3</sup>

Thus, I have argued that the legal services regulatory regimes of the common law world today are bifurcated into (i) a *competitive-consumerist* paradigm apparent in the UK, in Australia, and in their smaller neighbours, and (ii) a *professionalist-independent* mode which survives in the United States and a few other places.<sup>4</sup> This dichotomy, I believe, maps a foundational difference in regulatory methodologies.<sup>5</sup> Contrasting approaches to alternative business structures, to non-lawyer practice, to self-regulation, and to entity regulation in these two clusters of anglophone countries make the dichotomy apparent.<sup>6</sup>

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<sup>2</sup> Identifying consumer protection and/or competition promotion as key drivers of legal services regulatory reform, see e.g. Julian Webb, "The Dynamics of Professionalism: The Moral Economy of English Legal Practice - and Some Lessons for New Zealand" (2008) 16 Waikato L. Rev. 21; Judith L. Maute, "Global continental shifts to a new governance paradigm in lawyer regulation and consumer protection : riding the wave" in Reid Mortensen, Francesca Bartlett & Kieran Tranter eds., *Alternative perspectives on lawyers and legal ethics: reimagining the profession* (New York: Routledge, 2010); Frank Stephen, *Lawyers, Markets and Regulation* (Cheltenham, UK: Edward Elgar, 2013); Nuno Garoupa, "Globalization and deregulation of legal services" (2014) 38 International Review of Law and Economics 77 at 81.

<sup>3</sup> Noel Semple, Russell Pearce and Renee Newman Knake, "A Taxonomy of Lawyer Regulation: How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England and Wales, and North America" (2013) 16 Legal Ethics 258.

<sup>4</sup> Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar, 2015).

<sup>5</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4, Chapters 3 and 4.

<sup>6</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4, Chapter 3. Related analysis of the divergence in the common law world, see also Deborah L. Rhode and Alice Woolley, "Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada" (2012) 80 Fordham Law Review 2761 and Ted

Figure 1: Two Paradigms of Legal Services Regulation<sup>7</sup>

<b>Professionalist-Independent Tradition</b>				<b>Competition →</b> <b>Consumer Interests →</b>
Unified Occupation	Self-Regulation	Insulation of Firms	Reg. Focus: Individuals only	
Multiple Occupations	State Regulation	Openness to Non-Lawyers	Reg. Focus: Firms & Individuals	
<b>Competitive-Consumerist Mode</b>				

Where does Canada fit into this picture? With a view to locating my home and native land on the spectrum between the competitive-consumerist and professionalist-independent traditions, this Chapter reviews key characteristics and important recent developments in Canadian legal services regulation. After providing an overview of the Canadian legal profession, the Chapter proceeds in four sections: (i) Governance and the Role of the State; (ii) Professional Organization and Occupational Unity; (iii) Firm Insulation and Alternative Business Structures, and (iv) Regulatory Focus.

I conclude that, in Canada's common law provinces, legal services regulation remains firmly in the professionalist-independent tradition. The approach is much more similar to American legal services regulation than it is to UK or Australasian legal services regulation. However, civilian and predominantly francophone Quebec is a "distinct society" within Canada in its legal services regulation as in other things. Policy choices including a more prominent role for the state, a bifurcation of the legal profession, and a greater tolerance of non-lawyer involvement in law firms place Quebec somewhat apart from the common law provinces, and closer to the competitive-consumerist mode.

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Schneyer, "Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice" (2009) 2009 J. Prof. Law. 13.

<sup>7</sup> Adapted from Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 75.

To say that the basic story is one of continuity is not to say that Canada's legal services regulators are resting on their haunches. Along with ongoing fine-tuning, they are discussing competitive-consumerist reforms such as liberalizing business structure rules, encouraging competition between multiple legal professions, and regulating law firms as opposed to only practitioners. However, in Canada these discussions occur almost exclusively among lawyers in the legal services regulatory and academic communities. They have not sparked much interest among the consumer groups, competition authorities, and elected leaders whose counterparts took them up in places like England & Wales and Australia. For this reason, the author predicts that any steps towards competitive-consumerist legal services regulatory reform in Canada will be tentative compromises, rather than the big bangs that have transformed systems elsewhere in the common law world.

#### a) Canada's Lawyers and Firms

The words "lawyer" and the French equivalent "*avocat*" are used to describe the main body of legal professionals throughout the country.<sup>8</sup> Canadian lawyers are authorized to provide all legal services, and most such services are reserved for them exclusively.<sup>9</sup> There were 117,132 Canadian lawyers in 2013:<sup>10</sup> one for every 300 Canadians. Roughly one quarter of Canada's private practice lawyers in are sole practitioners.<sup>11</sup> Approximately 20% of private practitioner lawyers work in firms with more than 50 lawyers,<sup>12</sup> with the remainder in small and mid-sized firms.<sup>13</sup> Not included in these figures are the growing numbers of lawyers employed within corporations and government. In the corporate client hemisphere, the size of Canadian law firms (like American law firms) tends

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<sup>8</sup> Although informal reference is sometimes made to "barristers" and "solicitors" there is no regulatory or legal distinction between them. (Adam M. Dodek *et al.*, *Canadian legal practice : a guide for the 21st century* (Markham, Ont.: LexisNexis Canada, 2009)). Regulation does however distinguish a few small legal para-professions, including Ontario's licensed paralegals and Quebec's *notaries*. (Section 2, *infra*.)

<sup>9</sup> See section 3, *infra*.

<sup>10</sup> Federation of Law Societies of Canada, *Membership (2013 Statistical Report)* (Ottawa: FLSC, 2013) online: FLSC <<http://docs.flsc.ca/STATS2013ReportFINAL.pdf>> (last accessed: 3 June 2016)

<sup>11</sup> Solos make up 34% of all lawyers in Ontario, 13% of all Quebec lawyers, and 22.65% of all BC lawyers. Sources: Law Society of Upper Canada, "2015 Annual Report Data," <<http://www.annualreport.lsuc.on.ca/2015/en/annual-report-data.html#LawFirmsBySize>> (last accessed: 3 June 2016); Barreau du Quebec, *Barreau-Mètre 2015: La Profession En Chiffres* (Quebec: Barreau du Quebec, 2015) online: Barreau du Quebec <<http://www.barreau.qc.ca/pdf/publications/barreau-metre-2015.pdf>> (last accessed: 3 June 2016); Law Society of British Columbia, "Quick Facts: About the Profession," <<https://www.lawsociety.bc.ca/page.cfm?cid=2189&t=About-the-Profession>> (last accessed: 3 June 2016). These three provinces collectively contain 75% of Canada's population.

<sup>12</sup> The proportions that work in these firms are as follows: Quebec -- 30.1%; BC -- 8.16%; Ontario -- 19%. Sources *ibid*.

<sup>13</sup> See also Federation of Law Societies of Canada, "Membership (2013 Statistical Report)," *supra* note 10.

to be proportionate to the size of the clients.<sup>14</sup> Personal clients are served almost exclusively by small and mid-sized firms.<sup>15</sup>

## 2. Governance and the Role of the State

Lawyers have traditionally enjoyed a significant degree of control over their own regulation, as noted by the Introduction to this volume. According to the professionalist-independent public interest theory, direct regulation by government would allow the state to coerce lawyers using the threat of discipline. Thus, self-regulation is said to foster loyal lawyer service to clients, especially those clients who confront the state.<sup>16</sup> According to Emile Durkheim and his followers, independent self-regulating professions also offer advantages related to efficiency and social cohesion.<sup>17</sup> These ideas still have great force in the United States, (although some consider the prominent role of the courts in that country a departure from true self-regulation).<sup>18</sup>

In countries like Australia and England & Wales, the neoliberal state has taken an increasingly prominent role in regulating legal services.<sup>19</sup> Lawyer self-regulation is under serious threat or has been essentially abandoned in much of the common law world.<sup>20</sup> It is typically

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<sup>14</sup> For detailed empirical study of Canadian corporate law firms, see the recent work of Ronit Dinovitzer, Hugh Gunz, and Sally Gunz: <http://individual.utoronto.ca/dinovitzer/#filter=.post3> and Ronit Dinovitzer, Hugh Gunz and Sally Gunz, "The Changing Landscape Of Corporate Legal Practices: An Empirical Study Of Lawyers In Large Corporate Law Firms" (2015) 93 Canadian Bar Review .

<sup>15</sup> This is especially true regarding contested "personal plight" matters: Herbert M. Kritzer, *Risks, reputations, and rewards : contingency fee legal practice in the United States* (Stanford, Calif.: Stanford University Press, 2004); Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers" (2014) 2014 Journal of the Legal Profession 25, online: <ssrn.com/abstract=2436438> (last accessed: 3 June 2016) at 43. In uncontested "personal business" matters a few larger firms are now competing, such as Anderson Sinclair LLP and Axxess Law (which operates in Walmarts).

<sup>16</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 220-222. There is also a broader claim in the literature to the effect that the legal profession fosters good government and/or liberal democracy, if and only if the profession is truly independent from the state. (Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 220-222; Terence C. Halliday and Lucien Karpik, "Politics Matter" in Terence C. Halliday & Lucien Karpik eds., *Lawyers and the rise of western political liberalism : Europe and North America from the eighteenth to twentieth centuries* (New York: Oxford University Press, 1997); Alexis de Tocqueville, *Democracy In America* (New York: Adlard and Saunders, [1831] 1862) at 356; Max Weber, *Economy and Society* (Berkeley, CA: University of California Press, [1922] 1978).

<sup>17</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at Chapter 7.

<sup>18</sup> Maute, "Global continental shifts to a new governance paradigm in lawyer regulation and consumer protection : riding the wave," *supra* note 2; Laurel S. Terry, Steve Mark and Tahlia Gordon, "Trends And Challenges In Lawyer Regulation: The Impact Of Globalization And Technology" (2012) 80 Fordham Law Review 2661; Dana Ann Remus, "Just Conduct: Regulating Bench-Bar Relationships" (2011) 30 Yale L. & Pol'y Rev. 123.

<sup>19</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 57-60; Terry, Mark and Gordon, "Trends And Challenges In Lawyer Regulation: The Impact Of Globalization And Technology," *supra* note 18 at 2673; Duncan Webb, "Are Lawyers Regulatable?" (2008) 5 Alberta Law Review 233 at 243.

<sup>20</sup> Gordon Turriff, "The Consumption of Lawyer Independence" (2010) 17 International Journal of the Legal Profession 283.

replaced by “co-regulation” whereby the self-regulatory bodies are effectively subordinate to executive and/or legislative arms of the state.<sup>21</sup>

In common law Canada, however, lawyer self-regulation is alive and well.<sup>22</sup> There is a law society in each of Canada’s 10 provinces and 3 territories. These bodies, which are led by and chosen by lawyers, exercise remarkably complete control over legal services regulation in their respective provinces and territories.<sup>23</sup> They establish licensing requirements, promulgate codes of conduct, and exercise discipline. Most regulatory investigations still result from client complaints, despite a trend towards increasing regulatory proactivity.<sup>24</sup> The law societies provide compensation for losses resulting from lawyer wrongdoing or error in some cases.<sup>25</sup> However, the professional liability insurance which they require lawyers to carry plays a more important role in this regard.<sup>26</sup>

The law societies are established by provincial legislation.<sup>27</sup> However these empowering statutes give the societies ample power and discretion, and they have typically been amended in ways proposed by the law societies themselves. Judges, legislators, and government officials, who have acquired influence to varying degrees in other parts of the world, have quite minor roles in Canadian legal services regulation.<sup>28</sup>

The “rule of law” is a core value system for Canadian lawyers. The very first line in the national Model Code of Conduct states that the rule of law is a “hallmark of civilized society” that privileges lawyers and imposes commensurate responsibilities on them.<sup>29</sup> The phrase is given

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<sup>21</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 57-60.

<sup>22</sup> Alice Woolley, *Understanding lawyers' ethics in Canada* (Markham, Ont.: LexisNexis, 2011) at 4.

<sup>23</sup> Noel Semple, "Male, Pale, and Stale? Diversity in Lawyers' Regulatory Leadership (working paper)," <<http://ssrn.com/abstract=2623743>> (last accessed: 3 June 2016).

<sup>24</sup> See section 4(b), *infra*.

<sup>25</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 42-3.

<sup>26</sup> Herbert M. Kritzer, "Lawyers' Professional Liability: Comparative Perspectives (Manuscript on file with author)" (2016) .

<sup>27</sup> E.g. *Law Society Act* (Ontario), R.S.O. 1990, c. L.8; *Law Society Act*, 1999 (Newfoundland & Labrador), SNL1999, c. L-9.1

<sup>28</sup> On the judicial role, see Amy Salyzyn, "The Judicial Regulation of Lawyers in Canada" (2014) 37 *Dalhousie Law Journal* 481. Regarding the institutional division of authority over legal services regulation in Canada, see Richard Devlin and Ora Morison, "Access To Justice And The Ethics And Politics Of Alternative Business Structures" (2014) 91 *Canadian Bar Review* 483 at 538.

<sup>29</sup> Federation of Law Societies of Canada, "Model Code of Professional Conduct," <<http://flsc.ca/national-initiatives/model-code-of-professional-conduct/>> (last accessed: 3 June 2016), Preface. See also Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 194-5 and s. 4.2(1) of the *Law Society Act* (Ontario), R.S.O. 1990, c. L.8: “The Society has a duty to maintain and advance the cause of justice and the rule of law.”

similar emphasis by the Canadian Bar Association,<sup>30</sup> and in the oath sworn by new lawyers in Ontario.<sup>31</sup> Many Canadian lawyers see upholding the rule of law as a reason to maintain self-regulation, insofar as this governance model lets them resist state coercion and hold government officials to account.<sup>32</sup> From another (although not necessarily irreconcilable) point of view, Adam Dodek identifies the rule of law as the “beginning of lawyers’ collective exercise of power” in this country.<sup>33</sup> Dodek sees self-regulation is a central component of Canadian lawyers’ power.<sup>34</sup>

If Canadian governments were to challenge lawyers’ self-regulation, there is a good chance that courts would come to the system’s defence. “Independence of the bar” is a principle that the Supreme Court of Canada has repeatedly endorsed and one which may have quasi-constitutional status.<sup>35</sup> Most recently, the Supreme Court struck down federal anti-money-laundering legislation that would have required lawyers to report client transactions, citing independence of the bar and the fact that law societies already had comparable rules with the same goals.<sup>36</sup> Whether or not this judicially-protected independence could be reconciled with a legislative push for co-regulation or direct state regulation would remain to be seen.<sup>37</sup>

#### a) Recent Canadian Trends in Governance

In competitive-consumerist jurisdictions such as England & Wales and Australia, traditional legal self-regulation was curtailed or abolished under pressure from governments, competition authorities, and consumer groups.<sup>38</sup> In Canada, there are few signs of any such pressure. The

<sup>30</sup> “We are ... the guardian of the rule of law in Canada.” (Canadian Bar Association, “Mission and Vision,” <<http://www.cba.org/Who-We-Are/About-us/Mission-and-Vision>> (last accessed: 3 June 2016)).

<sup>31</sup> “I shall champion the rule of law.” (Law Society of Upper Canada, “Barristers’ Oath,” <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=9720>> (last accessed: 3 June 2016)).

<sup>32</sup> E.g. F.C. DeCoste, “Towards a Comprehensive Theory of Professional Responsibility” (2001) 50 U.N.B.L.J. 109; Task Force on the Rule of Law and the Independence of the Bar, *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: Irwin Law, 2007); Turriff, “The Consumption of Lawyer Independence,” *supra* note 20.

<sup>33</sup> Adam Dodek, “Lawyers, Guns, and Money: Lawyers and Power in Canadian Society” in David L. Blaikie, Thomas Cromwell & Darrel Pink eds., *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Canada (AG) v Law Society of British Columbia*, [1982] 2 SCR 307 at 335-36; *Lavallee, Rackel & Heintz v Canada (Attorney General)*; *R v Fink*, 2002 SCC 61 at 68, [2002] 3 SCR 209; John Pearson, “Canada’s Legal Profession: Self-regulating in the Public Interest?” (2015) 92 Canadian Bar Review 555 at 565.

<sup>36</sup> “Canada (Attorney General) v. Federation of Law Societies of Canada, [2015] 1 SCR 401,” <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14639/index.do>> (last accessed: 3 June 2016).

<sup>37</sup> Alice Woolley, “Rhetoric And Realities: What Independence Of The Bar Requires Of Lawyer Regulation” (2012) 45 University of British Columbia Law Review 145. Arguing that independence does not necessarily require self-regulation, see Pearson, “Canada’s Legal Profession: Self-regulating in the Public Interest?,” *supra* note 35.

<sup>38</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4.

Competition Bureau brought a case against Toronto real estate agents in 2012,<sup>39</sup> and fired a shot across the self-regulating professions' collective bow in 2007,<sup>40</sup> and but has made no subsequent moves against lawyers. Criticism of the law societies in the press to date has not generally called for government intervention, but rather for changes to be led by the societies themselves.<sup>41</sup>

One notable governance trend is the increasing influence of the Federation of Law Societies of Canada (FLSC) over the law societies.<sup>42</sup> A major accomplishment was the harmonization of most terms in most provinces' codes with a national Model Code of Professional Conduct.<sup>43</sup> Discipline procedures and licensing processes are also increasingly consistent with FLSC national standards.<sup>44</sup> However, the empowerment of the FLSC cannot be considered a step away from self-regulation. The FLSC's governing council is entirely nominated by the law societies themselves, and it has no legal authority to impose anything on them.<sup>45</sup>

While Canada's governments have generally declined to challenge the Law Societies' hegemony, one small but interesting exception recently arose in Ontario. Facing a dire access to justice problem in the family courts,<sup>46</sup> Ontario's Ministry of the Attorney General has launched a

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<sup>39</sup> Competition Bureau (Canada), "Competition Bureau's Case Against Canada's Largest Real Estate Board: Hearing Starts Today," <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03495.html>> (last accessed: 3 June 2016).

<sup>40</sup> Competition Bureau (Canada), *Self-regulated professions: Balancing competition and regulation* (Ottawa: Competition Bureau (Canada), 2007) online: Competition Bureau (Canada) <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02523.html>> (last accessed: 3 June 2016).

<sup>41</sup> E.g. Sean Rehaag, "Law Society failing vulnerable refugee claimants (Toronto Star, May 18 2015)," <<https://www.thestar.com/opinion/commentary/2015/05/18/law-society-failing-vulnerable-refugee-claimants.html>> (last accessed: 3 June 2016); Kenyon Wallace, Rachel Mendleson and Dale Brazao, "Broken Trust (Toronto Star Project, 2015)," <<http://projects.thestar.com/broken-trust/>> (last accessed: 3 June 2016), but see James Balkwill, "Self-governance the problem (Letter to the editor of the Toronto Star, Fri., Jan. 16, 2015)," <[https://www.thestar.com/opinion/letters\\_to\\_the\\_editors/2015/01/16/self-governance-the-problem.html](https://www.thestar.com/opinion/letters_to_the_editors/2015/01/16/self-governance-the-problem.html)> (last accessed: 3 June 2016).

<sup>42</sup> Devlin and Morison, "Access To Justice And The Ethics And Politics Of Alternative Business Structures," *supra* note 28 at 539.

<sup>43</sup> Federation of Law Societies of Canada, "Model Code of Professional Conduct," *supra* note 29.

<sup>44</sup> Federation of Law Societies of Canada, "National Initiatives," <<http://flsc.ca/national-initiatives/>> (last accessed: 3 June 2016).

<sup>45</sup> Federation of Law Societies of Canada, "Council of the Federation," <<http://flsc.ca/about-us/council-of-the-federation/>> (last accessed: 3 June 2016).

<sup>46</sup> Action Committee on Access to Justice in Civil and Family Matters Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: ACAJCFM, 2013) online: ACAJCFM <<http://www.westcoastleaf.org/userfiles/file/FJWG%20report%20Meaningful%20Change%20Consultation%20Jan%202013.pdf>> (last accessed: 3 June 2016); Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* (Toronto: LCO, 2013) online: LCO <<http://www.lco-cdo.org/family-law-reform-final-report.pdf>> (last accessed: 3 June 2016); Noel Semple and Nicholas Bala, *Reforming the Family Justice System: An Evidence-Based Approach (Report commissioned by the Association of Family and Conciliation Courts, Ontario Chapter)* (Toronto: AFCC Ontario Chapter, 2013) online: SSRN

“Family Legal Services Review” led by a retired judge.<sup>47</sup> As explained below, this could lead to an expansion of non-lawyers’ spheres of permitted practice. Although the review is co-sponsored by the Law Society of Upper Canada (LSUC),<sup>48</sup> it is a rare example of a Canadian government body taking a direct interest in legal services regulation.

Quebec is a different story, slightly removed from pure self-regulation and thus closer to co-regulation. The provincial government’s *Office des professions du Québec* oversees the two legal self-regulatory bodies along with the other professions.<sup>49</sup> However, this relationship appears to a relatively harmonious one in which the lawyers’ self-regulatory bodies take the lead.

### 3. Professional Licensing and Occupational (Dis)Unity

How many different legal professions will be licensed within a given jurisdiction? Will regulation seek to enshrine professional *unity*? Or will it foster a multiplicity of professions and professional pathways, and encourage them to compete against each other? Legal services regulators’ differing policy choices on these issues reflects the dichotomy between the professionalist-independent and competitive-consumerist modes.

The legal professions in competitive-consumerist UK and Australasia have long been divided between barristers and solicitors,<sup>50</sup> and further professional ramification has occurred in recent years. Moreover, the doctrine of *regulatory competition* in these countries encourages the multiple legal professions to compete against each other for clients, for practitioners, and for regulatory expansion of their respective spheres of jurisdiction.<sup>51</sup>

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<<http://ssrn.com/abstract=2366934>> (last accessed: 3 June 2016); Advocates' Society, *Family Justice Reform Project* (Toronto: The Advocates’ Society (Ontario), 2014) online: The Advocates’ Society (Ontario) <[http://www.advocates.ca/assets/files/pdf/news/Family\\_Justice\\_Reform\\_Paper-Grassroots\\_Project\\_oct6.pdf](http://www.advocates.ca/assets/files/pdf/news/Family_Justice_Reform_Paper-Grassroots_Project_oct6.pdf)> (last accessed: 3 June 2016).

<sup>47</sup> Ministry of the Attorney General (Ontario), *Family Legal Services Review Consultation Paper (February 9, 2016)* (Toronto: MAG (Ontario), 2016) online: MAG (Ontario) <[http://www.attorneygeneral.jus.gov.on.ca/english/family/legal\\_services\\_consultation\\_paper.html](http://www.attorneygeneral.jus.gov.on.ca/english/family/legal_services_consultation_paper.html)> (last accessed: 3 June 2016)

<sup>48</sup> LSUC is the legal services regulator for Ontario, Canada’s largest province. Ministry of the Attorney General (Ontario), "Terms of Reference for Family Legal Services Review," <[https://news.ontario.ca/mag/en/2016/02/terms-of-reference-for-family-legal-services-review.html?\\_ga=1.92337438.201967515.1452098441](https://news.ontario.ca/mag/en/2016/02/terms-of-reference-for-family-legal-services-review.html?_ga=1.92337438.201967515.1452098441)> (last accessed: 3 June 2016).

<sup>49</sup> Légis Québec, "Code des Professions (Quebec), chapitre C-26," <<http://legisquebec.gouv.qc.ca/fr/ShowDoc/cs/C-26>> (last accessed: 3 June 2016).

<sup>50</sup> Roger Kerridge and Gwynn Davis, "Reform of the Legal Profession: An Alternative Way Ahead" (1999) 62 *Modern Law Review* 807.

<sup>51</sup> Stephen, *Lawyers, Markets and Regulation*, *supra* note 2 at Chapter 7; Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 79.

Canada's legal profession, by contrast, is much more unified and the competition between different occupational groups is much less evident. Regulation in this country has never distinguished barristers from solicitors or recognized licensed conveyor professions.<sup>52</sup> As in the United States, the overwhelming majority of legal work in Canada is done by lawyers who need compete only with other lawyers. Licensed Canadian lawyers can offer any and all legal services. Unlike in the medical field, regulators do not require specialist credentials (although some clients do).

The training and licensing process is fairly consistent across the country. In every province and territory, lawyers must obtain an undergraduate post-secondary education (typically a four-year bachelor-level degree although two or three years suffice in some cases). Candidates must then graduate from a three-year law school program. At this point in prospective lawyers' education, the law societies take over from the universities. Candidates must pass a bar exam and, in some provinces, attend professional training classes that are meant to be more practical than law school.

One licensing requirement that distinguishes the Canadian jurisdictions from the American states is "articling," an apprenticeship lasting between 6 and 10 months. Candidates are responsible for finding their own articling positions, which can be very challenging.<sup>53</sup> Given that the job market for licensed lawyers is reasonably strong,<sup>54</sup> some argue that the articling requirement is an artificial regulatory bottleneck separating would-be lawyers from the market.<sup>55</sup> Bar exam passage rates are generally much higher in Canada than they are south of the border, which may provide some

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<sup>52</sup> Devlin and Morison, "Access To Justice And The Ethics And Politics Of Alternative Business Structures," *supra* note 28 at 538; Adam M. Dodek *et al.*, *Canadian legal practice : a guide for the 21st century* (Markham, Ont.: LexisNexis Canada, 2009).

<sup>53</sup> Jordan Furlong and Canadian Bar Association, *Do Law Differently: Futures for Young Lawyers* 2016) <https://www.cba.org/getattachment/Publications-Resources/Resources/Futures/DO-LAW-DIFFERENTLY-FUTURES-FOR-YOUNG-LAWYERS/NewLawforNewLawyersEng.pdf> (last accessed: 3 June 2016) at 13; Kendyl Sebesta, "Articling crisis gets worse: Report shows three-percentage-point increase in applicants without jobs" *Law Times* (Monday, May 07, 2012) <http://www.lawtimesnews.com/201205079078/Headline-News/Articling-crisis-gets-worse>.

<sup>54</sup> Glenn Kauth, "New report notes 94% employment rate for law graduates (Legal Feeds, 24 February 2014)," <http://www.canadianlawyermag.com/legalfeeds/1952/new-report-notes-94-per-cent-employment-rate-for-law-graduates.html> (last accessed: 3 June 2016).

<sup>55</sup> Avner Levin and Asher Alkoby, "Barriers to the Profession: Inaction in Ontario, Canada and its Consequences" (2013) 3 *Oñati Socio-legal Series* 580. In response to concerns about articling student unemployment, the Law Society of Upper Canada launched a "Pathways Pilot Project" which, among other things, gives candidates the option of enrolling in a Law Practice Program in lieu of articling (Law Society of Upper Canada Articling Task Force, *Pathways To The Profession: A Roadmap For The Reform Of Lawyer Licensing In Ontario* (Toronto: Law Society of Upper Canada, 2012) online: LSUC Gazette <http://www.lawsocietygazette.ca/wp-content/uploads/2012/10/ArticlingTaskForcefinalreport.pdf>) (last accessed: 3 June 2016); Law Society of Upper Canada, "Pathways Pilot Project," <http://www.lsuc.on.ca/Pathways/> (last accessed: 3 June 2016).

consolation for candidates who envy their American counterparts' freedom from the apprenticeship requirement.

Canadian lawyers enjoy a relatively hegemonic position in the market. A handful of competing legal professions do exist, but the relatively minor nature of these exceptions helps them prove the general rule of occupational unity. The two ancient exceptions are the notarial professions of British Columbia (B.C.) and Quebec. In B.C., there are only a few hundred notaries. It appears likely that the Law Society of B.C. (the self-regulatory body for the main professional group in that province) will soon obtain regulatory control over the notaries, thereby bringing British Columbia even closer to the principle of occupational unity.<sup>56</sup> The *Chambre des notaires du Québec* is larger (almost 4000 notaries), and it is fully independent of Quebec's lawyers.<sup>57</sup> The *Code Civil* gives Quebec *notaires* their own scope of practice which includes some litigation as well as transactional work. This plurality of legal professions again places Quebec's legal services regulatory regime closer to the competitive-consumerist mode of the UK and Australia.

#### a) Recent Canadian Trends in Professional Licensing

In recent years, two more legal para-professions have come into existence in Canada. Immigration Consultants are federally licensed non-lawyers who can provide representation and advice in immigration and refugee matters.<sup>58</sup> Ontario paralegals have been licensed and regulated by the Law Society of Upper Canada since 2007.<sup>59</sup> There is a small set of legal tasks that paralegals are permitted to perform independently in competition with lawyers.<sup>60</sup> Ontario's Family Legal

<sup>56</sup> Society of Notaries of British Columbia and Law Society of British Columbia, "Memorandum of Understanding and Appendices," <<http://www.lawsociety.bc.ca/docs/home/blog/MOU-Notaries.pdf>> (last accessed: 3 June 2016).

<sup>57</sup> *Chambre Des Notaires Du Québec, Rapport Annuel 2014-2015* (Quebec: CNQ, 2015) online: CNQ <<http://www.cnq.org/DATA/TEXTEDOC/2014-2015.pdf>> (last accessed: 3 June 2016); Fiona M. Kay, "Intra-professional Competition and Earnings Inequalities across a Professional Chasm: The Case of the Québec Legal Profession" (2009) 43 *Law & Society Review* 901.

<sup>58</sup> "Immigration Consultants Of Canada Regulatory Council," <<http://icrc-crcic.info>> (last accessed: 3 June 2016).

<sup>59</sup> *Access to Justice Act*, 2006, S.O. 2006, c. 21 and subsequent regulatory action by the Law Society of Upper Canada. See David J. Morris, *Report of Appointee's Five-Year Review of Paralegal Regulation in Ontario, Pursuant to Section 63.1 of the Law Society Act* (Toronto: Ministry of the Attorney General (Ontario), 2012) online: MAG <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal\\_review/Morris\\_five\\_year\\_review-ENG.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal_review/Morris_five_year_review-ENG.pdf)> (last accessed: 3 June 2016) for a history.

<sup>60</sup> In British Columbia and most other provinces, paralegals must be supervised by lawyers: Law Society of British Columbia, "Designated Paralegals," <<https://www.lawsociety.bc.ca/page.cfm?cid=2582&t=Paralegals>> (last accessed: 3 June 2016). See also Law Society of British Columbia, *Report of the Legal Services Regulatory Framework Task Force* (Victoria: LSBC, 2014) online: LSBC <<http://www.lawsociety.bc.ca/docs/publications/reports/LegalServicesRegulatoryFrameworkTF.pdf>> (last accessed: 3 June 2016).

Services Review (mentioned above) may or may not propose expansion of the paralegal scope of practice into some family law matters.<sup>61</sup>

Still, a commitment to professional unity that is strong by international standards characterizes Canadian legal services regulation. With the exception of Quebec's *notaires*, Canada's legal para-professions are generally (i) small (ii), constrained to narrow scopes of independent practice, and (iii) controlled by law societies, which are in turn controlled by lawyers.<sup>62</sup> Outside of their narrow bands of permitted work, non-lawyers who offer legal services continue to be prosecuted for unauthorized practice of law, whether or not their work has been the subject of client complaints.<sup>63</sup> For better or worse, Canada like the U.S.A. seems unlikely to embrace the increasing competition between legal professions that is now found elsewhere in the common law world.

#### 4. Insulating Rules and Alternative Business Structures

To what extent should regulators *insulate* law firms from the influence of non-lawyers? Traditionally, the prospect of non-lawyer investors, managers or partners in law firms has been considered a threat to lawyer professionalism and independence.<sup>64</sup> The United States continues to insulate its law firms from non-lawyers, pursuant to traditional professionalist-independent arguments. Conversely, openness to non-lawyer influence in firms is a distinguishing characteristic of the competitive-consumerist reform that has transformed legal services regulation in the English-

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<sup>61</sup> E.g. Ministry of the Attorney General (Ontario), "Family Legal Services Review Consultation Paper (February 9, 2016)," *supra* note 47.

<sup>62</sup> Licensed paralegals do have representatives among the "Benchers" who lead Ontario's legal services regulator. However, 75 percent of the benchers (40 individuals) are lawyers and only 9 percent are paralegals (5 individuals). (Law Society of Upper Canada, "By-Law 3: Benchers, Convocation, and Committees," <<https://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147484279>> (last accessed: 3 June 2016)).

Suggesting that paraprofessions controlled by the main profession will never create significant competition, see Avner Shaked and John Sutton, "The Self-Regulating Profession" (1981) 47 *Review of Economic Studies* 217.

<sup>63</sup> Joan Brockman, "Money for Nothing, Advice for Free: The Law Society of British Columbia's Enforcement Actions Against the Unauthorized Practice of Law" (2010) 29 *Windsor Review of Legal and Social Issues* 1. See e.g. Law Society of British Columbia, "Law Society takes action to protect BC public from individuals, businesses engaging in unauthorized practice of law (Press release, February 25, 2016)," <-businesses-engaging-in-unauthorized-practice-of-law <https://www.lawsociety.bc.ca/page.cfm?cid=4202&t=Law-Society-takes-action-to-protect-BC-public-from-individuals>> (last accessed: 3 June 2016).

<sup>64</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 228 *et seq.*; Bruce A. Green, "The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate" (2000) 84 *Minnesota Law Review* 1115; James E. Moliterno, *The American Legal Profession in Crisis: Resistance and Responses to Change* (New York: Oxford University Press, 2013) at 163.

speaking world outside of North America.<sup>65</sup> Under this influence, alternative business structure (ABS) solicitor firms with non-lawyer investors are now permitted in countries like Australia and England & Wales.<sup>66</sup>

Once again, Canadian legal services regulation is very close to the American position on insulation and ABS. Most of the provinces do permit firms to incorporate, but only if their shares are controlled entirely by lawyers.<sup>67</sup> “Multi-disciplinary partnerships” between lawyers and others are forbidden or tightly restricted by the law societies,<sup>68</sup> and sharing fees with non-lawyers (including through the payment of referral fees) is generally prohibited.<sup>69</sup> Again, Quebec’s regime is somewhat closer to the competitive-consumerist model of regulatory openness to non-lawyer involvement. In that province, non-lawyers are permitted to own share capital in law firms, so long as the majority of the voting shares are held by lawyers or other regulated professionals.<sup>70</sup> In no part of Canada can an incorporated law firm issue publicly traded shares.

#### a) Recent Canadian Trends in Insulating Rules

The Law Society of Upper Canada (LSUC) ABS Working Group reports sparked reconsideration of these issues in early 2015.<sup>71</sup> Several legal academics,<sup>72</sup> along with the Canadian

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<sup>65</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4.

<sup>66</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 65-67.

<sup>67</sup> Family members of licensees can in some provinces also hold shares. See Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, *Innovating Regulation* (Edmonton, Winnipeg, Regina: LSM LSA, LSS, 2015) online: LSS <<http://www.lawsociety.sk.ca/publications/innovating-regulation.aspx>> (last accessed: 3 June 2016) at 43 and 51.

See also *Law Society Act* (Ontario), RSO 1990, c. L.8, s. 4.2, at s. 61.0.1(4);

*Legal Profession Act* (Alberta), RSA 2000, c. L-8, at s. 131(3)(e);

*The Legal Profession Act* (Manitoba), SM 2002, c. 44, at s. 32(1);

*Legal Profession Act* (Nova Scotia), SNS 2004, c. 28, as amended by SNS 2010, c. 56, at s. 21(1);

*Law Society Act 1999* (Newfoundland & Labrador), SNL 1999, c. L-9.1, at s. 63.4(1).

<sup>68</sup> Richard Devlin and Albert Cheng, "Re-calibrating, re-visioning and re-thinking self-regulation in Canada" (2010) 17 *International Journal of the Legal Profession* 233; Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, "Innovating Regulation," *supra* note 67 at 49.

<sup>69</sup> Federation of Law Societies of Canada, "Model Code of Professional Conduct," *supra* note 29 at Rule 3.67 and corresponding provisions in the provincial Law Societies' codes.

<sup>70</sup> Legis Quebec, "Règlement sur l'exercice de la profession d'avocat en société et en multidisciplinarité (chapitre B-1, r. 9),"

<[http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FB1\\_1%2FB1R9.htm](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FB1_1%2FB1R9.htm)> (last accessed: 3 June 2016).

<sup>71</sup> Law Society of Upper Canada Professional Regulation Committee, *Report to Convocation, January 29, 2015* (Toronto: LSUC, 2015) online: LSUC

<[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2015/convocation-january-2015-professional-regulation.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-january-2015-professional-regulation.pdf)> (last accessed: 3 June 2016).

For a comprehensive account of the Canadian debate regarding alternative business structures, see Devlin and Morison, "Access To Justice And The Ethics And Politics Of Alternative Business Structures," *supra* note 28.

Bar Association's Futures Initiative,<sup>73</sup> argued that our regulators should roll back insulating rules.<sup>74</sup> The author's personal view is that insulating anti-ABS rules contribute to the deplorable state of access to justice in Canada, because they artificially suppress the size of personal plight law firms and prevent potentially access-enhancing collaborations with non-lawyers.<sup>75</sup>

However, as of mid-2016, the professionalist-independent dedication to insulating law firms seems likely to survive the current debate.<sup>76</sup> Canada's legal services regulators seem unlikely to permit full-scale ABS on the English/Australian model.<sup>77</sup> Defenders of insulating rules have argued that profit-obsessed outsiders would undermine lawyers' ethics and loyalty to their clients,<sup>78</sup> and

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<sup>72</sup> Edward Iacobucci and M. J. Trebilcock, "An Economic Analysis Of Alternative Business Structures For The Practice Of Law" *ibid.* 57 at 97; Mitch Kowalski, "The Fight for ABS Is Just Beginning (Slaw.ca, March 6 2014)," <<http://www.slaw.ca/2014/03/06/the-fight-for-abs-is-just-beginning/>> (last accessed: 3 June 2016); Mitch Kowalski, "Why one scandal shouldn't doom a new twist on law firm ownership (National Post, August 17, 2015)," <<http://business.financialpost.com/legal-post/why-one-scandal-shouldnt-doom-a-new-twist-on-law-firm-ownership>> (last accessed: 3 June 2016); David Wiseman, "Poverty Law, the Future of Legal Services and Access to Justice: Towards ABS+" (2015) 3 Canadian Journal of Poverty Law, online: <[http://www.povertylaw.ca/uploads/6/7/6/0/6760250/abs\\_+\\_pdf](http://www.povertylaw.ca/uploads/6/7/6/0/6760250/abs_+_pdf)> (last accessed: 3 June 2016). For a summary of the potential benefits of ABS, see Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, "Innovating Regulation," *supra* note 67 at 59 *et seq.*

Law Society of Upper Canada bencher Malcolm Mercer is a persuasive advocate for ABS within the regulatory community: Malcolm Mercer, "Utopia, Dystopia and Alternative Business Structures (Slaw.ca, November 11, 2013)," <<http://www.slaw.ca/2013/11/11/utopia-dystopia-and-alternative-business-structures>> (last accessed: 3 June 2016), Malcolm Mercer, "So Many Lawyers, so Many Unmet Legal Needs (ABA Law Practice Magazine, July/August 2015)" (2015), online: <<https://malcolmm Mercer.ca/2015/07/07/so-many-lawyers-so-many-unmet-legal-needs/>> (last accessed: 3 June 2016).

<sup>73</sup> CBA Legal Futures Initiative, *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: Canadian Bar Association, 2014) online: CBA <<http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>> (last accessed: 3 June 2016).

<sup>74</sup> See also Andrew Grech and Tahlia Gordon, *Modern Law Firm Management: Should Non-Lawyer Ownership be Endorsed and Encouraged?* (Sydney, Australia: Creative Consequences, 2015) online: Creative Consequences <[http://www.researchgate.net/profile/Tahlia\\_Gordon/publication/276257026\\_Modern\\_Law\\_Firm\\_Management\\_\\_Should\\_non-lawyer\\_ownership\\_of\\_law\\_firms\\_be\\_endorsed\\_and\\_encouraged/links/5553283408ae980ca606dc99.pdf](http://www.researchgate.net/profile/Tahlia_Gordon/publication/276257026_Modern_Law_Firm_Management__Should_non-lawyer_ownership_of_law_firms_be_endorsed_and_encouraged/links/5553283408ae980ca606dc99.pdf)> (last accessed: 3 June 2016).

<sup>75</sup> Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013) 21 International Journal of the Legal Profession 267, online: <<http://ssrn.com/abstract=2303987>> (last accessed: 3 June 2016); Noel Semple, "ABS: What Horrors Within? (CBA National Magazine: December 4, 2014)," <<http://www.nationalmagazine.ca/Articles/December-2014-Web/ABS-What-horrors-within.aspx>> (last accessed: 3 June 2016).

<sup>76</sup> For a contrary view, see Devlin and Morison, "Access To Justice And The Ethics And Politics Of Alternative Business Structures," *supra* note 28 at 553: "we have come to believe that ABS's are likely to be permitted in Canada in the foreseeable future."

<sup>77</sup> David Wiseman, "Update on regulatory consideration of ABS in Canada: towards a 'made in Canada' approach?" (2015) 18 Legal Ethics, online: <<http://www.tandfonline.com/doi/pdf/10.1080/1460728x.2015.1127079>> (last accessed: 3 June 2016).

<sup>78</sup> Devlin and Morison, "Access To Justice And The Ethics And Politics Of Alternative Business Structures," *supra* note 28; Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, "Innovating Regulation," *supra* note 67.

that ABS would not improve access to justice.<sup>79</sup> The majority of the 40 submissions to the Law Society's ABS consultation opposed allowing majority non-lawyer ownership.<sup>80</sup> Opposition was led by the Ontario Trial Lawyers' Association (OTLA).<sup>81</sup> The OTLA represents plaintiff-side personal injury lawyers, the segment of the bar which has been most dramatically disrupted by new ABS competitors in England and Australia.

The LSUC Working Group removed majority non-lawyer ownership from the list of options being considered in September 2015.<sup>82</sup> However, "more limited non-licensee ownership models for traditional law firms" remain on the table.<sup>83</sup> This might include the current Quebec model.<sup>84</sup> Other common law provinces have thus far adopted a "wait and see" approach. Once again, the reform pressure from outside the profession, which sparked competitive-consumerist reform in Northern Europe and Australasia, is conspicuous in its absence from the Canadian debate on insulating regulation.

## 5. Regulatory Focus: Entity Regulation and Proactivity

A fourth set of policy decisions has also divided professionalist-independent legal services regulators from competitive-consumerist ones. These are issues of regulatory focus. Regulatory focus is, first, a matter of *who* is to be regulated: only individual practitioners, or also the law firms in which they work? Second, regulatory focus involves the question of *when* regulation will be

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<sup>79</sup> Jasminka Kalajdzic, *Memo Re: ABS Research (Prepared for Ontario Trial Lawyers Association)* (Toronto: OTLA, 2014) online: OTLA <<https://www.otla.com/docDownload/680494>> (last accessed: 3 June 2016).

<sup>80</sup> Law Society of Upper Canada Professional Regulation Committee, *Report to Convocation, February 26, 2015* (Toronto: 2015) online: LSUC

<[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2015/convocation-february-2015-professional-regulation.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-february-2015-professional-regulation.pdf)> (last accessed: 3 June 2016) at 141.

<sup>81</sup> Ontario Trial Lawyers Association, *Submission on Alternative Business Structures* (Toronto: OTLA, 2014) online: OTLA <<https://www.lsuc.on.ca/uploadedFiles/Ontario%20Trial%20Lawyers%20Association.pdf>> (last accessed: 3 June 2016); Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, "Innovating Regulation," *supra* note at 53.

<sup>82</sup> Law Society of Upper Canada Professional Regulation Committee, *Report to Convocation, September 24, 2015* (Toronto: 2015) online: LSUC

<[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2015/convocation-september-2015-prc.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf)> (last accessed: 3 June 2016) at 110.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Supra* note 70 and accompanying text.

applied: in response to problems, or also to prevent problems and encourage improvements in practice?<sup>85</sup>

#### a) Recent Canadian Trends: Entity Regulation

Traditionally regulation (including licensing, codes of conduct, and discipline) has been aimed at individual practitioners. Law *firms* large and small were functionally invisible to regulation, and not mentioned in the codes. This remains the case, more or less, in the United States.<sup>86</sup> Individual-focused regulation is therefore one of the four pillars of the professionalist-independent mode of legal services regulation that has proven surprisingly resilient in the United States.<sup>87</sup> Northern European and Australasian regulators, however, have moved in a very different direction in recent years. Entity regulation of law firms is now found in many of these jurisdictions,<sup>88</sup> deployed as a way to entrench “ethical infrastructure” and thereby protect consumer interests.<sup>89</sup>

Canada’s position is, for now, quite close to that of our southern neighbours. A few of the law societies do have authority to regulate firms and other entities in which lawyers practice. So far only Nova Scotia has formally embraced entity regulation,<sup>90</sup> and drafted systems and tools to

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<sup>85</sup> Victoria Rees, *Transforming Regulation and Governance in the Public Interest* (Halifax, Nova Scotia: Nova Scotia Barristers’ Society, 2013) online: NSBS <<http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>> (last accessed: 3 June 2016) at 5.

<sup>86</sup> Adam Dodek, "Regulating Law Firms in Canada" (2011) 90 *Canadian Bar Review* 383; Ted Schneyer, "A tale of four systems: reflections on how law influences the ‘ethical infrastructure’ of law firms" (1998) 39 *South Texas Law Review* 245. American legal ethicists have argued that lawyers must be independently accountable moral agents, and that placing responsibility at the firm level would undermine this principle: Julie Rose O’Sullivan, "Professional Discipline for Law Firms - A Response to Professor Schneyer's Proposal" (2002) 16 *Georgetown Journal of Legal Ethics* 1; Margaret Raymond, "The Professionalization of Ethics" (2005) 33 *Fordham Urban Law Journal* 153; Anthony V. Alfieri, "The Fall of Legal Ethics and the Rise of Risk Management" (2006) 94 *Georgetown Law Journal* 1909.

<sup>87</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4.

<sup>88</sup> Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, "Innovating Regulation," *supra* note 67.

<sup>89</sup> See e.g. Christine Parker *et al.*, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behavior" (2008) 31 *UNSWLJ* 158; Amy Salyzyn, "What if We Didn’t Wait?: Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices" (2015) 92 *Canadian Bar Review* 507 at 525 *et seq.* Entity regulation includes “indirect” regulation of firms (whereby senior individuals are held responsible for the behaviour of subordinates) as well as direct regulation of the law firms themselves: Andrew Boon, "Professionalism under the Legal Services Act 2007" (2010) 17 *International Journal of the Legal Profession* 195; Dodek, "Regulating Law Firms in Canada," *supra* note 86 at 407.

<sup>90</sup> Federation of Law Societies of Canada, "Exploring Entity Regulation," <[www.lawsociety-barreau.nb.ca/files/LawNews/LawNews\\_January2016.pdf](http://www.lawsociety-barreau.nb.ca/files/LawNews/LawNews_January2016.pdf)> (last accessed: 3 June 2016) at 14.

effectuate it.<sup>91</sup> Adam Dodek's 2011 observation that "as a general matter, law societies regulate individual lawyers," and not firms, remains accurate today.<sup>92</sup>

That being said, the odds of a Canadian departure from the professionalist-independent mode are higher in this policy space than they are in the other three reviewed above. Entity regulation, like ABS, is a "hot topic" (at least by the temperate standards of Canada's legal services regulation discourse). In different parts of the country, discussion papers have been published and submissions are being sought.<sup>93</sup> Amy Salyzyn argues that Canadian regulators should take an active interest in firms' ethical infrastructures, and she identifies entity regulation as one way (although not the only way) to do so.<sup>94</sup> Manitoba has recently amended its statutes to authorize entity regulation by the Law Society of Manitoba.<sup>95</sup> One ambitious idea, raised in a joint discussion paper by the three prairie law societies, is to apply entity regulation to in-house legal departments within corporations and perhaps even to government ministries, along with "pure" private sector law firms.<sup>96</sup>

Compared to the ABS proposals, Canadian regulators' entity regulation trial balloons have provoked less resistance from the bar. However some do share the American legal ethicists' concern about undermining individual ethical responsibility.<sup>97</sup> Others worry that entity regulation will

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<sup>91</sup> Nova Scotia Barristers' Society, "Framework for Legal Services Regulation," <<http://nsbs.org/framework-legal-services-regulation>> (last accessed: 3 June 2016); Nova Scotia Barristers' Society, "Draft self-assessment process for legal entities," <<http://nsbs.org/draft-self-assessment-process-legal-entities>> (last accessed: 3 June 2016).

<sup>92</sup> Dodek, "Regulating Law Firms in Canada," *supra* note 86 at 409.

<sup>93</sup> Law Society of Alberta, "Highlights of February 2016 Bench Meeting (March 7, 2016)," <<http://lawsociety.ab.ca/law-society-today/articles/articles-list/2016/03/07/highlights-of-february-2016-bencher-meeting>> (last accessed: 3 June 2016); Law Society of Upper Canada, "Professions to be consulted on Compliance-Based Entity Regulation (Report to Convocation, December 4, 2015)," <[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2015/convocation%20december%202015%20compliance.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation%20december%202015%20compliance.pdf)> (last accessed: 3 June 2016); Law Society of British Columbia, "Law Firm Regulation: Consultation with the Profession (February 2016)," <<https://www.lawsociety.bc.ca/docs/about/2016PresentationLawFirmRegulation.pdf>> (last accessed: 3 June 2016).

<sup>94</sup> Salyzyn, "What if We Didn't Wait?: Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices," *supra* note 89.

<sup>95</sup> Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, "Innovating Regulation," *supra* note 67 at 38; "The Legal Profession Act (Manitoba), C.C.S.M. c. L107," <<https://web2.gov.mb.ca/laws/statutes/ccsm/l107e.php>> (last accessed: 3 June 2016) at s. 24. Nova Scotia already gives this power to the Nova Scotia Barristers' Society.

<sup>96</sup> Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, "Innovating Regulation," *supra* note 67 at 10.

<sup>97</sup> Law Society of British Columbia Law Firm Regulation Task Force, "Law firm regulation survey report," <<https://www.lawsociety.bc.ca/docs/publications/survey/LawFirmRegulation.pdf>> (last accessed: 3 June 2016).

constitute an superfluous extra layer of obligations on small firm and solo practitioners,<sup>98</sup> increasing their cost of doing business and eventually, perhaps, their service prices.<sup>99</sup>

It seems plausible that there will be some modest move towards entity regulation. Law societies might well obtain the necessary powers through amendments to their respective empowering statutes, but then use those powers only sparingly. Increased reliance on voluntary efforts to enhance ethical infrastructure at the firm level – such as the Canadian Bar Association’s “Ethical Practices Self Evaluation Tool,” is another likely development.<sup>100</sup>

#### b) Recent Canadian Trends: Proactive Regulation

As noted above, questions of regulatory focus are not just about whether or not firms are to be regulated, but also about *when* regulation is to be applied. Entity regulation could in principle be applied in the traditional “reactive” manner, imposing punishment on a firm or requiring remedial action from a firm only if a complaint or audit reveals a problem.<sup>101</sup> However, regulators are increasingly enthusiastic about “proactive” or “compliance-based” approaches that are applied to all firms regardless of whether there is any sign of problems.<sup>102</sup>

While this topic has generated significant interest of late, proactivity in legal services regulation is by no means unprecedented. What Michael Trebilcock terms “input” legal services regulation has a long history, most familiarly in licensing and educational requirements for new lawyers.<sup>103</sup> If entity regulation is embraced by Canadian legal services regulators, it seems likely that it will be primarily proactive rather than reactive in nature.

## 6. Conclusion

### a) Canada’s Place in the Common Law World

Canadians are like most residents of small countries with large neighbours and the insecurities about national identity that tend to result. We like to accentuate (and defend) our clear-

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<sup>98</sup> Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, “Innovating Regulation,” *supra* note at 7-8

<sup>99</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4.

<sup>100</sup> Canadian Bar Association (CBA), “Ethical Practices Self Evaluation Tool,” <<http://www.cba.org/CBA-Legal-Futures-Initiative/Resources/Ethical-Practices-Self-Evaluation-Tool>> (last accessed: 3 June 2016); Salyzyn, “What if We Didn’t Wait?: Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices,” *supra* note 89 at 542.

<sup>101</sup> Law Society of Alberta, Law Society of Manitoba and Law Society of Saskatchewan, “Innovating Regulation,” *supra* note 67 at 10.

<sup>102</sup> *Ibid.*

<sup>103</sup> Michael Trebilcock, “Regulating the Market for Legal Services” (2008) 45 *Alberta Law Review* 215.

cut differences from the United States. However, our general approach to legal services regulation cannot realistically be counted among these points of dramatic distinction. If the legal services regulatory regimes of the common law world are indeed bifurcated into competitive-consumerist jurisdictions on one hand and professionalist-independent ones on the other, then Canada remains in the latter camp along with the American states.

Self-regulation remains a consensus principle across the country.<sup>104</sup> By international standards, the unified profession of “lawyer” in Canada enjoys unity and hegemony, with relatively little competition among multiple legal professions.<sup>105</sup> The regulatory policy of insulating law firms from non-lawyer investors and managers seems set to resist the push for regulatory openness and alternative business structures.<sup>106</sup> When it comes to entity regulation, although our regulators are somewhat more ready to take modest steps toward the competitive-consumerist mode, again no major revolution is likely.<sup>107</sup>

Why has Canada resisted competitive-consumerist reform of legal services regulation? The question is intriguing because, in many other policy domains, our country remains more similar to its Commonwealth brethren than it is to the revolutionary Republic. The proximate cause of the dichotomy between professionalist-independent and competitive-consumerist modes seems to have been the presence of reform pressure from governments, competition authorities, and consumer groups in Northern Europe and Australasia, and the absence thereof in North America. This, however, begs the question of *why* that reform pressure never rolled onto these shores. Federalism seems unlikely to explain it, given that (i) Canada’s federal government would have no basis to prevent legal services regulatory reform by the provinces and (ii) federalism has not impeded competitive-consumerist reform in Australia.

In previous work, the author has speculated about possible ways to account for the divergence.<sup>108</sup> It could be that more generous legal aid in the UK and Australia led to greater state interest in reducing legal fees by fostering competition.<sup>109</sup> Another possibility is that less generous

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<sup>104</sup> Section 1, *supra*.

<sup>105</sup> Section 2, *supra*.

<sup>106</sup> Section 3, *supra*.

<sup>107</sup> Section 4, *supra*.

<sup>108</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4 at 88-90.

<sup>109</sup> Richard Abel, "England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors" in Richard L. Abel & Philip Lewis eds., *Lawyers in society: The Common Law World* (Berkeley: University of California Press, 1988) at 46.

social safety nets in North America increased the perceived need for and tolerance of non-state market shelters such as traditionally-regulated professions. Finally, it could be that the historic barrister-solicitor division in the UK and Australia, and the attendant intra-professional squabbles over regulatory privileges,<sup>110</sup> called public attention to issues of professional powers and competition in a manner that has not transpired here.

#### b) Professionalist-Independent Regulation, For Better and for Worse

This Chapter's characterization of Canadian legal services regulation as relatively traditional is, by and large, not meant as criticism. It is true that there are episodes of regulatory decision-making in which self-regulation arguably lets the economic interests of a particular group of lawyers trump the public interest.<sup>111</sup> It is not entirely clear, for example, that the Law Society of Upper Canada was single-mindedly pursuing the public interest when it brought its professional indemnity insurer into the title insurance market,<sup>112</sup> or when it excluded independent paralegals from all family law practice.<sup>113</sup> However the author's view is that Canada's law societies usually balance their many commitments reasonably, and carry out their mandates effectively and efficiently.

The professionalist-independent tradition of legal services regulation has several distinct virtues, to which competitive-consumerist reformers in Northern Europe and Australasia may have given too short shrift. I have argued that this tradition can and should endure, so long as it is reinvigorated through an overall dedication to client-centricity and several specific reforms (including a significant rollback of insulating regulation).<sup>114</sup> In several ways, Quebec regulates legal services in a more competitive-consumerist mode: greater state involvement, greater openness to non-lawyers, and a greater multiplicity of competing legal professions. *La belle province* offers a

<sup>110</sup> Andy Boon and John Flood, "Trials of Strength: The Reconfiguration of Litigation as a Contested Terrain" (1999) 33 *Law & Soc'y Rev.* 595; Abel, *ibid* at 39.

<sup>111</sup> Joan Brockman, " 'Fortunate enough to obtain and keep the title of profession:' Self-regulating organizations and the enforcement of professional monopolies" (1998) 41 *Canadian Public Administration* 587.

<sup>112</sup> Paul D. Paton, *A Review of the Law Society Act, Regulation 666 and the Commercial Activities of the Law Society of Upper Canada (Report for First Canadian Title)* (Kingston, Ontario: First Canadian Title, 2007) online: First Canadian Title <[http://www.firstcanadiantitle.com/portal/server.pt/gateway/PTARGS\\_0\\_0\\_342\\_0\\_0\\_47/en/about/Corporate\\_Public%2520Affairs/Pdf/First%2520Canadian%2520Title%2520Report%2520on%2520Regulation%2520666\\_Paton.pdf](http://www.firstcanadiantitle.com/portal/server.pt/gateway/PTARGS_0_0_342_0_0_47/en/about/Corporate_Public%2520Affairs/Pdf/First%2520Canadian%2520Title%2520Report%2520on%2520Regulation%2520666_Paton.pdf)> (last accessed: 3 June 2016).

<sup>113</sup> Marshall Yarmus, "Yarmus: Ontario's crisis in family courts (Ottawa Citizen, July 27, 2015)," <<http://ottawacitizen.com/news/national/yarmus-ontarios-crisis-in-family-courts>> (last accessed: 3 June 2016); Kendyl Sebesta, "LSUC touts success of paralegal regulation, But critics say review is 'far removed' from the truth" *Law Times* (July 16, 2012).

<sup>114</sup> Semple, *Legal Services Regulation at the Crossroads*, *supra* note 4, Chapters 9 and 10.

distinct approach, and one that in some respects can be a model for the law societies of the other Canadian provinces.

*“Plus ça change, plus c'est la même chose”* (the more things change, the more they stay the same) may not be entirely fair as a summary of Canadian legal services regulation at this point in time. There is a constant stream of minor course corrections, and a willingness to at least talk about larger changes. However, the professionalist-independent regulatory tradition remains as strong in this country as it is anywhere in the world. The reform we have seen, and the reform we are likely to see in the future, is evolutionary in nature rather than revolutionary.

Richard Devlin and Ora Morison described the Canadian ABS debate as “a monologue within the Canadian legal profession,” in which “neither governments nor consumers nor corporations have had much to say.”<sup>115</sup> This description, it seems, is apt for legal services regulatory discourse in this country in general. It is very hard to find any Canadian who is *not* a lawyer who takes any interest whatsoever in the regulatory issues discussed here. The scrutiny from competition authorities, legislators, and consumer groups which presaged thoroughgoing competitive-consumerist reform in Australia and the UK is not evident in Canada at this time. Thus Canada’s legal profession seems to have the luxury of deciding for itself how and whether to reform legal services regulation. All Canadians who rely directly or indirectly on legal services and the rule of law – which is to say all Canadians – should hope that this discretion is used in a public-interested and perspicacious fashion.

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<sup>115</sup>Devlin and Morison, "Access To Justice And The Ethics And Politics Of Alternative Business Structures," *supra* note 28 at 539.