

The question of whether Canadian lawyers ought to be trusted to govern themselves has been repeatedly raised by the public, policy-makers and the academy over the past several decades. The legal profession has responded on a number of fronts, adopting what has been characterized as a "regime of defensive self-regulation." The analysis in this article complements and complicates this account by arguing that, alongside the profession's efforts at defensive self-regulation, there has been a steady stream of aggressive judicial regulation. The central argument of this article is two-fold: first, that courts have come to occupy an increasingly active role as regulators of the Canadian legal profession in the past several decades; and, second, that the measures taken by the courts have resulted in a regulatory regime more attentive to the public interest. In advancing these arguments, this article seeks not only to present a more accurate picture of the current status of lawyer regulation in Canada but also to provide a better foundation from which to discuss future reforms.

Au cours des dernières décennies, la question de savoir s'il faut faire confiance aux avocats canadiens et croire qu'ils peuvent s'autogouverner a été soulevée par le public, par les décideurs politiques et par des universitaires. Le corps juridique a répondu sur plusieurs fronts et adopté ce qui a été qualifié de « régime d'autoréglementation défensive ». L'analyse proposée dans cet article vient parfaire et compliquer cette affirmation. En effet, l'auteure avance que le travail d'autoréglementation défensive de la profession a continuellement été accompagné par une réglementation judiciaire rigoureuse. L'argument central de l'article comporte deux volets : premièrement, au cours des dernières décennies, les tribunaux en sont venus à jouer un rôle de plus en plus actif en tant qu'organismes de réglementation de la profession juridique au Canada et, deuxièmement, les mesures prises par les tribunaux ont amené la mise en place d'un régime réglementaire plus soucieux de l'intérêt public. En avançant ces arguments, l'auteure cherche non seulement à présenter un tableau relativement précis du statut actuel de la réglementation à laquelle les avocats sont assujettis au Canada, mais également à proposer une base plus solide qui servira de point de départ pour discuter des futures réformes.

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Introduction

This article traces developments in lawyer regulation in Canada over the last forty years, with a focus on the judicial regulation of lawyers. The role that judges play in regulating Canadian lawyers has not, to date, been the subject of extended and detailed scholarly analysis. This is a gap that needs to be filled. In the absence of a systematic analysis of judicial regulation

in Canada, we lack a complete picture of the current regulatory landscape governing this country's legal profession and how it came to be. Having this more complete picture in hand is essential in considering the best way forward in regulating Canadian lawyers.

The question of whether Canadian lawyers ought to be trusted to govern themselves has been repeatedly raised by the public, policy-makers and the academy over the past several decades. The legal profession has responded on a number of fronts, adopting what has been characterized as a "regime of defensive self-regulation."¹ The analysis in this article complements and complicates this account by arguing that, alongside the profession's efforts at defensive self-regulation, there has been a steady stream of aggressive judicial regulation. The central argument of this article is two-fold: first, that courts have come to occupy an increasingly active role as regulators of the Canadian legal profession in the past several decades; and, second, that the measures taken by the courts have resulted in a regulatory regime more attentive to the public interest. In advancing these arguments, this article seeks not only to present a more accurate picture of the current status of lawyer regulation in Canada but also to provide a better foundation from which to discuss future reforms.

Much of the current attention given to how the Canadian legal profession is regulated is a result of moves away from lawyer self-regulation in other common law jurisdictions. Reforms in these jurisdictions—most notably, Australia and England and Wales—have prompted self-reflection in Canada and raised a number of important questions. Why haven't we seen similar changes in Canada? Should Canada head in the same direction as other countries? The account that this article provides of the emergence of aggressive judicial regulation helps to direct our consideration of these questions in several important respects. First, it clearly and methodically demonstrates that the profession's claim to self-regulation is highly attenuated. As will be explored in detail below, judges have powerfully inserted themselves in all of the areas considered to be constitutive of self-regulation and have done so in a manner that has advanced the public interest. This observation seriously undermines any sort of blanket claim

1. This term finds its source in Richard Devlin & Albert Cheng, "Re-calibrating, re-visioning and rethinking self-regulation in Canada" (2010) 17:3 *Int'l J L Prof* 233. I use this term in a manner consistent with Devlin and Cheng, namely, to label the "increasingly muscular approach to the regulation of the legal profession" taken by Canadian law societies (at 234) and I rely on some of these authors' observations. As my review of the regulatory environment extends to an earlier time period than that addressed by Devlin and Cheng, however, I also use this term to describe developments that precede the activity discussed in their paper.

that the public interest requires Canadian lawyers to have independence from external control.

Second, the analysis here also calls into question the assumption advanced via the “lawyer-judge bias” theory that judges, by virtue of being former lawyers, are inherently deficient regulators of lawyers who will inevitably favour the interests of their former colleagues at every turn.² To the contrary, a close and careful look at judicial regulation reveals that measures taken by Canadian courts have repeatedly promoted the public interest over the interests of the profession. This suggests that any discussion of regulatory reform should not focus exclusively on a binary weighting of governmental control versus professional self-control but also include the judiciary as a major and helpful regulatory player.

This article proceeds in four parts. Part I covers off some preliminary issues, outlining in more detail the nature of the “lawyer-judge bias” theory that has been advanced and discussing how several key concepts—namely self-regulation, judicial regulation, and public interest—are defined and used in this article. Part II briefly touches on the political background for the judicial regulatory measures discussed, with particular attention to a series of governmental inquiries beginning in the 1970s that served to sharpen public scrutiny of the legal profession. Parts III and IV form the heart of the article and make the case that a regime of aggressive judicial regulation has emerged alongside the profession’s defensive efforts.

Part III focuses on developments in judicial regulation of the *practice* of law and, in particular, regulation relating to the post-entry competence of lawyers. Beginning in the late 1970s, courts established themselves as aggressive co-regulators in this area through their administration of civil actions in negligence. In a series of decisions, courts rejected exceptional treatment for lawyers in relation to negligence claims. The scope of liability faced by lawyers in negligence was also expanded in certain areas.

Part IV takes up the judicial regulation of the *business* of law and canvasses measures taken in relation to (1) entry restrictions; (2) post-entry limits on competition (in particular, in the areas of advertising, fees, and unauthorized practice of law); and (3) post-entry conduct rules (specifically relating to conflicts of interest and lawyer withdrawals from the record). In each of these areas, courts have taken measures that have favoured the public interest over the self-interest of the profession and, in

2. The term “lawyer-judge bias” is taken from Benjamin H Barton, *The Lawyer-Judge Bias in the American Legal System* (New York: Cambridge University Press, 2011). Barton has been a leading proponent of this theory in the context of the American legal system.

some cases, directly rejected contemporaneous standards adopted by the legal profession itself.

I. *A theory and some definitions*

As noted above, this article is not only concerned with documenting the various measures taken by courts in recent decades with respect to the lawyer regulation, but also considers the consequences of these measures. In order to set the stage for this critical analysis, this Part introduces the “lawyer-judge bias” theory and discusses how several key concepts—self-regulation, judicial regulation, and public interest—are understood and used in the arguments developed in this article.

1. *Lawyer-judge bias*

To the extent that judges have been recognized as regulators of the legal profession, their ability to effectively regulate lawyers has come into question. More specifically, judges, as former lawyers, are often viewed as lacking the distance or motivation to fairly regulate “their own.” The specific term “lawyer-judge bias” is taken from the work of Benjamin Barton who has laid out a detailed case that, in the American context, “lawyer-judges instinctively favor the legal profession in their decisions and actions and that this bias has powerful and far-reaching effects.”³ In short, he posits, “when given the chance, judges favor the interests of the legal profession over the public.”⁴ This bias, according to Barton, is based on the fact that “regardless of political affiliation, judicial philosophy, race, gender or religion, every American judge shares a single characteristic: every American judge is a former lawyer.”⁵ Canadian judges, of course, share this same characteristic, which invites an application of this theory to Canada. Although American judges possess different powers in regulating lawyers than do Canadian judges,⁶ one can find similar concerns regarding

3. *Ibid* at 2.

4. *Ibid*.

5. *Ibid* at 3.

6. For a more detailed account of the role that American judges play in regulating American lawyers, see, e.g., Fred C Zacharias, “Rationalizing Judicial Regulation of Lawyers” (2009) 70 Ohio St LJ 73.

judicial sympathy to the legal profession's interests expressed in the Canadian context.⁷

This article explores the applicability of the "lawyer-judge bias" theory to the Canadian context. It is argued that, in Canada, experience has shown that courts will *not* inevitably favour the interests of the legal profession over those of the public. To the contrary, judges have taken repeated measures that have favoured the public interest at the expense of the legal profession's self-interest.

2. *Self-regulation*

The definition of "self-regulation" is neither self-evident nor uncontroversial.⁸ This article proceeds by relying on a definition of self-regulation consistent with that provided by Tanina Rostain, who describes self-regulation as "encompass[ing] the authority to delineate a sphere of expertise, establish qualifications for membership, limit competition from non-members, and impose ethical rules of conduct on practitioners."⁹ Drawing from this explanation, self-regulation is defined for the purposes of this article in terms of control over four core regulatory areas: entry, competition, competence, and conduct.

The first of the two interrelated arguments developed in this article—that courts have occupied an increasingly active role as regulators of the legal profession in the past several decades—is rooted in the observation that significant judicial measures have been taken in each of these four core areas. Part III below examines measures taken with respect to post-entry competence, while Part IV takes up entry restrictions, post-entry limits on competition, and post-entry conduct rules. The analysis in these parts reveals that, notwithstanding the fact that law societies are still powerful regulators in Canada, their authority is far from exclusive or even dominant in core areas.

7. As stated by Adam Dodek in "Lawyers, Guns, and Money: Lawyers and Power in Canadian Society" in David L Blaikie et al, eds, *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) 57 at 62:

It is an obvious but important point that all judges are drawn from the ranks of lawyers. Most judges are persons who practiced law for twenty to thirty years. They are steeped in the culture of the law and of the legal profession. They may be expected to be sympathetic to and supportive of the existing structures of power from whence they came.

See also, Richard F Devlin & Porter Heffernan, "The End(s) of Self-Regulation?" (2008) 45 *Alta L Rev* 169 at 208.

8. Indeed, some commentators proceed—in a manner that I reject—by characterizing judicial involvement in lawyer regulation as a form of self-regulation because judges are lawyers (or former lawyers). For further discussion, see, e.g., Fred Zacharias, "The Myth of Self-Regulation" (2009) 93 *Minn L Rev* 1147 at 1153.

9. Tanina Rostain, "Self-Regulatory Authority, Markets, and the Ideology of Professionalism," in Robert Baldwin et al, eds, *The Oxford Handbook of Regulation* (New York: Oxford University Press, 2010) 169 at 169.

3. *The public interest*

Key to the arguments advanced in this article is the concept of the public interest. For the purposes of this article, the premise that judicial regulation has been attentive to the public interest is framed in terms of judicial actions taken to counteract or mitigate abuses associated with self-governing powers. As observed by Michael J. Trebilcock:

one of the principal social risks involved in delegated forms of regulation is that the profession in question may be tempted to abuse its self-governing powers to engage in anti-social forms of collusion or cartelization, e.g. by *restricting entry unnecessarily*, or by *constraining unnecessarily post-entry forms of consumer welfare enhancing behaviour* (e.g. advertising, broader utilization of para-professionals), or by *insufficiently zealous monitoring of post-entry competence* (as opposed to dishonesty or unethical conduct).¹⁰

To the above list, I would add: adopting conduct rules that unduly favour the commercial interests of the profession. With this list, each of the four core areas of control constitutive of self-regulation may be understood as carrying an attendant risk:

- (1) Entry: Unnecessary entrance restrictions,
- (2) Competence: Insufficiently zealous monitoring of post-entry competence,
- (3) Competition: Unnecessary constraints on post-entry forms of consumer enhancing behaviour, and
- (4) Conduct: Adopting conduct rules that unduly favour the commercial interests of the profession.

The argument advanced in this article is that judges have come to occupy an important regulatory role by acting to mitigate these risks. In some cases this has involved rejection of the self-interested standards or positions adopted by the legal profession. In other cases, this has involved courts more actively regulating themselves in a certain area.

The use of this framework to discuss the public interest is not intended to preclude a more expansive and sophisticated definition of this term that would, for example, recognize an inherent value in having members of the public participate in the governance of the legal profession or suggest that acting in the public interest *is* the legal profession's self-interest, properly understood. The argument here is consciously modest: in taking actions that counteract identified "anti-social" behaviours or risks associated with a self-regulating legal profession, judges have regulated the legal

10. Michael J Trebilcock, "Critical Issues in the Design of Governance Regimes for the Professions" (1989) 23 Law Society Gazette 349 at 350-351 [emphasis added].

profession in a manner that has promoted the public interest over interests of the profession, narrowly understood.

4. *Judicial regulation*

As a final introductory matter, the term “judicial regulation” deserves some consideration. The use of this term here is broad and is intended to encompass a wide range of measures taken by courts that have a bearing on the governance of the legal profession and the behaviour of lawyers. Such measures would include not only those traditionally viewed as within the ambit of judicial regulation of lawyers—for example, the court’s exercise of its statutory and inherent jurisdiction over court processes and its administration of civil causes of action—but also judicial interpretation and application of legislation affecting lawyer governance or behaviour. The latter category includes, for example, court decisions involving provincial and territorial legislation delegating governing authority to the law societies as well as legislation of more general application, such as the *Canadian Charter of Rights and Freedoms*¹¹ and federal competition law¹² to the legal profession.

II. *The political background: a series of inquiries*

The judicial measures traced in this article begin in the 1970s, a period characterized by intensified public scrutiny of the Canadian legal profession. To be sure, prior to this decade, lawyers in Canada faced (as they continue to face) an “endemic unpopularity” with the public similar to that experienced by their peers in other countries.¹³ Canadian lawyers were also, throughout the twentieth century, forced to grapple with a number of governmental challenges to their claims to self-regulation.¹⁴ Although skepticism of the legal profession was nothing new, the 1970s brought sharpened focus to the principle of public accountability.¹⁵ This focus on public accountability, with the concept of protecting and furthering

11. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c II.

12. See, e.g., the *Competition Act*, RSC 1985, c C-34 and its predecessors.

13. For evidence of some of this earlier criticism, see, e.g., PJ Giffen, “Social Control and Professional Self-Government: A Study of the Legal Profession in Canada” in SD Clark, ed, *Urbanism and the Changing Canadian Society* (Toronto: University of Toronto Press, 1961) at 117.

14. *Ibid* at 131 and generally. In this chapter, Giffen traces some of the major challenges that the legal profession in Canada faced from the 1920s to 1960s to its authority to self-regulate and also reviews some of the defensive measures taken by the law societies including the establishment of “reimbursement funds” to compensate clients for financial losses suffered as a result of defaulting solicitors, the organization of legal aid programs, and the development of public relations programs.

15. Harry W Arthurs “Public Accountability of the Legal Profession” in Philip A Thomas, ed, *Law in the Balance: Legal Services in the 1980s* (Oxford: Martin Robertson, 1982) 161.

the public interest at its centre, was ultimately reflected in the judicial regulatory measures traced in this article, beginning in the late 1970s.

The public scrutiny faced by Canadian lawyers in the 1970s finds its most tangible reflection in a number of public inquiries into the professions. Two government commissions in the late 1960s were particularly influential. First, in Quebec, the 1970 Quebec Report of the Commission of Inquiry on Health and Social Welfare Part V (the “Castonguay-Nepveu Report”)¹⁶ led to the adoption of a new *Professional Code*¹⁷ in 1973 that “effected a complete reorganization in the regulation of professions”¹⁸ and placed the protection of the public as the prime regulatory objective.¹⁹ Second, in Ontario, the first report of the province’s Royal Commission Inquiry into Civil Rights²⁰ inspired, “for the first time in a half-century... systematic scrutiny” of the legal profession in Ontario.²¹ The McRuer Report’s attitude toward self-government was generally skeptical²² but ultimately did not call for the abolition of self-regulation. Instead, the report modestly recommended that “[t]he power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it and that the public interest could not be adequately safeguarded by other means.”²³ On the heels of the McRuer Report, at least one commentator felt that the legal profession was particularly “vulnerable to...attack” and that it fell to the courts to remediate the narrow scope of civil liability faced by lawyers in relation to their conduct in order to stave off closer governmental regulation of the legal profession.²⁴ As will be explored below, the courts did ultimately take up this task in the late 1970s. The first response to the McRuer Report,

16. The name of the Report derives from the fact that the Commission had “initially been concerned with the professions involved in the provision of health and social services[.]” but had expanded its mandate as it “became convinced that since other professions faced problems that were similar in nature, the matter should be approached globally.” Pierre Issalys, “The Professions Tribunal and the Control of Ethical Conduct among Professionals” (1978) 24 McGill LJ 588 at 592.

17. *Professional Code*, CQLR c C-26.

18. Issalys, *supra* note 16 at 588.

19. *Ibid* at 588 and generally for the changes introduced. See also, “The Professional System,” online: Conseil interprofessionnel du Québec <<http://www.professions-quebec.org/index.php/en/element/visualiser/id/7>>.

20. Ontario, Royal Commission, *Inquiry into Civil Rights: Report No 1* (Toronto: Queen’s Printer, 1968) [McRuer Report].

21. Harry Arthurs, “Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession” (1971) 49:1 Can Bar Rev 1 at 1.

22. As framed in the McRuer Report, *supra* note 20 at 1162, “The relevant question is not, ‘do the practitioners of this occupation desire the power of self-government?’ but ‘is self-government necessary for the protection of the public?’”

23. *Ibid*, vol 3 at 1209.

24. TG Bastedo, “A Note on Lawyers’ Malpractice: Legal Boundaries and Judicial Regulations” (1969–1970) Osgoode Hall LJ 311 at 311.

however, came in the form of legislative change. A new *Law Society Act*²⁵ was passed in 1970, which introduced several measures explicitly focused on increasing the public accountability of the Law Society and protecting the public interest.²⁶

Although the governmental commissions in both Ontario and Quebec led to legislative reforms, the legal profession in each of the two provinces maintained a considerable amount of autonomy.²⁷ This is, perhaps, unsurprising given that the reforms instituted in Quebec and Ontario came after intensive periods of consultation with, and resistance by, the legal profession²⁸ and that the final legislative product in each province represented a compromise. As the 1970s progressed, additional legislative committees were set up to examine the professions in Manitoba and Alberta,²⁹ and further review took place in Ontario in 1977.³⁰ Another flurry of governmental reviews of the professions came in the late 1980s and early 1990s.³¹ In 2007, the federal government stepped in to make its mark as the Competition Bureau released a study into the self-regulated

25. RSO 1970, c 238.

26. These measures included, for example, provision for decisions by benchers in disciplinary matters to be appealable to the Ontario Court of Appeal and the designation of the Attorney General as an *ex officio* bencher, and to be “the guardian of the public interest in all matters within the scope of the [Law Society Act] or having to do with the legal profession.” For further discussion, see, e.g., Arthurs, “Authority, Accountability, and Democracy,” *supra* note 21.

27. As reported by Harry Arthurs over a decade after the new legislation was introduced, “[t]he new Quebec regime apparently functions without much direct intervention in the profession’s affairs” and “[t]here is, in fact, little concrete evidence...to suggest that the autonomy of the Quebec bar has been eroded”: Arthurs, “Public Accountability of the Legal Profession,” *supra* note 15 at 179-180; Arthurs et al, “The Canadian Legal Profession” (1986) Am B Found Res J 447 at 476. Arthurs similarly reported that, “in Ontario, neither the lay benchers nor the Attorney General, in his role as a bencher *ex officio*, appear[ed] to have taken any policy initiatives”: Arthurs, “Public Accountability of the Legal Profession,” *supra* note 15 at 179-180.

28. For further discussion, see, e.g., Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers, 1797–1997* (Toronto: University of Toronto Press, 1997) at 283-284; and Arthurs, “Public Accountability of the Legal Profession,” *supra* note 15 at 179-180.

29. Alberta, Legislative Assembly, Special Committee of the Legislative Assembly of Alberta on the Professions and Occupations, *Report 1* (Edmonton: Queen’s Printer, 1973); Alberta, Legislative Assembly, Special Committee of the Legislative Assembly of Alberta on the Professions and Occupations, *Report II* (Edmonton: Queen’s Printer, 1973); FC Muldoon, *Report of the Manitoba Professional Associations Study Group* (1972).

30. Ontario, Professional Organizations Committee, *The Professional Organizations Report* (Toronto: Ministry of the Attorney General, 1980). For further discussion, see Carolyn J Tuohy “Public Accountability of Professional Groups: The Case of the Legal Profession in Ontario” in Robert G Evans & Michael J Trebilcock, *Lawyers and the Consumer Interest: Regulating the Market for Legal Services* (Toronto: Butterworths, 1982) 105 at 115.

31. Alberta, Council on Professions and Occupations, Discussion Paper: *Principles and Policies Governing Professional Legislation in Alberta* by Diane Morash (Edmonton: Professions and Occupations Bureau, 1989); Saskatchewan, Discussion Paper: *Towards the Development of a Professions Policy for Saskatchewan* (Regina: Queen’s Printer, 1990); Manitoba, Law Reform Commission, *Regulating Professions and Occupations* (Winnipeg: Queen’s Printer, 1994).

professions in which a number of specific recommendations were made regarding the governance of the legal profession.³²

Notwithstanding being subject to repeated reviews for several decades, beginning in the 1970s, Canadian lawyers emerged largely unscathed and provincial law societies retained significant powers of self-regulation.³³ One important effect of this sustained scrutiny, however, was to raise the profile and solidly entrench public interest as the dominant norm against which lawyer regulation was to be measured.³⁴ Although, as will be discussed below, the legal profession itself took steps to check its self-interest when faced with this scrutiny, its posture was considerably more defensive and reactive when compared with judicial measures taken during this same time period. Parts III and IV will trace how judges expanded the scope and depth of their reach in lawyer regulation, ousted self-interested standards adopted by the legal profession itself, and were an important part of the background conditions that pushed the legal profession to undertake its own reforms in some instances.

III. *Regulation of the practice of law: a new era of negligence*

This Part examines developments in the courts' regulation of the practice of law and, in particular, looks at reforms to the civil liability of lawyers in negligence. As a result of the courts' rejection of exceptional treatment for lawyers in this area and their creation of new sources of liability for lawyers rooted in negligence, the competence of lawyers is now subject to more rigorous scrutiny and examined across a greater number of contexts than in the pre-1970s era. In undertaking these measures, the courts have, therefore, both asserted themselves in a key regulatory area (post-entry competence) and, in doing so, have mitigated a key risk associated with profession self-regulation (insufficiently zealous monitoring of post-entry competence). The result has been a regulatory regime more attentive to the public interest in this area of regulatory concern.

32. Competition Bureau of Canada, *Self-Regulated Professions—Balancing Competition and Regulation* (Gatineau: Competition Bureau, 2007). The five professions examined were accountants, lawyers, optometrists, pharmacists, and real-estate agents. A brief post-study assessment was published in 2011.

33. For example, as reported by Harry Arthurs with respect to the results of second Ontario review: The Committee's formal Report, obviously intended to mollify the Law Society, ...virtually accepted the status quo in all matters pertaining to the Society's internal government and policies.

Arthurs, "Public Accountability of the Legal Profession," *supra* note 15 at 172 [footnotes omitted].

34. See, e.g., the discussion in Wesley W Pue, "Foxes, Henhouses, Unfathomable Mysteries, and the Sufferance of the People: A Review of Regulating Professions and Occupations" (1996) 24 Man LJ 283.

1. *Rejecting exceptions*a. *Eliminating immunity*

In the late 1970s, Canadian courts rejected “the most dramatic example”³⁵ of exceptional treatment for lawyers in negligence law in confirming that the English doctrine of advocates’ immunity had no place in Canadian law. Although, in 2000, the House of Lords ultimately abolished the operation of this doctrine, it was considered well-settled law at the time in England and Wales that barristers were immune from suit in relation to the conduct and management of a case in court.³⁶ Translated into practice, the effect of this immunity was significant: it meant, for example, that barristers would not be subject to an action “for calling or not calling a particular witness, or for putting or not putting a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous.”³⁷ Despite the harsh effects of this immunity for clients who wished to seek relief for negligent conduct of their lawyers in court, it was not idiosyncratic to England and Wales. New Zealand, for example, recognized this doctrine until 2006.³⁸ Further, amidst controversy, the immunity has been retained to date in Australia.³⁹

Traditionally, the English courts had justified the immunity on the basis that it would be unfair to allow clients to sue barristers for negligence when the barristers were unable to sue clients for their fees. Given that Canadian lawyers could sue for their fees, early Canadian precedent held that the English courts’ rationale for the immunity (and therefore the immunity itself) could not be imported to the Canadian context.⁴⁰ This precedent, however, came under question after the 1967 English decision *Rondel v. Worsley*⁴¹ where the House of Lords shifted the justification for the immunity away from the treatment of fees and, instead, rooted the immunity in public policy grounds. The new public policy grounds given—for example, claims that lawyers needed to be protected from the threat of lawsuits in order to be able to zealously represent their clients or

35. Gene Anne Smith, “Liability for the Negligent Conduct of Litigation: The Legacy of *Rondel v Worsley*” (1982–1983) 47 Sask L Rev 211 at 212.

36. Although the immunity was first understood and applied in relation to barristers, the House of Lords confirmed that this immunity extended to solicitors in *Saif Ali v Sydney Mitchell & Co*, [1980] AC 198 HL (Eng).

37. Thomas Beven, *Negligence in Law* vol 2, 3rd ed (London: Stevens and Haynes, 1908) 1204 [footnotes omitted].

38. *Lai v Chamberlains*, [2006] NZSC 70, [2007] 2 NZLR 7.

39. See, *Goddard Elliott (a firm) v Fritsch*, [2012] VSC 87 and *Donnellan v Woodland*, [2012] NSWCA 433 as examples of recent cases where this immunity has been applied in Australia.

40. *Leslie v Ball* (1863), 22 UCR 512 [the court is Upper Canada Queen’s Bench].

41. *Rondel v Worsley*, [1967] UKHL 5, [1969] 1 AC 191 [*Rondel*].

that negligence actions against barristers would inevitably require retrying the original actions and potentially create inconsistent results—were not obviously inapplicable in the Canadian context.⁴²

Following the decision in *Rondel*, several Canadian cases considered the effect of the House of Lords' new public policy rationale and left open the possibility that some form of immunity from negligence existed for Canadian lawyers.⁴³ However, in 1979, Krever J of the Ontario High Court of Justice clarified in *Demarco v. Ungaro* that the English immunity had no place in Canadian law.⁴⁴ In support of this conclusion, Krever J cited the public interest, albeit in a negative fashion, stating that "the public interest...does *not* require that our Courts recognize an immunity."⁴⁵ To be sure, Krever J's choice of language was influenced by the repeated reference of the Law Lords in *Rondel v. Worsley* to "public interest" in their defence of the immunity. It is also apparent, however, that Krever J took seriously the perspective of the Canadian public, writing: "I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence."⁴⁶

It is now well settled across Canada that the doctrine of advocates' immunity does not insulate lawyers from negligence actions. While the

42. With the possible exception of one of the rationales given that was rooted in the cab-rank rule. Indeed, in a commentary published in the Canadian Bar Review shortly following the decision, Marvin Catzman opined that, notwithstanding the fact that English precedents were not binding in Commonwealth countries,

it will have not escaped the reader's attention that substantially all of the considerations of public interest which the members of the House of Lords found so compelling are equally appropriate to the realities of Canadian litigation. In the writer's review, therefore, it is not unlikely that, when a Canadian *Rondel* and a Canadian *Worsley* have the mutual misfortune to combine, our courts may well extend the immunity from action which the House of Lords saw fit to bestow upon *Worsley* to his hapless Canadian counterpart.

(Marvin A Catzman (1968) 46:3 Can Bar Rev 505 at 515.)

43. See, e.g., *Banks v Reid* (1974), 6 OR (2d) 404 (SC (TD), wherein the trial judge commented that, although he had dismissed the allegations of negligence against the defendant lawyer on other grounds, he would have dismissed the case on the basis of *Rondel v Worsley* in any event. The Court of Appeal, (1977) 18 OR (2d) 148 (CA), reversed the trial judge's decision on other grounds; however, Brooke JA, writing for the court, also commented:

If it is applicable at all in this jurisdiction, where practitioners are both barristers and solicitors, *Rondel v. Worsley* should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a Court[.]

A similar comment was made by the court in *Gouzenko v Harris* (1976), 13 OR (2d) 730 (H Ct J), wherein Justice Goodman wrote that "[e]ven if [*Rondel v Worsley*] is applicable to persons engaged in providing the services of a barrister in this province, it is, in my opinion, of no assistance to the solicitors in this case." See, also, *Beckmat Leaseholds Ltd v Tassou* (1978), 14 AR 468 (Dist Ct).

44. *Demarco v Ungaro* (1979), 21 OR (2d) 673 (H Ct J) [*Demarco*].

45. *Ibid* at 238 [emphasis added].

46. *Ibid*.

result in *Demarco* is likely intuitive to most Canadian lawyers today, it was more controversial at the time. As the Assistant Secretary of The Law Society of Upper Canada observed in a case comment following the decision: “[t]o many counsel Mr. Justice Krever’s decision is tantamount to the opening of Pandora’s box.”⁴⁷ Skeptics could also be found in British Columbia as late as 1985, when an article appeared in a legal trade journal advocating that the immunity be retained in that province notwithstanding the decision in *Demarco*.⁴⁸

The decision in *Demarco* was a forceful rejection of the proposition that exceptional treatment of the legal profession in the area of negligence was in the public interest. As noted by one academic at the time, however: “Although the *Demarco* decision may have opened the door to actions by a client against an advocate for negligent conduct of litigation...once over the threshold the plaintiff may find his passage through the corridors of the halls of justice severely impeded.”⁴⁹ Eventually, however, the courts began to chip away at these additional impediments to lawyer liability as well.

b. *Securing concurrent liability*

A second area of exceptionalism was addressed in the 1980s when the courts clarified that lawyers could have concurrent liability in contract and negligence. Notwithstanding the reference in *Demarco* to immunity (or lack thereof) of lawyers from actions in *negligence*, there was considerable controversy at the time as to whether lawyers owed any duty of care to clients independent of implied duties of care that could be said to exist under lawyer-client contracts. Historically, English “authorities commonly held that it did not matter how an action against a solicitor was framed—in contract or in tort.”⁵⁰ In the case of *Groom v. Crocker*,⁵¹ however, the English Court of Appeal held that “[t]he relationship [between] solicitor and client is a contractual one” and that “[i]t was by virtue of that relationship that the duty [to the client] arose, and it had no existence apart from that relationship.”⁵²

47. Stephen E Traviss, “A Barrister’s Liability to Civil Suit in Ontario: A Case Comment on *Demarco v. Ungaro and Barycky*” (1979) 13 Law Society Gazette 262 at 269.

48. Bryan Baynham & Andrew Baldwin, “Barristers’ Immunity” (1985) 43:5 The Advocate 611 at 614. Note, however, that a dissenting view was also published in the subsequent issue of the trade journal: Darrell W Roberts, “Barrister’s Immunity—A Different View” (1986) 44:2 The Advocate 197.

49. Smith, *supra* note 35 at 212.

50. Stephen M Grant & Linda Rothstein, *Lawyers’ Professional Liability*, 2nd ed (Toronto: Butterworth Canada, 1998) at 6.

51. *Groom v Crocker*, [1939] 1 KB 194.

52. *Ibid* at 205.

Following *Groom v. Crocker*, there was “considerable authority” in Canada in support of the proposition that liability to a client existed in contract only, although the matter remained unsettled due to a number of conflicting judgments.⁵³ At stake in this distinction was more than semantics: “[i]mportant legal consequences have turned on the differences in the rules applicable to contractual and tortious liability...[most particularly, in the areas of] limitation of actions, measure of damages and apportionment of liability.”⁵⁴

The possibility of concurrent liability in contract and tort was ultimately resolved by the Supreme Court of Canada in the 1986 decision of *Central Trust Co. v. Rafuse*.⁵⁵ Writing for the court, LeDain J concluded that concurrent liability in tort and in contract was available in cases of lawyer negligence, noting that “[t]here is no sound reason of principle or policy why the solicitor should be in a different position in respect of concurrent liability from that of other professionals.”⁵⁶ Once again, the concept of exceptional treatment for legal professionals was firmly rejected.

c. *Standard of care*

Judicial scrutiny of lawyer liability in negligence did not end, however, with the rejection of advocates’ immunity and the acceptance of concurrent liability. The standard of care applicable to lawyer conduct was the next target. At a general level, the standard of care imposed on Canadian lawyers has long been articulated in the same terms: a lawyer must bring reasonable care, skill, and knowledge to the professional service that he or she has undertaken.⁵⁷ What this standard actually requires and the manner in which it has been framed, however, has changed significantly over the past few decades.

In several different ways, the courts historically articulated the standard of care applicable to lawyers in a manner that suggested that lawyers were subject to less rigorous scrutiny. For example, throughout most of the twentieth century, Canadian courts regularly cited a standard of *crassa*

53. Harry B Radomski, “Actions Against Solicitors—Contract or Tort?” (1979–1981) 2 *Advocates’ Q* 160 at 179. See also, Allen M Linden, *Canadian Tort Law* (Toronto: Butterworths, 1977) at 108 [footnotes omitted]: “The duty owed by a lawyer to his client has been founded on contract, not on tort, for well over a century.”

54. *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at para 13 [*Rafuse*].

55. *Ibid.*

56. *Ibid* at para 52.

57. See, e.g., *Hett v Pong*, [1890] 18 SCR 290 at 292: “an attorney is bound to bring to the exercise of his profession a reasonable amount of knowledge, skill and care in connection with the business of his client.” This language has been cited approvingly in a number of subsequent cases, including *Rafuse*, *supra* note 54 at 208 and *Ristimaki v Cooper* (2006), 79 OR (3d) 648 (CA) at para 59.

negligentia or “gross negligence” in addressing lawyer negligence.⁵⁸ The reference to *crassa negligentia* created some tension in light of the broader recognized standard of requiring that lawyers use reasonable care, skill, and knowledge. The broader standard suggested that mere negligence was sufficient to ground liability, while *crassa negligentia* suggested something more was required in the form of gross negligence.

The 1979 *Demarco* decision, discussed above, served to introduce further confusion. In the course of his reasons rejecting advocates’ immunity, Justice Krever also commented that he found “it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a Court will conclude that it is negligence.”⁵⁹ Picking up on this language, courts in a number of different provinces began to apply an “egregious error” standard to actions in negligence brought against lawyers.⁶⁰ As with the use of the *crassa negligentia* or gross negligence standard, the language of egregious error “suggests that lawyers enjoy a more forgiving standard of care than that which is expected of other professionals.”⁶¹ As observed by one commentator, in practice, the use of an “egregious error” standard effectively meant that lawyers continued to enjoy a *de facto* immunity from liability in negligence in connection with their conduct of a case in

58. For example, in the 1915 case of *Marriott v Martin* (1915), 21 BCR 161 (SC (TD)), the court held that the plaintiff was required to establish not merely an error of judgment on the part of his solicitor but a want of professional care and skill to such an extent as to render the defendant liable for gross negligence. In arriving at this conclusion, the court reviewed the Canadian and English authorities on the issue, including the statements of Lord Brougham in *Purves v Landell* that “[i]t is of the very essence of [an action against a solicitor for negligence] that there should be a negligence of a crass description, which we call *crassa negligentia*[.]” The reference to the standard of *crassa negligentia* by Canadian courts continued throughout the twentieth century. See, e.g., *Schmalzbauer v Gares* (1990), 89 Sask R 254 (QB) at para 18; *B & R Farms Ltd v James Ulmer* (1987), 55 Sask R 309 (QB) at para 10; *Nielsen v Watson* (1981), 33 OR (2d) 515 (H Ct J) at para 17; *Page v Dick* (1980), 12 CCLT 43 (H Ct J); *Samayoa v Marks* (1974), 6 OR (2d) 419 (Sup Ct) at para 52; *Brenner v Gregory*, [1973] 1 OR 252 (H Ct J) at para 13.

59. *Demarco*, *supra* note 44 at para 24.

60. Although not specifically mentioning a standard of “egregious error,” the Ontario Court of Appeal approvingly cited the test set out in *Demarco* in *Wong v Thomson, Rogers*, 1994 CarswellOnt 2925 (WL Can) (CA). A number of lower court decisions specifically applied the “egregious error” standard. See, e.g., *Karpenko v Parioian, Courey, Cohen & Houston* (1980), 30 OR (2d) 776 (ON Sup Ct), applying the standard to settlements; *Forbes v Siskind, Cromarty, Ivey & Dowler LLP* (2003), 20 CCLT (3d) 87 (Sup Ct), applying the standard with respect to counsel’s conduct in an arbitration; *Bhagat v Raby (Trustee of)*, 2000 CarswellOnt 1094 (WL Can) (Sup Ct), in relation to advice given to negotiate rather than appeal a court order; *Simanek v Lamourie*, 2001 CarswellOnt 3559 (WL Can) (Sup Ct), regarding conduct in family law litigation; *Noble v Lourensse*, 2001 NBQB 251, regarding conduct of litigation in a real property matter.

61. *Meister v Coyle*, 2010 NSSC 125 at para 40.

court.⁶² Evidence that lawyers themselves believed that this was a lower standard can be found in a case heard subsequent to the egregious error test being rejected by the courts, wherein counsel for the defendant lawyer submitted (unsuccessfully) that the egregious error test should nonetheless be applied in order to avoid an improper retroactive application of the law.⁶³

In the early 2000s, courts ultimately clarified that lawyers are not subject to any special treatment when it comes to the standard of care. Two provincial appellate court decisions, in particular, stand out in firmly rejecting the egregious error standard. In 2003, the Saskatchewan Court of Appeal reviewed the comments in *Demarco* and noted that “[t]o find a different standard of care for lawyers performing barristers’ work than for those doing solicitors’ work is really a means of introducing barristers’ immunity in a different form, and should probably be rejected for the same reasons.”⁶⁴ Shortly thereafter, the Ontario Court of Appeal also rejected the concept of applying an exceptional standard of care to the conduct of lawyers.⁶⁵ Writing for the Court, Doherty JA stated: “The decisions of other professionals are routinely subjected to a reasonableness standard in negligence lawsuits. I see no reason why lawyers should not be subjected to the same standard.”⁶⁶

2. *Opening new frontiers of liability*

a. *Liability to non-clients*

In addition to shutting down exceptional treatment for Canadian lawyers in negligence law, the courts also expanded lawyers’ liability in negligence in several respects. Liability to non-clients is one important area in which this occurred. Historically, liability in negligence of Canadian lawyers to non-clients was “extremely limited.”⁶⁷ Beginning in the late 1970s, however, the courts began to expand lawyers’ obligations to third parties in modest but significant ways.⁶⁸ The two major areas of liability to third parties that emerged were: (1) where the third party was able to establish that they reasonably relied on the lawyer to protect their interests,⁶⁹ and (2) where the third party was an intended (but failed) beneficiary of a

62. Beverly G Smith, *Professional Conduct for Lawyers and Judges* (Fredericton, NB : Maritime Law Book, 1998) at 74.

63. *Di Martino v Delisio* (2008), 58 CCLT (3d) 218 (ON Sup Ct).

64. *Henderson v Hagblom*, 2003 SKCA 40 at para 69, 232 Sask R 81 (CA).

65. *Folland v Reardon* (2005), 249 DLR (4th) 167 (ON CA) at para 41.

66. *Ibid* [footnote omitted].

67. Grant & Rothstein, *supra* note 50 at 65.

68. *Ibid*.

69. See discussion in Grant & Rothstein, *supra* note 50 at 70.

will where the lawyer has been retained by the testator.⁷⁰ The first area of expanded liability followed logically from the general expansion of Canadian negligence law to permit recovery of pure economic loss in cases of negligent misrepresentation, following the House of Lord's decision in *Hedley Byrne & Co. v. Heller & Partners*.⁷¹ The second area of liability—liability of a lawyer in negligence to an intended beneficiary of a will—was more exceptional in that the courts found that lawyers could be liable to a non-client in the absence of any contractual relationship or other reliance.⁷²

In a 2000 decision, for example, the Saskatchewan Court of Appeal drew from English authority in noting that one of the “reasons of justice” for holding lawyers liable in cases of “disappointed beneficiaries” was that “the public relies on lawyers to prepare effective wills...[and] [t]o deny an effective remedy amounts to a refusal to acknowledge a lawyer’s professional role in the community.”⁷³ Courts in other provinces have now approvingly cited the rationales for the duty as provided by the Saskatchewan Court of Appeal.⁷⁴ In expanding the liability of lawyers in negligence to non-clients, albeit in limited circumstances, the courts have again further extended their reach in the area of post-entry competence and have done so in a manner that has favoured the public interest at the expense of the interests of the profession.

b. *Personal responsibility for costs*⁷⁵

Lawyers also now face expanded liability in terms of their potential personal responsibility for costs of litigation. Although Canadian courts have long had the power to order a lawyer to personally pay the costs of litigation in cases where the lawyer has improperly conducted himself or herself, the threshold for making such orders has been lowered over the past several decades. Historically, Canadian courts relied on English authority to hold that the lawyers’ conduct must amount to something

70. See discussion in *ibid* at 70-97; and Debra Rolph, “Solicitors’ Liability to Non-Clients in Negligence” (1993) 15 *Advocates’ Q* 129.

71. [1964] AC 465.

72. Grant & Rothstein, *supra* note 50 at 83; Rolph, *supra* note 70 at 153-154.

73. *Earl v Wilhelm*, 2000 SKCA 1 at para 35, 183 DLR (4th) 45.

74. See, e.g., *McCullough v Riffert*, 2010 ONSC 3891 at para 48, 76 CCLT (3d) 71.

75. The material found in this section is both directly taken and developed from material previously published in Amy Salyzyn, “A Comparative Study of Attorney Responsibility for Fees of an Opposing Party” (2013) 3:2 *St. John’s J Int’l Comp L* 71.

akin to gross negligence before liability for costs would be imposed.⁷⁶ Following the 1993 Supreme Court of Canada decision in *Young v. Young*,⁷⁷ the standard used morphed somewhat into focussing on the issue of “bad faith” and took on a decidedly subjective hue.⁷⁸ These decisions, however, were rooted in the court’s inherent jurisdiction to make such orders. As the years progressed, courts moved to apply objective negligence-based standards under provincial statutory provisions providing for costs against lawyers personally rather than the court’s inherent jurisdiction. Although costs orders against lawyers personally remain the exception rather than the rule, lawyers now face an increased scope of liability under objective negligence-based standards.

In Ontario, for example, Rule 57.07 was introduced in 1985 and empowered courts to order a lawyer to personally pay the costs of any party where the lawyer “has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default.”⁷⁹ At the time of its introduction, Rule 57.07 was “entirely new”⁸⁰ and members

76. Paul Perell, “Ordering a Solicitor Personally to Pay Costs” (2001) 25 *Advocates’ Q* 103 at 103-104. See, e.g., the Ontario Court of Appeal’s comments in *Re Ontario Crime Commission*, [1963] 1 OR 391 at para 23 (CA), whereby the court ordered a lawyer to personally pay costs where he had knowingly filed a false affidavit of a client. In so ordering, the court quoted from Lord Wright’s speech in *Myers v Elman* including his statement that, “[a] mere mistake or error of judgment is not generally sufficient [for the court’s exercise of its inherent disciplinary authority], but a gross neglect or inaccuracy in a matter which it is a solicitor’s duty to ascertain with accuracy may suffice.”

77. *Young v Young*, [1993] 4 SCR 3.

78. The Supreme Court found that no cost should be awarded against the lawyer personally in *Young*. Following *Young*, a number of Canadian courts cited Justice McLachlin’s comments therein as having established the proposition that the exercise of the courts’ inherent jurisdiction to award costs against lawyers personally required a finding of “bad faith.” See, e.g., *Schwisberg v Perry Krieger & Associates* (1997), 33 OR (3d) 256 (CA); *Marchand v Public General Hospital Society of Chatham et al* (1998), 16 CPC (4th) 201 (ON Gen Div); *Markdale Ltd v Ducharme* (1998), 238 AR 98 (QB).

79. *Rules of Civil Procedure*, RRO 1990, Reg 194, s 57.07.

80. W David Scott, “Costs and the Rules of Civil Procedure” in *New Rules of Civil Procedure* (Toronto: Law Society of Upper Canada, The Canadian Bar Association–Ontario, The Advocates’ Society, 1984) at 12-2.

of the profession expressed concern about its potential effects.⁸¹ Within weeks of Rule 57.07 coming into force, one Ontario lawyer brought an application for a declaration that the rule was of no force and effect on several grounds, including alleging that the rule unduly infringed the independence of the bar and violated certain constitutional rights.⁸² The application ultimately made its way to the Supreme Court of Canada, which held that the lawyer was not entitled to proceed with the application “as presently constituted” given his failure to present an adequate factual foundation.⁸³ The hostility to Rule 57.07 among the legal profession is reflected in the Supreme Court’s decision: Sopinka J noted in the opening paragraph of his reasons that Rule 57.07 was “known colloquially among the Ontario Bar as the ‘Torquemada Rule’” referencing “the first grand inquisitor of the Spanish Inquisition whose name has become synonymous with cruelty.”⁸⁴

The courts were initially divided as to whether more than “mere negligence” was required to make an order under 57.07. This issue was ultimately resolved by Granger J in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*⁸⁵ who concluded that the “ordinary meaning of the words contained therein can be applied to determine if an order for costs should be made against the solicitor personally.”⁸⁶ Justice Granger held that lawyers could be responsible for costs in cases of “mere negligence” as well as in circumstances that “fall short of negligence” such as cases where “bad judgment” not amounting to negligence causes undue delay in a trial.⁸⁷

81. The comments of David W Scott, a senior practitioner in Ontario, reflect a number of the profession concerns at the time:

The fact that a significant portion of the relief encompassed by Rule 57.07 was available in the ordinary exercise of the Court’s extraordinary discretion is beside the point. The codification of this relief is, I would suggest, ominous. It is not a rule which will give much pause to the experienced practitioner. The inexperienced members of the Bar are another matter. How many times have we all, in our developing years, agonized over claims to make, issues to raise, lines of questioning to develop, as part of our responsibilities to our clients in the framework of our roles as officers of the Court? Will this process, in the hands of the young lawyer, be encouraged to the advantage of the client if the sword of Rule 57.07 hangs over counsel’s head as a backdrop against which the strategy of presenting the client’s case is developed? It is not unlikely that codification and expansion of this drastic remedy may serve to intimidate the responsible lawyer more than the reverse.

Ibid at 12-8–12-9.

82. *Re Danson and Attorney-General of Ontario* (1985), 51 OR (2d) 405 (H Ct J).

83. *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at para 28.

84. *Ibid* at para 2.

85. *Marchand (Litigation Guardian of) v Public General Hospital Society of Chatham* (1998), 16 CPC (4th) 201 (ON Gen Div) [*Marchand*].

86. *Ibid* at para 115.

87. *Ibid* at para 121.

Although in *Marchand* the confirmation of a lower, negligence-based standard for awarding costs against lawyers personally did not translate into a cost award against the lawyer, a number of subsequent cases have relied on an ordinary standard of negligence in awarding such costs.⁸⁸ Courts in other provincial jurisdictions have also adopted an approach consistent with that taken by Ontario courts. The British Columbia Court of Appeal, for example, recently confirmed that “mere delay and mere neglect may, in some circumstances, be sufficient for [an order of costs] against a lawyer” personally.⁸⁹ Although orders of costs against lawyers personally remain rare in Canada, this is yet another area wherein lawyers face expanded liability before the courts following the triumph of an objective negligence-based test over a subjective test rooted in bad faith.

3. *Judges and post-entry competence*

As a result of the developments canvassed above, Canadian lawyers today face a materially increased scope of liability in negligence compared to what they encountered in the early 1970s. Courts have firmly rejected exceptional treatment for lawyers in negligence by clarifying: (1) that advocates’ immunity does not apply in Canada, (2) that lawyers are concurrently liable in contract and tort, and (3) that no special standard of “gross negligence” or “egregious error” applies to the legal profession. Courts have also opened up new frontiers of liability in the areas of duties owed to third parties and costs orders against lawyers personally. One clear consequence of these developments is that there is now more rigorous monitoring of the post-entry competence of lawyers and increased exposure to civil penalties for incompetence.

There are possible objections that should be considered, however, to the characterization of these developments as aggressive judicial regulation of the legal profession. First, it might be observed that the legal profession itself was first to wade into the area of post-entry competence in the 1970s and, therefore, suggested that the judicial measures taken

88. See, e.g., *Beardy v Canada (Attorney General)* (2003), 42 CPC (5th) 181 (ON Sup Ct); *Burrell v Peel (Regional Municipality) Police Services Board*, 2007 CarswellOnt 7767 (WL Can) (ON Master); *McDonald v Standard Life Assurance Co* (2007), 50 CCL1 (4th) 301 (ON Sup Ct); *Kerr v CIBC World Markets Inc.*, 2013 ONSC 1109. In *Galganov v Russell (Township)* 2012 ONCA 410, 294 OAC 13, the Ontario Court of Appeal confirmed that the appropriate standard to be applied under Rule 57.07 is as set out in *Marchand* and that “mere negligence can attract costs consequences in addition to actions or omissions which fall short of negligence.”

89. *Nazmdeh v Spraggs*, 2010 BCCA 131 at 102, 83 CPC (6th) 201. Although, see also, *Waters v DaimlerChrysler Financial Services Canada Inc.*, 2011 SKCA 53, 371 Sask R 153, wherein the Saskatchewan Court of Appeal considered the issue of lawyer responsibility for costs in terms of the inherent jurisdiction of the court and relied on, *inter alia*, *Young v Young* in setting out a threshold of serious dereliction of duty.

were responsive to the profession's own regulatory efforts rather than examples of aggressive judicial regulation in contradistinction to the profession's defensive self-regulation.⁹⁰ Although, today, one might be inclined to think of a self-imposed rule relating to competence as a long-standing component of a code of professional conduct for lawyers, this is not the case. In fact, "competence was essentially not on [lawyers'] agenda at all until the 1970s."⁹¹ A requirement of competence was first introduced in 1974, when the Canadian Bar Association adopted a new *Code of Professional Conduct* to replace the vague and largely hortatory *Canons of Legal Ethics* adopted in 1920.⁹² Prior to the 1974 *CBA Code* "incompetence was not explicitly stigmatized as unacceptable behavior.... [and] [a]s a consequence, almost no one in Canada ha[d] ever been disbarred for incompetence except lawyers who have suffered a virtually total collapse of personality and have become unable to carry on their practice."⁹³

Despite the profession's claim to first efforts in the area of post-entry competence, there is a strong argument to be made that the judicial measures described above were, in fact, contradictory rather than complementary to the legal profession's efforts and, moreover, that judicial efforts bore a closer connection to the public interest. As Harry Arthurs has pointed out, the interest of law societies in the issue of competence can be understood in relation to the introduction of mandatory malpractice insurance schemes in the early 1970s. One major effect of such schemes was that the law societies "for the first time acquired a direct stake in the costs and consequences of incompetence" and, as a consequence, had "strong motivation[s] to contain rising costs... by attempting to reduce the

90. Arthurs, "Public Accountability of the Legal Profession," *supra* note 15 at 178-179.

91. Harry Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 *Alta L Rev* 800 at 807.

92. Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1974) and Canadian Bar Association, *Canons of Legal Ethics* (Ottawa: Canadian Bar Association, 1920). The introduced rule on "Competence and Quality of Service" read:

- (a) The lawyer owes a duty to his client to be competent to perform any legal services which the lawyer undertakes on his behalf.
- (b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.

Prior to the introduction of the 1974 CBA Code provisions, steps had been taken in Quebec and British Columbia to increase focus on the competence of members of the legal profession. The 1974 CBA Code has, however, been singled out as provid[ing] the major impetus for the movement of the Canadian law societies into the regulation of professional competence and quality of service.

Hurlburt, *infra* note 108 at 118.

93. Arthurs et al, "The Canadian Legal Profession," *supra* note 27 at 490.

incidence of claims.”⁹⁴ In contrast, judicial efforts to reject exceptional treatment and expand lawyers’ liability in relation to civil negligence claims clearly risk having the opposite effect of increasing the incidence of claims.

In short, while the profession’s actions can be read—at least in part—as being undertaken with the self-interested motivation of keeping insurance costs down, the actions of courts in the area of post-entry competence are arguably more directly connected to the public’s interest in receiving competent legal services. It should also be pointed out that, although lawyer competence has now been within the regulatory ambit of law societies for several decades, law societies still rarely discipline lawyers for incompetence.⁹⁵ Given this reality, judicial expansion of malpractice liability may be appropriately viewed as a more aggressive move to counteract the self-regulatory risk that post-entry competence will be insufficiently monitored by the profession’s own efforts.

Second, it might be pointed out that—notwithstanding the judiciary’s activity in the area of negligence—the courts have shown significant deference in relation to competence when it comes to law societies’ control in the area of discipline. Take, for example, the Supreme Court of Canada’s decision in *Pearlman v. Manitoba Law Society Judicial Committee*⁹⁶ where Iacobucci J stated plainly that “[b]enchers are in the best position to determine issues of misconduct and incompetence.”⁹⁷ In *Pearlman*, Iacobucci J also affirmed the self-governing status of the legal profession and characterized “peer review” as an essential feature of effective self-governance.⁹⁸ Similar sentiments were expressed by the Supreme Court of Canada years later in *Law Society of New Brunswick v. Ryan*,⁹⁹ where the court confirmed that a high degree of deference should be accorded to the province’s discipline committee and commented that “[t]he Law Society is clearly intended to be the primary body that articulates and enforces professional standards among its members.”¹⁰⁰ Relying on

94. Arthurs, “Dead Parrot,” *supra* note 91 at 807. It should be noted, as was pointed out by an anonymous reviewer of this article, that incentives may differ between different jurisdictions as in some jurisdictions (like, for example, Alberta), the insurer and law society are not separate bodies, while in others they are (like, for example, Ontario).

95. For further discussion, e.g., Alice Woolley, “Regulation in Practice: The ‘Ethical Economy’ of Lawyer Regulation and a Case Study in Lawyer Deviance” (2012) 15:2 *Legal Ethics* 243.

96. *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 [*Pearlman*].

97. *Ibid* at 880.

98. *Ibid* at 890.

99. *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247 [*Ryan*].

100. *Ibid* at para 40.

these authorities and others, Canadian courts are reluctant to interfere with decisions of law society discipline committees.

The object of the argument here, however, is not to contend that courts have come to exclusively govern the area of post-entry competence, but rather that they have expanded their reach in this area in recent decades and have done so with the public interest in mind. Moreover, it should be noted that—notwithstanding the strong comments in *Pearlman* and *Ryan*—there are a number of significant ways in which courts have come to intrude into the law society’s disciplinary sphere of authority. First, and most obviously, despite endorsing a deferential standard of review, courts do judicially review the discipline decisions of law societies and, on occasion, overturn them. Second, the courts have also shown a willingness to review the actions of law societies at an institutional level and impose civil liability where such disciplinary measures do not adequately attend to the public interest. In 2004, for example, the Supreme Court of Canada “sent a chill through the corridors of the provincial law societies”¹⁰¹ after releasing its decision in *Finney v. Barreau du Québec*,¹⁰² in which it held that the Barreau du Québec was liable to pay damages to a member of the public who had made a complaint regarding a Quebec lawyer. After confirming that self-governing powers held by the Quebec legal profession were not accorded for “private purposes” but rather delegated for the public’s interest, the Court held that “[t]he virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence.”¹⁰³ Although the Court’s imposition of a standard of “gross carelessness” was far from a radical interference in the Barreau’s authority to govern,¹⁰⁴ the judiciary’s attention to the public interest in the situation can be contrasted to “the highly adversarial and protectionist stance of the Federation of Law Societies which, it seems, was intervening on behalf of the law societies’ interest rather than the public interest.”¹⁰⁵

101. Beppi Crosariol, “Supreme Court decision puts watchdogs on high alert,” *The Globe and Mail* (16 August 2004), online: The Globe and Mail <<http://www.theglobeandmail.com/life/food-and-wine/supreme-court-decision-puts-watchdogs-on-high-alert/article365744/page1>>.

102. *Finney v Barreau du Québec*, 2004 SCC 36, [2004] 2 SCR 17.

103. *Ibid* at para 45.

104. As Devlin & Heffernan point out:

Even in finding for Finney, the Court did not set an impossibly high standard for the Barreau to meet in its duty to the public. A standard of gross carelessness does not require that the Barreau watch over the shoulder of every lawyer, all the time, but rather that it institute effective, quick processes to deal with complaints as they come in, and to deal with lawyers who are unfit to practice and are therefore a threat to the public[.]”

Supra note 7 at 174-175.

105. *Ibid* at 175.

Third, the courts have rejected claims by the legal profession for exclusive authority over the disciplining of lawyers and affirmed the authority of other external regulators to also engage in disciplinary activity. In *Wilder v. Ontario (Securities Commission)*,¹⁰⁶ for example, the Ontario Court of Appeal confirmed that the Ontario Securities Commission had the authority to reprimand lawyers who appear before it and rejected the submissions of the Law Society of Upper Canada that “it had exclusive and exhaustive powers over the regulation of professional conduct of lawyers.”¹⁰⁷

In conclusion, the primary mechanism through which judges regulate the post-entry competence of lawyers is by administering civil actions in negligence. In this area, courts have firmly rejected lawyer exceptionality and expanded the scope of liability through a series of decisions beginning in the late 1970s. Although law societies retain primary authority over discipline proceedings—which also operate to regulate post-entry competence—judges have taken modest measures that have intruded on this authority as well. Such modest measures include imposing liability on law societies in limited circumstances for failing to adequately meet their mandate of regulating in the public interest and recognizing the authority of other institutions to concurrently discipline lawyers. Together, these developments reflect a trend of aggressive judicial regulation with the result that there is now more rigorous, public interest-oriented and broad-reaching scrutiny of lawyer competence than in the pre-1970s era.

IV. *Regulating the business of law: entry, competition, conduct*

In addition to making their mark regulating the practice of law and, in particular, post-entry competence, the courts have also taken a number of significant measures in the last several decades with respect to regulating the *business* of law. This Part examines judicial measures in three areas: entry restrictions, post-entry limits on competition, and post-entry conduct rules.

1. *Entry restrictions*

As noted in Part II, one potential abuse of self-governing powers is the imposition of unnecessary entry restrictions. Rules restricting entry to a profession are, of course, not inherently problematic. Requiring a certain level or type of education before being allowed to practice law,

106. *Wilder v Ontario (Securities Commission)* (2001), 53 OR (3d) 519 (CA).

107. The quoted arguments were rejected by Justice Swinton at first instance at the Ontario Divisional Court (*Wilder v Ontario (Securities Commission)* (2000), 47 OR (3d) 361) and Justice Swinton's reasons on this issue were, in turn, adopted by the Ontario Court of Appeal at paragraph 29 of its decision, *Wilder v Ontario (Securities Commission)* (2001), 53 OR (3d) 519 (CA).

for example, is one way to ensure that those providing legal services to the public have the appropriate training to do so. Entry restrictions can, however, also operate to more nefarious discriminatory and anti-competitive ends. Indeed, the two types of entry restrictions that are the subject of this section—citizenship requirements and constraints on inter-provincial firms—were found by courts to be, respectively, discriminatory and motivated by concerns to limit competition. Over the legal profession's objections, courts declared the restrictions constitutionally invalid and stepped into a core regulatory area with considerable force and impact.

In general, provincial and territorial law societies regulate admission to the practice of law by prescribing entrance requirements and evaluating whether applicants have met these requirements. The courts have no direct authority over this regulatory area, although they are empowered to judicially review the validity of decisions made by the law societies in individual cases.¹⁰⁸ With the introduction of the *Charter of Rights and Freedoms* in 1982, however, the courts were given a new tool to directly review the validity of admission requirements. Two significant decisions by the Supreme Court of Canada shortly after the introduction of the *Charter*—*Andrews v. Law Society of British Columbia*¹⁰⁹ and *Black v. Law Society of Alberta*¹¹⁰—resulted in the invalidation of certain entry restrictions. These decisions, together with various legislative and policy reforms that followed, ushered in a significantly liberalized regime with respect to the admission of foreign professionals to practice and the interprovincial mobility of lawyers.

a. *Citizenship and residency requirements*

In *Andrews*, the Supreme Court of Canada struck down the requirement that applicants to British Columbia's legal profession be Canadian citizens. At the time, "Canadian citizenship was virtually a universal requirement for admittance to any of the provincial law societies"¹¹¹ and law societies were strong advocates of the limiting entry to the profession to Canadian

108. For a brief summary, see William H Hurlburt, *The Self-Regulation of the Legal Profession in Canada and in England and Wales* (Calgary: Law Society of Alberta, 2000) at 33-34.

109. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*].

110. *Black v Law Society of Alberta*, [1989] 1 SCR 591 [*Black*].

111. Maurice Laprairie, "Regulatory Framework" in Adam M Dodek & Jeffrey G Hoskins eds, *Canadian Legal Practice: A Guide for the 21st Century*, loose-leaf (consulted on 20 May 2012) (Markham, Ontario: LexisNexis Canada, 2009), ch 1 at 1-12. See, also, Ellen Murray, *Citizenship and Professional Practice in Ontario: A Working Paper* (Toronto: Professional Organizations Committee, 1978) at 20-21 for a summary of the situation across Canada in 1978.

citizens.¹¹² On several occasions previous to *Andrews*, the courts had considered citizenship requirements for admission to law practice and, despite raising questions as to the justifiability of such requirements, had declined to find them invalid.¹¹³ These cases were heard before the equality provisions of the *Charter* were in force, however, they ultimately formed the basis for the Supreme Court's finding in *Andrews* that the British Columbia citizenship requirement was invalid.¹¹⁴

In *Andrews*, the Law Society of British Columbia—which was a party to the action—had vigorously defended the citizenship requirement, arguing, *inter alia*, that the “vital role” role lawyers play in governmental processes and in the administration of justice justified the rule.¹¹⁵ In the background, however, lurked less lofty motivations. When viewed in the context of the long history of other nationality requirements imposed in Canada in relation to voting, land-holding, and employment, it is difficult to deny that xenophobia and anti-immigrant sentiments played a role in the origination of citizenship requirements for legal professionals.¹¹⁶ The citizenship requirements may also be viewed as a protectionist measure from a competition standpoint. Speaking about the citizenship requirement in Manitoba in 1977, Jack London observed that it could “be seen as an attempt to limit the numbers of persons entering the legal profession and hence to provide a kind of import restriction in the numbers practicing law in the community. The monopoly is maintained in many ways, this being one.”¹¹⁷ In rejecting the citizenship requirement in *Andrews*, the Supreme Court of Canada overruled the Canadian legal profession's self-serving view of who should be allowed to be a lawyer.

Post-*Andrews*, a number of provinces maintained a requirement that an applicant for admission to practice be either a Canadian citizen *or* a permanent resident.¹¹⁸ Such requirements, however, came under attack

112. As Hurlburt reports: “As late as 1970, a committee of the Conference of Governing Bodies of the Legal Profession in Canada recommended that citizenship be a requirement for a lawyer who wished to transfer to another province and that a lawyer coming into Canada be required to acquire citizenship before admission, though not before commencing to meet other requirements.” Hurlburt, *supra* note 108 at 87-88.

113. See *Dickenson v Law Society of Alberta* (1978), 10 AR 120 (QB); and *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357.

114. Due to the operation of section 32(2) of the *Charter*, the provisions of section 15 came into force three years later than the other provisions.

115. *Andrews*, *supra* note 109.

116. See discussion in Robert L Lenoir, “Citizenship as a Requirement for the Practice of Law in Ontario” (1981) 13 *Ottawa L Rev* 527.

117. Jack R London, “The Admissions and Education Committee: A Perspective on Legal Education and Admission to Practice in the Province of Manitoba—Past, Present and Future” in Cameron Harvey, ed, *The Law Society of Manitoba: 1877–1977* (Winnipeg: Peguis, 1977) 74 at 98-99.

118. For a summary, see discussion in Hurlburt, *supra* note 108 at 88.

with the release of the federal Competition Bureau's 2007 report on the self-regulating professions.¹¹⁹ The report recommended that the residency and citizenship requirements imposed in certain provinces be eliminated, observing that, "[f]rom a competition standpoint, such restrictions limit the supply of lawyers by imposing an additional requirement that lawyers must meet before becoming members of a law society that has such a restriction."¹²⁰ With this additional push from the Competition Bureau, a number of law societies have more recently removed residency and citizenship requirements previously in place.¹²¹

b. *Inter-provincial practice of law*

Shortly after *Andrews*, the Supreme Court of Canada waded into another aspect of the legal profession's control over entry. In *Black v. Law Society of Alberta*,¹²² the Court declared invalid two rules enacted by the Law Society of Alberta that aimed to restrict the emergence of inter-provincial law firms in the province.¹²³ At the time, inter-provincial firms were virtually unknown in Canada¹²⁴ and the provinces had differing opinions regarding their desirability.¹²⁵ The specific rules enacted in Alberta were a direct response to efforts by the Toronto law firm McCarthy and McCarthy to establish an inter-provincial law firm with a branch in Alberta. Before the Supreme Court of Canada, the Law Society of Alberta attempted to justify the rules by arguing that they were necessary to protect the quality of legal services in the province.¹²⁶ As the trial judge concluded, however, the worry that inter-provincial firms would increase competition and take work away from Alberta lawyers formed at least part of the motivation

119. Competition Bureau of Canada, *supra* note 32.

120. *Ibid* at 67-68.

121. For example, Ontario's requirement was removed in 2007 such that an individual no longer needs to be a permanent resident or a Canadian Citizen when entering the licensing process or for the purpose of being called to the Bar of Ontario (see The Law Society of Upper Canada's Discussion, online: <<http://www.lsuc.on.ca/FAQs>> and Saskatchewan's requirement was removed in 2010 (see discussion in (2010) 23:4 Benchers' Digest 1 at 2)).

122. *Black*, *supra* note 110.

123. The rules in question required, respectively, that (1) "An active member who ordinarily resides in and carries on the practice of law within Alberta shall not enter into or continue any partnership, association or other arrangement for the joint practice of law in Alberta with anyone who is not an active member ordinarily resident in Alberta"; and (2): "No member shall be a partner in or associated for the practice of law with more than one law firm." See *Black*, *ibid* at paras 7, 8.

124. *Black v Law Society of Alberta* (1984), 57 AR 1 (QB) at para 38 [*Black*, QB].

125. *Ibid* at para 147.

126. *Black v Law Society of Alberta* [1989] 1 SCR 591 at paras 93 to 105.

for the rules.¹²⁷ Writing for the majority of the Supreme Court of Canada, La Forest J found that the rules violated mobility rights guaranteed by the *Charter* and rejected the Law Society's contention "that legal services delivered to the public of Alberta would be endangered by interprovincial law firms."¹²⁸

Beginning in the late 1990s, the legal profession also began to address the issue of inter-provincial mobility through a series of mobility agreements entered into between provincial and territorial law societies.¹²⁹ Included among these measures is the *National Mobility Agreement*, described on the Federation of Canadian Law Societies, website as "the blueprint for the mobility regime...[that] facilitates temporary and permanent mobility of lawyers between all common law provinces in Canada."¹³⁰ The *National Mobility Agreement* has eased the requirements for permanently transferring between jurisdictions and also addresses temporary mobility by allowing for lawyers to practice in other signatory jurisdictions for up to 100 days a year without having to obtain a permit (subject to certain restrictions).¹³¹

The measures adopted by the legal profession to facilitate the movement of legal professionals across provinces and those taken to ease citizenship and residency requirements demonstrate the willingness of Canadian lawyers to evolve under criticism. It bears highlighting, however, that these measures only emerged after an initial period of resistance and judicial decisions made over the forceful objections of provincial law societies. Viewing these reforms in their historical context helps to highlight the role that the judiciary has played in both changing the rules of the game—for example, in eliminating bars on non-citizens in *Andrews* and inter-provincial law firms in *Black*—and in setting the stage to prompt the legal profession to pursue their own reforms.

2. *Post-entry limits on competition*

Examples of aggressive judicial regulation can also be found in the area of post-entry limits on competition. This section examines judicial measures

127. On this point, the trial judge declined to find any bad faith on the part of the Alberta Law Society, but noted at paragraph 35: "The debates of the benchers disclose that the issue of economic protectionism was clearly raised. There was additionally in argument, expressed and implied, that view that the benchers feared that the McCarthy firm in Toronto would take legal work away from residents of this province." *Black*, QB, *supra* note 124.

128. *Black*, *supra* note 110 at para 93.

129. See discussion in Devlin & Cheng, *supra* note 1 at 248.

130. See Federation of Law Societies of Canada, "National Mobility of the Legal Profession," online: Federation of Law Societies of Canada <<http://www.flsc.ca/en/national-mobility-of-the-legal-profession>>.

131. *Ibid.*

taken with respect to advertising, unauthorized practice, and fees. Once again, measures by the courts may be seen as resulting in a regulatory regime more attentive to the public interest. In this area, further judicial rejection of self-serving rules and positions adopted by law societies can be observed. In several important respects, decisions by the courts have also prompted and enabled further reforms.

a. *Advertising*

Historically, the Canadian legal profession faced significant, self-imposed restrictions in the area of advertising: close to a total ban was in place.¹³² Officially, this was justified as a matter of maintaining an appropriate level of professionalism; the advertising of services was said to “lower the tone of the lawyer’s high calling.”¹³³ Such restrictions, however, also served to advance the economic interests of lawyers through restricting price competition.¹³⁴ For example, a study commissioned by the Competition Bureau concluded that advertising restrictions imposed upon lawyers cost Canadian consumers over \$30,000,000 in 1970 alone.¹³⁵

Although the legal profession had started to take small steps to liberalize rules governing advertising in the late 1970s following legislative amendments that brought legal services under the ambit of

132. As reported in Mark Orkin’s seminal text on legal ethics in 1957:

Solicitation of business by a lawyer is considered to be professional misconduct. In particular, solicitation of business through the medium of advertising, whether direct or indirect, is forbidden.

While the rule as so stated may be considered absolute, in practice it appears to admit of some slight encroachments. An example is the use of name plates and business cards, where the primary purpose of identification does not exclude some element of advertising, in the sense of bringing the lawyer’s name to the attention of the public.

Mark Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright, 1957) at 180 [footnotes omitted].

133. *Ibid* at 185. See also, the 1920 *Canons of Legal Ethics* (Ottawa: Canadian Bar Association, 1920), Canon 5(3) which stated:

The publication or circulation of ordinary simple business cards is not per se improper, but solicitation of business by circulars or advertisements or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to seek retainers through agents of any kind. Indirect advertisement for business by furnishing or inspiring newspaper comment concerning causes in which the lawyer has been or is connected, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer’s position, and the like self-laudations defy the traditions and lower the tone of the lawyer’s high calling and should not be tolerated. The best advertisement for a lawyer is the establishment of a well-merited reputation for personal capacity and fidelity to trust.

134. Competition Bureau of Canada, *supra* note 32 at 28-29.

135. Timothy R Muzondo & Bohumir Pazderka, *Professional Licensing and Competition Policy: Effects of Licensing on Earnings and Rates-of-return Differentials* (Ottawa: Minister of Supply and Services, 1979) at 127.

federal competition law,¹³⁶ significant changes only began to take place in the mid-1980s after a series of court challenges. As was the case with citizenship requirements, the courts had demonstrated some initial hesitancy to intervene in this area before the introduction of the *Charter*.¹³⁷ Moreover, even after the *Charter*, it was not initially clear if and how the new *Charter* right to freedom of expression would apply to commercial speech and, in several early cases, lower courts were reluctant to find that law society restrictions on lawyer advertising were unconstitutional.¹³⁸ Increased judicial attention in addition to continuing interest shown by government regulators, however, encouraged further liberalization on the part of the law societies in the 1980s.¹³⁹ In 1990, in *Rocket v. Royal College of Dental Surgeons of Ontario*, the Supreme Court of Canada ultimately affirmed that the *Charter*'s freedom of expression protections applied to professional advertising.¹⁴⁰ This ruling made it clear that the legal profession's rules on advertising would not be able to escape constitutional scrutiny.

More than a decade later, with the release of its 2007 report on the self-regulated professions, the Competition Bureau renewed pressure on the legal profession to further relax rules with respect to advertising. In reviewing the issue of lawyer advertising, the Bureau explicitly rejected the submission of the Federation of Law Societies of Canada that the regulations in place were necessary "to 'protect the public interest and confidence in the legal system'" and took the position that "the restrictions currently in place on advertising go outside of what is necessary to guarantee this, since the public needs only to be protected against advertising that is

136. For example, as reported in *The Report of the Professional Organizations Committee* (Toronto: Ministry of the Attorney General, 1980) at 194-195, in the late 1970s, the Law Society of Upper Canada introduced a program that permitted lawyers to advertise up to three preferred areas of practice in the Yellow Pages and other print media subject to certain pre-conditions. The Report also noted "recent rule changes in Manitoba, Alberta, and British Columbia now allow most forms of price advertising by lawyers."

137. *Canada (Attorney General) v Law Society of British Columbia*, [1982] 2 SCR 307.

138. See, e.g., *Re Law Society of Manitoba and Savino* (1983), 1 DLR (4th) 285 (CA); *Klein v Law Society of Upper Canada* (1985), 50 OR (2d) 118 (Div Ct).

139. As noted by Moore, *supra* note 28 at 316: "The Law Society of Upper Canada followed the trend, voting to withdraw most of its professional conduct restrictions on advertising and other forms of business-like competition. In September 1986, it abolished all limits on lawyers' advertising except those of good taste, honesty, and verifiability." In other words, "the regulatory scheme, which was formerly a general prohibition subject to expanding exceptions, was converted into a general authorization subject to qualifiers." See Darryl Robinson, "Ethical Evolution: The Development of the Professional Conduct Handbook of the Law Society of Upper Canada" (1995) 29:2 *Law Society Gazette* 162 at 178-179.

140. *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232.

false or misleading.”¹⁴¹ Following the release of the Bureau’s report, law societies continued their reforms of advertising rules.¹⁴²

b. *Unauthorized practice*

Having individuals go through a licensing process before practicing law and monitoring their activities thereafter is a means of protecting the public from incompetent and unscrupulous practitioners. As with other areas of professional control, however, the legal profession’s interest in preventing unauthorized practice has also been influenced by a desire to limit competition. In carving out a set of certain activities for sale by lawyers only, the legal profession protects not only the public but also its monopoly over legal services.

Over the last several decades, the most prominent issue related to the unauthorized practice of law in Canada has been the issue of paralegals providing legal services to the public. Paralegal regulation was thrust into the spotlight in Ontario in 1987 with the Court of Appeal’s decision in *R v. Lawrie and Pointts*,¹⁴³ which involved an appeal of a private prosecution initiated by the Law Society of Upper Canada against a retired police officer who had set up a company to represent persons charged with traffic offences. In the course of concluding that the applicable legislation did not prohibit the practice, Blair J, who wrote for the court, stated: “[i]t has been observed many times that the prohibition against the unauthorized practice of law is not merely to protect qualified lawyers from infringement of their right to practise their profession. Its primary purpose is to protect the public.”¹⁴⁴ This was not the result that the Law Society had hoped for. Just prior to the decision in *Pointts*, the Treasurer of the Law Society of Upper Canada “promised his colleagues that the law society would ‘prosecute the hell’ out of independent paralegals.”¹⁴⁵ After the decision, the Law Society’s response was more moderate, but still chilly, deciding “that although it had to accept the existence of independent paralegal services, it would take no part in their regulation and would continue to oppose their expansion.”¹⁴⁶ Following her study of paralegals several years later, Paula

141. Competition Bureau of Canada, *supra* note 32 at 72.

142. See, e.g., Donalee Moulton, “Law societies’ advertising rules inhibit competition,” *The Lawyers Weekly* 28:9 (27 June 2008). See, also, the summary of post-2007 reforms as found in Kim Alexander-Cook, “Advertising, Competition and Restraint of Trade” in Adam M Dodek & Jeffrey G Hoskins, eds, *Canadian Legal Practice*, loose-leaf (consulted on 20 May 2012) (Markham: LexisNexis Canada, 2009), ch 5 at 5-5.

143. *R v Lawrie and Pointts* (1987), 59 OR (2d) 161 (CA) [*Pointts*].

144. *Ibid* at para 21.

145. Paula Pevato, “Should Law Societies ‘Prosecute the Hell’ out of Independent Paralegal Firms” (1991) 7 J L & Soc Pol’y 215 at 215.

146. Moore, *supra* note 28 at 317.

Pevato observed that there was “substantial evidence...suggest[ing] that the legal profession’s hostility toward paralegals is motivated, to a large degree, by a self-serving desire to maintain a monopoly over the delivery of legal services to the public.”¹⁴⁷

Although the Ontario government commissioned a report and drafted legislation to address the status of paralegals, no legislative reform occurred until after the Ontario Court of Appeal raised the matter again in 1999 and explicitly chastised the government for failing to take any action to regulate paralegals.¹⁴⁸ Further study followed which ultimately led to legislation, effective 1 May 2007, giving the Law Society of Upper Canada the authority to regulate paralegals.¹⁴⁹

The issue of non-lawyers providing legal services has also garnered attention at the federal level in recent years in the immigration context. In *Law Society (British Columbia) v. Mangat*,¹⁵⁰ the Law Society of British Columbia sought to enjoin immigration consultants from acting in relation to immigration proceedings on the basis that this was the unauthorized practice of law. The Supreme Court of Canada rejected the Law Society’s application, finding, among other things, that federal legislation permitting this practice trumped any provincial legislation to the contrary. Following *Mangat*, the federal government enacted regulations and designated a private corporation to govern immigration consultants. The Law Society of Upper Canada soon challenged these developments on a number of grounds, including that the regulations violated the rule of law because they interfered with the independence of the bar and exceeded the government’s authority.¹⁵¹ The Federal Court dismissed the application and the dismissal was subsequently upheld on appeal.¹⁵²

In the cases of Ontario paralegals and federal immigration consultants, the courts opened up the practice of law to non-lawyers in the face of strenuous objection by law societies. In both cases, this set the stage for legislative reform that further entrenched and legitimized non-lawyers providing services to the public that lawyers had wanted to reserve

147. Pevato, *supra* note 145 at 248.

148. *Ibid.*

149. For a more detailed summary of these events, see Julia Bass & Paul Jonathan Saquil, “The Authorized Provision of Legal Services by Non-Lawyers: Paralegals and Others” in Adam M Dodek & Jeffrey G Hoskins eds, *Canadian Legal Practice*, loose-leaf (consulted on 20 May 2012) (Markham: LexisNexis Canada, 2009), ch 13 at 13-2–13-12.

150. *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 SCR 113 [*Mangat*].

151. *Law Society of Upper Canada v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1489, [2007] 4 FCR 132.

152. *Law Society of Upper Canada v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243, [2009] 2 FCR 466, leave to appeal to SCC dismissed, 2008 CanLII 65720 (SCC).

for themselves. Although the legal profession eventually took its own measures—take, for example, the Law Society of Upper Canada’s ultimate embrace of regulating paralegals—this only came after courts and governments already took forceful steps in favour of liberalizing the market for legal services.

c. *Fees*

In addition to being involved in decisions about who may practice law and how they may promote their practice, courts have also been a powerful force in regulating how much lawyers may charge for their services. Due to various imperfections in the market for legal services—including, for example, informational asymmetry and the monopoly that lawyers exercise over the provision of legal services—the risk for price inflation and escalation is considered to be high when it comes to lawyers as a collective professional group.¹⁵³ One check on this risk has been the long-recognized inherent jurisdiction of Canadian courts to supervise the fees that lawyers charge to clients.¹⁵⁴ In practice, however, the use of this inherent judicial power has been generally supplanted by formal statutory processes that allow clients to have their lawyers’ accounts reviewed by non-judicial assessment officers or court registrars.¹⁵⁵

In addition to hearing appeals of non-judicial reviews of costs, courts have also taken an active role in rejecting anti-competitive fee practices of lawyers. Set fee schedules, in particular, have been a particular target. Despite lacking any statutory basis, fee schedules that directed lawyers what to charge for certain services were once common in Ontario.¹⁵⁶ In the mid-1980s, the Competition Bureau set its sights on fee schedules put in place by two county law associations in Ontario, the Waterloo Law Association and the Kent County Law Association, that related to residential

153. For further discussion on this point, see, e.g., Alice Woolley, “Imperfect Duty: Lawyers’ Obligation to Foster Access to Justice” (2007) 45:5 *Alta L Rev* 107; and Gillian Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System” (2000) 98 *Mich L Rev* 953.

154. See, e.g., *Glanc v O’Donohue & O’Donohue*, 2008 ONCA 395, 90 OR (3d) 309.

155. In Ontario, for example, this process is conducted by “assessment officers” appointed pursuant to the *Courts of Justice Act*, RSO 1990, c C 43, s 90. Similarly, in British Columbia, registrars of the British Columbia Superior Court are tasked with this work pursuant to the *Legal Profession Act*, SBC 1998, c 9, Part 8; and in Alberta, a “review officer” does this work (*Alberta Rules of Court*, Alta Reg 124/2010, s 10.9). One major exception to this general delegation of supervision over fees is in the area of class proceedings, where class counsel fees must be reviewed by the court in every case. For further discussion of this issue, see, e.g., Kirk M Baert & Jonathan Bida, “Fee Approval Hearings in Class Proceedings,” online: Koskie Minsky LLP <http://www.kmlaw.ca/site_documents/Fee%20Approval%20Hearings%20-%20Class%20Proceedings_18jun10.pdf>.

156. See, e.g., William P McKeown, “How the Conspiracy Provisions of the New Competition Law Affect the Professions and Services” (1977) 2 *Can Bus LJ* 4 at 21, reporting that, at the time, almost all counties in Ontario had “a solicitor’s conveyancing and general tariff or a suggested fee schedule for solicitors.”

real estate legal services and involved sanctions for non-adherence.¹⁵⁷ The Waterloo Law Association initially responded to the investigation initiated by the Competition Bureau by seeking, among other things, a declaration from the Ontario Superior Court that the *Competition Act* did not apply to its activities.¹⁵⁸ Justice Eberle, who heard the matter, ultimately took the position that the application was premature given that no charges had yet been laid under the *Competition Act*. It was clear, however, that he rejected the proposition that lawyers enjoyed a complete exemption from the operations of the *Competition Act*:

The fact that governance of the legal profession and of its members is within the provincial legislative domain, under property and civil rights, does not remove lawyers from the reach of a valid criminal law. For example, a lawyer is subject to criminal prosecution if he commits murder or theft, or any other crime. This remains the case even where, as here, the province has delegated governing powers over the legal profession to a provincial law society.¹⁵⁹

Ultimately, in 1988, both the Waterloo and Kent County law associations consented to the issuance of court orders of prohibition which, among other things, prohibited them from promulgating any schedule of fees for legal services and mandated certain reporting requirements for a five-year period.¹⁶⁰ Although the court orders issued only related to small groups of lawyers in Ontario, these tariff cases stand as yet another example of courts rejecting exceptional treatment for the legal profession and ousting self-serving measures in favour of the public interest.

157. *R v Waterloo Law Assn* (1988), 21 CPR (3d) 528 (ON H Ct J) [*R v Waterloo*]; *R v Kent County Law Assn*, [1988] OJ No 2965 (ON H Ct J) [*R v Kent County*]. For a summary of the cases, see also Calvin S Goldman, Director of Investigation and Research, Bureau of Competition Policy, "The *Competition Act* and the Professions" (Notes for an Address by Calvin S Goldman, to the Canadian Bar Association (Ontario) Program on the Professions, Toronto, Ontario, 25 April 1989), online: Competition Bureau <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01128.html>>.

158. *Waterloo Law Association v Canada (Attorney General)* (1986), 58 OR (2d) 275 (H Ct J). As reported at paragraph 18 of the decision: "Although the Law Society [of Upper Canada] was notified of the proceedings and appeared for the argument of the applications, it [was] not a party to either proceeding and took no position."

159. *Ibid* at para 20. It should also be noted that Justice Eberle did qualify this passage somewhat in the next paragraph, acknowledging

[t]hat a lawyer or law association ought to be able to claim an exemption, in appropriate circumstances, in answer to a prosecution under the *Competition Act*, where the activities which give rise to the prosecution are activities required by the governing body of the profession acting within powers delegated to it by a valid provincial statute. I recognize also that it may be sufficient if the activities are merely authorized, and not actually required.

160. *R v Law Waterloo*, *supra* note 157; *R v Kent County*, *supra* note 157.

3. *Conduct rules*

As seen in the above examples, during the 1970s and 1980s, the courts were active in rejecting various anti-competitive restrictions on entry, advertising, and fees. In the 1990s, judicial review of conduct rules applying to the profession led to important regulatory changes. Most significantly, judges acted to regulate in the areas of conflicts of interest and withdrawal from the record. In both cases, the standards established by the courts placed a greater emphasis on the public interest than the standards contemporaneously favoured by the profession itself.

a. *Conflicts of interest*

Broadly speaking, conflict of interest rules for lawyers operate to regulate the risk that a lawyer's representation of a client "would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."¹⁶¹ Conflict of interest rules relate to a lawyer's ethical duties—for example, the duties of loyalty and confidentiality—but can also engage a lawyer's economic interests. Simply put, if a lawyer is prevented from acting for a client as a result of a deemed conflict, the lawyer loses the client and all associated fees. In general, Canadian courts adjudicate on conflicts of interest in the course of exercising their inherent jurisdiction over the court's processes and in administering civil actions for breach of fiduciary duty.

Conflicts of interest gained a new prominence in Canada in the last several decades as a result of a trilogy of Supreme Court of Canada decisions.¹⁶² In the first case that "ignited the conflicts revolution in Canada,"¹⁶³ *Martin v. Gray*,¹⁶⁴ the issue was whether the law firm representing the defendant was precluded from continuing to act because an associate who had previously assisted in representing the plaintiff at another firm was now working at the defendant's firm. In considering whether an impermissible conflict arose, the majority held that courts must consider to the "possibility of real mischief" with respect to the misuse of confidential information by a lawyer against a former client rather

161. This definition of a "conflict" is found in American Law Institute, *Restatement of the Law, Third: The Law Governing Lawyers*, vol 2 (St Paul, MN: American Law Institute, 2000) at 244-245 and was cited with approval by the Supreme Court of Canada in *R v Neil*, 2002 SCC 70 at para 31, [2002] 3 SCR 631 [*R v Neil*].

162. The analysis in this section has greatly benefited from the careful parsing of these cases by other scholars and lawyers, including most notably, Adam Dodek (see, e.g. Adam M Dodek, "Conflicted Identities: The Battle over the Duty of Loyalty in Canada" (2011) 14:2 Legal Ethics 193) and Simon Chester (see, e.g. Simon Chester, *The Conflicts Revolution: Martin V. Gray and Fifteen Years of Change* (Heenan Blaikie LLP, 2006)).

163. Chester, *supra* note 162 at 14 [footnote omitted].

164. *Martin v Gray*, [1990] 3 SCR 1235.

than a lower standard that would only require the “probability of real mischief.”¹⁶⁵ Writing for the majority, Sopinka J rejected the proposition that the realities of the modern practice of law—the rise of the large firm, mergers, and the more regular movement of lawyers between firms—should lead to a “slackening” of the conflicts of interests rule.¹⁶⁶

As Adam Dodek has observed, the majority reasons in *Martin v. Gray* may be read as deferential to the legal profession.¹⁶⁷ Justice Sopinka acknowledges, for example, that lawyers are a self-governing profession and the courts should consider an expression of a standard in codes of professional conduct to be, although not binding on the courts, “an important statement of public policy.”¹⁶⁸ He also suggests that the Canadian Bar Association should take the lead in determining whether institutional screening devices “such as Chinese walls and cones of silence” might be effective in shielding against a transferee lawyer “tainting” his or her new law firm and in developing national standards for using such devices.¹⁶⁹

Notwithstanding the deference shown, the immediate reaction of the Canadian legal profession to *Martin v. Gray* was intense and the decision “sent shockwaves through the Canadian legal profession.”¹⁷⁰ In response to the Court’s invitation, the Canadian Bar Association set up a Task Force that produced a report setting out guidelines to assist in “screening” transferring lawyers to avoid disqualification in cases where the transferring lawyer has received confidential information attributable to a solicitor-client relationship while working at his or her former firm that would put him or her in a position of conflict at the new firm.¹⁷¹ The recommendations set out in the report were, in general, endorsed by the profession and found their way into governing codes of conduct.¹⁷²

Roughly a decade later, the Supreme Court of Canada decided another major conflict case. In *R. v. Neil*, the court considered the question of duties

165. *Ibid* at para 47.

166. *Ibid*.

167. Dodek, *supra* note 162 at 202.

168. *Martin v Gray*, [1990] 3 SCR 1235 at para 21.

169. *Ibid* at para 51.

170. Dodek, *supra* note 162 at 201. See also, Cristin Schmitz, “S.C.C. creates tough new conflict of interest standards,” *The Lawyers Weekly* 10:34 (18 January 1991). It should be noted that the minority decision, authored by Justice Cory, advocated for an even stricter duty that would see an irrebutable inference that the knowledge of one member of a law firm constitutes knowledge of all members of the firm and rejected the suggestion that institutional devices might provide appropriate safeguards. This stricter test, argued the minority, was necessary to preserve public confidence in the administration of justice.

171. Canadian Bar Association Task Force on Conflict of Interest, *Conflicts of Interest Disqualification: Martin v Gray and Screening Methods* (Ottawa: Canadian Bar Association, 1993).

172. Dodek, *supra* note 167 at 201.

owed to concurrent clients, rather than that of duties owed to former clients that was raised in *Martin v. Gray*. Justice Binnie, writing for a unanimous court, characterized the central issue on appeal as follows: “What are the proper limits of a lawyer’s ‘duty of loyalty’ to a current client in a case where the lawyer did not receive any confidential information that was (or is) relevant to the matter in which he proposes to act against the client’s current interest?”¹⁷³ The Court adopted a “bright-line” rule which dictated that

a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client—even if the two mandates are unrelated—unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.¹⁷⁴

In arriving at this rule, the Court leaned on the notion that strict rules regarding conflicts of interest were necessary to ensure that the public maintained confidence in the legal system.¹⁷⁵ The impact of *Neil* was even more intense than that of *Martin v. Gray*: “[i]f *Martin v. Gray* was an earthquake, *Neil* was treated more like a tsunami threatening Canadian legal practice.”¹⁷⁶

Several years later, the Supreme Court of Canada once again addressed the issue of a duty of loyalty in *3464920 Canada Inc. v. Strother*.¹⁷⁷ In this case, the Court considered the situation of a lawyer (Strother) who had, among other things, obtained a substantial and direct financial interest in a client (Sentinel) in competition with another client (Monarch). The majority decision found that Strother had breached his fiduciary duty to Monarch by accepting a personal interest in Sentinel.¹⁷⁸ As summarized by Binnie J: “Strother could not with equal loyalty serve Monarch and pursue his own financial interest which stood in obvious conflict with Monarch

173. *R v Neil*, *supra* note 161 at para 1.

174. *Ibid* at para 29 [emphasis in the original].

175. *Ibid* at para 12.

176. Dodek, *supra* note 162 at 203 [footnote omitted].

177. *3464920 Canada Inc v Strother*, 2007 SCC 24, [2007] 2 SCR 177 [*Strother*].

178. As stated at *ibid*, paragraph 67:

By acquiring a substantial and direct financial interest in one client (Sentinel) seeking to enter a very restricted market related to film production services in which another client (Monarch) previously had a major presence, Strother put his personal financial interest into conflict with his duty to Monarch. The conflict compromised Strother’s duty to ‘zealously’ represent Monarch’s interests (Neil, at para. 19), a delinquency compounded by his lack of ‘candour’ with Monarch ‘on matters relevant to the retainer’ (*ibid*), i.e. his own competing financial interest.

making a quick re-entry into the tax-assisted film financing business.”¹⁷⁹ The minority decision by McLachlin CJ took a different view, beginning from the premise that the duty of loyalty owed to a client must be informed by the content of the contractual retainer. Given the fact that, at the time of Strother’s investment he was under a new retainer with Monarch that provided he was only to provide advice when specifically asked and was free to act for competitors, the minority decision found that “there is no reason to conclude that Strother’s capacity to loyally and zealously perform the very limited duties to Monarch under the 1998 oral retainer would be affected by his taking a personal interest in Sentinel Hill.”¹⁸⁰

One way to understand the majority and minority decisions in *Strother* is as a disagreement about whether, in a solicitor-client relationship, fiduciary duties overlay the contractual terms found in the retainer or vice versa.¹⁸¹ In taking the former view, the majority decision opted to impose a more robust duty of loyalty on Canadian lawyers. As noted by Harvey Morrison, “[i]f there were any hopes that the Supreme Court of Canada would moderate the rigour of the bright line rule in *Neil*, they were dashed in *Strother*.”¹⁸² The bright-line test, or the “unrelated matters rule” affirmed in both of these cases gave conflicts of interest rules a broad mandate of application.

Following the decisions of *Neil* and *Strother*, the Canadian Bar Association reacted defensively, establishing another task force that produced a “surprisingly confrontational” report that argued that the bright-line rule set out by the Supreme Court of Canada “is *obiter*, unreasoned, overly broad and contrary to the public interest.”¹⁸³ Equally surprising, perhaps, were the extra-judicial comments from a sitting Supreme Court of Canada justice about the report. In a speech delivered at a conference in Strasbourg, France, Justice Binnie directly confronted the content of the CBA task force report, emphasizing the need to “enhance the public trust” in the legal profession and the important role of more, not less, strict conflicts rules.¹⁸⁴ Indeed, the title of the speech “Sondage après sondage”

179. *Ibid* at para 70.

180. *Ibid* at para 145.

181. Dodek, *supra* note 162 at 205. See, also, Anthony Duggan, “Solicitors’ Conflict of Interest and the Wider Fiduciary Question” (2007) 45:3 Can Bus LJ 414 at 417-420.

182. Harvey L Morrison, “Conflicts of Interest and the Concept of Loyalty” (2008) 87:3 Can Bar Rev 565 at 578.

183. Alice Woolley, “Correspondent’s Report from Canada: Task Force on Conflicts of Interest” (2009) 12:1 Legal Ethics 87 at 87.

184. Ian Binnie, “Sondage après sondage... quelques réflexions sur les conflits d’intérêts” (“Poll After Poll: A Few Thoughts about Conflicts of Interest”) edited version of a speech given at *Les Journées Strasbourgeoises*, Strasbourg, France (4 July 2008). For further discussion of this incident, see Dodek, *supra* note 162 at 209-211.

(Poll after Poll) was a direct reference to a recent speech given by the former president of the Quebec Bar in which he referenced the fact that lawyers find themselves poorly ranked (alongside politicians and used car dealers) in surveys regarding the public confidence in the legal profession. In view of this back and forth and these unusual extra-judicial comments, it might be fairly said, as Adam Dodek has previously, that “[t]he tension between judicial regulation and self-regulation is perhaps most evident in the area of conflicts of interest.”¹⁸⁵

Most recently, in the 2013 case of *Canadian National Railway Co. v. McKercher LLP*,¹⁸⁶ the Supreme Court of Canada once again considered the issue of lawyer conflicts. This case involved a large firm in Saskatchewan, McKercher LLP, that had accepted a retainer to act against the Canadian National Railway Company in a class action lawsuit notwithstanding the fact that it was acting for CN on a variety of unrelated matters. CN only learned of McKercher’s involvement in the class action matter once it was served with a statement of claim. In the month before serving the statement of claim and in the days following service, the firm terminated its existing retainers with CN, except for a retainer on one file which CN itself terminated. CN applied for an order removing McKercher as solicitor of record for the plaintiff in the class action against it. Writing for a unanimous court, McLachlin CJC concluded, among other things, that the situation “fell squarely within the scope of the bright line rule”¹⁸⁷ and remitted the matter back to the lower court for redetermination in accordance with the Court’s reasons. In terms of the development of the law of conflicts, the Court in *McKercher* reaffirmed the bright line rule set out in *Neil* and clarified its scope.¹⁸⁸

For the purposes of this article, Chief Justice McLachlin’s comments at paragraph 16 of the decision are perhaps the most interesting wherein she writes:

[16] Both the courts and law societies are involved in resolving issues relating to conflicts of interest—the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331. In exercising their respective powers, each may properly have regard for the other’s views. Yet each must discharge its

185. Dodek, *supra* note 162 at 195.

186. 2013 SCC 39.

187. *Ibid* at para. 8.

188. Specifically, the Court clarified that: (1) the rule applies where the immediate legal interests of clients are directly adverse; (2) it does not apply to condone tactical abuses; and (3) it does not apply in circumstance where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters (*ibid* at para 32).

unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although “an expression of a professional standard in a code of ethics...should be considered an important statement of public policy”: *Martin*, at p. 1246.

Although the above suggests a co-operative relationship between the courts and the law societies, and distinct roles for each, it fails to acknowledge that both institutions are, in fact, regulating precisely the same area of lawyer conduct (albeit for different ends) and that the judiciary, beginning with *Martin v. Gray* in 1990, has inserted itself as a regulator in this area in an unprecedented fashion which has led to significant changes in how conflict of interests are regulated not only by the courts but also by law society rules. Moreover, the positions taken by the Court have resulted in greater regulation in this area and, in some cases, been in direct opposition to the positions taken by the legal profession.¹⁸⁹

b. *Withdrawal*

In 2010, the Supreme Court of Canada again waded into the area of lawyer conduct in considering the circumstances under which lawyers should be permitted to withdraw from the record. In *R v. Cunningham*,¹⁹⁰ a unanimous Supreme Court confirmed that courts have the authority to mandate that counsel continue to represent an accused in circumstances where counsel wishes to withdraw because of non-payment of legal fees, although this authority “must be exercised sparingly, and only when necessary to prevent serious harm to the administration of justice.”¹⁹¹ The decision also confirmed that the authority to refuse an application for withdrawal did not extend to circumstances where withdrawal was sought for an ethical reason: in such cases “the court must grant [the] withdrawal.”¹⁹² Although at the time this case was heard, the majority of provincial and territorial appellate courts held that courts had jurisdiction to prevent defence counsel from withdrawing due to non-payment in fees, there was some division in the case law and differing approaches had been

189. In the case of lawyer conflicts of interests, it is important to note that the legal profession has not spoken with one voice. Although the CBA has been critical of the bright line rule, the Federation of Law Societies has aligned itself with the Supreme Court jurisprudence. For further discussion, see Dodek, “Conflicted Identities,” *supra* note 162 at 211-213 and see, also, Alice Woolley, “Problem solved? Assessing the Supreme Court’s Latest Statement on the Law Governing Conflicts of Interest” *AbLawg.ca*, 2 August 2013, online: <<http://ablawg.ca/2013/08/02/problem-solved-assessing-the-supreme-courts-latest-statement-on-the-law-governing-conflicts-of-interest/>>.

190. *R v Cunningham*, 2010 SCC 10, [2010] 1 SCR 331 [*Cunningham*].

191. *Ibid* at para 1.

192. *Ibid* at para 49.

taken in the codes of conduct established by provincial law societies.¹⁹³ In clarifying the law, *Cunningham* generated some bold headlines.¹⁹⁴

In *Cunningham*, the Court again had the opportunity to discuss the relationship between the judicial regulation of lawyers and the role of self-governing bodies. The Court of Appeal for Yukon had held that the court had no jurisdiction to refuse a withdrawal for non-payment of fees, in part, because the legal profession is self-governing and that the provincial and territorial law societies have primary responsibility over lawyer regulation.¹⁹⁵ The Yukon appeals court expressed concern that “the potential for an unseemly conflict would exist if the court took one view of a lawyer’s conduct in withdrawing, and the Law Society took another.”¹⁹⁶ The Supreme Court of Canada considered this issue, but ultimately found that this tension did not preclude the courts from exercising jurisdiction, commenting that

[t]he law societies play an essential role in disciplining lawyers for unprofessional conduct; however, the purpose of the court overseeing withdrawal is not disciplinary. The court’s authority is preventative—to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is *reactive*. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.¹⁹⁷

Despite the Court’s evocation of complementary roles for the law societies and courts in this area, it is hard to escape the conclusion that the Supreme Court of Canada in *R v. Cunningham* issued a judicial trump card in the area of lawyer withdrawal. Even where ethics rules promulgated by law societies allow for withdrawal for non-payment of fees, a court has the power to refuse to allow the lawyer to withdraw. Although, as the Court indicated, this power is to be used only “sparingly,” its impact is tremendously significant: a lawyer can be forced to act for a client, for free, against the lawyer’s wishes. In a narrow set of cases, therefore, courts have been given the power to exercise a powerful form of lawyer regulation.

193. Annalise Acorn, “Jumping Ship: *R v Cunningham* and the Lawyer’s Right to Withdraw” (2011) 44 UBC L Rev 381 at 381-383.

194. See, e.g., Cristin Schmitz, “Courts can order lawyers to work for free,” *The Lawyers Weekly* 29:45 (9 April 2010); and Janice Tibbetts, “Lawyers can’t dump deadbeat clients, top court rules,” *Canwest News Service* 13:776 (26 March 2010).

195. *Cunningham v Lilles*, 2008 YKCA 7, 59 CR (6th) 49.

196. *Ibid* at para 25.

197. *Supra* note 190 at para 35 [emphasis in the original].

4. *Judges and entry restrictions, post-entry limits on competition and conduct rules*

In adjudicating disputes in the areas of entry restrictions, post-entry limits on competition, and post-entry conduct rules, the judiciary has repeatedly taken measures to promote the public interest and has often rejected self-serving standards favoured by the legal profession. Although the above account outlines a number of laudable measures taken by the legal profession to, for example, liberalize entry restrictions and rules relating to advertising and unauthorized practice of law, these measures have often only come after considerable resistance and court intervention.

Before these judicial measures can be fairly classified as amounting to a regime of aggressive judicial co-regulation, however, it is again necessary to address several possible objections. First, it may fairly be pointed out that the judicial record in these areas has been mixed. Initial efforts to invalidate citizenship requirements, for example, were rebuffed by the courts. The Supreme Court of Canada also originally upheld the advertising restrictions imposed by the Law Society of British Columbia. Moreover, not all appellate courts have limited efforts by law societies to exclude paralegals or non-Canadian lawyers from providing legal services.¹⁹⁸ These examples require an acknowledgement that the judicial regulation of lawyers has not always immediately or straightforwardly favoured the public interest at the expense of lawyers' narrow self-interest. However, in each of the above areas—entry restrictions, advertising and paralegals—the courts did ultimately inspire, if not dictate, significant change: citizenship requirements were ultimately deemed invalid by the Supreme Court of Canada in *Andrews*, advertising restrictions were liberalized in the context of a series of post-*Charter* cases finding freedom of expression protections applied to commercial speech and professional advertising, and paralegal regulation has been reviewed in provinces across Canada following the courts' attention to the issue. In short, the courts have had a meaningful impact in mitigating abuses of self-regulatory powers: unnecessary entry restrictions and limits on competition have been judicially rejected, leading to reforms which have resulted in a regulatory environment more attentive to the public interest. Moreover, the chronology outlined in this Part suggests that courts have become more and more bold in confronting the profession's self-serving standards as the decades have progressed.

Second, one might object to the argument that aggressive judicial regulation has occurred in light of the reliance of courts on legislative

198. See, e.g., *Lameman v Alberta*, 2012 ABCA 59, 522 AR 140.

developments in their regulatory activity: specifically, amendments to federal competition legislation and the introduction of the *Canadian Charter of Rights and Freedoms*. Except for the developments in conflicts of interest and withdrawal rules, it is difficult to see how the courts would have taken many of the measures described in this Part without these statutory tools. To be sure, this observation reveals the limited nature of judicial regulation. The power of the courts to regulate the legal profession is not “at-large” but arises in relation to common law rights of action, statutory provisions, and the courts’ inherent jurisdiction. The above account does reveal, however, that the courts have used the tools provided to them—however limited—to regulate the legal profession in the public interest. The reforms that have resulted are significant, both collectively and individually.

Conclusion

When contrasted with the major changes in lawyer regulation that have occurred in other jurisdictions, the Canadian regulatory environment appears to be fairly calm. Provincial and territorial law societies continue to operate largely independently of the legislative and executive branches of government. Moreover, the law societies have maintained governing authority in core regulatory areas. As this article has demonstrated, however, it is a mistake to move from these observations to a conclusion that there has been an absence of either critique or change with respect to how the legal profession is regulated in Canada. The last several decades have witnessed significant changes, and courts have been at the forefront of many of the reforms that have occurred. As a result of the judicial measures described in Parts III and IV, above, a Canadian lawyer today faces a radically different regulatory regime than he or she would have in the early 1970s.¹⁹⁹

The developments outlined in this article can also be understood in terms of their impact on core regulatory areas constitutive of self-regulation. Exerting control over entry, competence, competition and conduct is, at its heart, what it means for a profession to be self-regulating. A close look at the last few decades of lawyer regulation in Canada reveals that judges have taken significant measures in each of these areas. Although it remains

199. It should be noted that one area largely unexplored in this article is the judicial regulation of lawyers in the criminal law domain (for example, the courts’ treatment of ineffective assistance of counsel claims made against criminal defence counsel and/or abuse of process or malicious prosecution claims against Crown counsel). This is an area ripe for further investigation and, indeed, another Canadian legal ethics scholar, Micah Rankin, has begun work in this area and is drafting an article on the topic of “The Court’s Role in Regulating Lawyers in Criminal Proceedings.”

accurate to call the Canadian legal profession self-regulating given the legislative delegated authority afforded to the provincial and territorial law societies, the observations in this article highlight an important way in which these self-regulatory powers are significantly attenuated. Further, given the ways in which the judicial activity in these core regulatory areas may be seen as acting to mitigate risks associated with delegated governance authority—in particular, unnecessary entrance restrictions, insufficiently zealous monitoring of post-entry competence, unnecessary constraints on post-entry forms of consumer enhancing behaviour and adoption of conduct rules that unduly favour the commercial interests of the profession—the judicial measures canvassed here can, overall, be understood as furthering the public interest. These observations, it is submitted, reveal two important things: first, judicial regulation of lawyers in Canada has been a good thing; and, two, we need not be so suspicious of judges as regulators of the lawyers. The proposition that the judiciary is inherently and inevitably biased towards protecting the self-interest of lawyers simply does not hold in the Canadian context.

Recognizing the reality and nature of aggressive judicial regulation may also help to break through some of the inertia around beginning a serious conversation about reforming lawyer regulation in Canada. Our conversations to date about this issue have too often become muddled by efforts to justify the status quo self-regulation in Canada with normative statements about the value of an independent bar, which in turn are understood as requiring that lawyer regulation needs to be free from any and all external influences.²⁰⁰ The account of judicial regulation in this article demonstrates that external regulation can be a very positive influence on lawyer regulation or, stated more negatively, that the legal profession sometimes needs a push or to be overruled from the outside in order to ensure a regulatory environment more attuned to the public interest. The contribution here is modest in the sense that it does not purport to provide an outline as to the nature and scope of external regulation that is ideal vis-à-vis the Canadian legal profession. The claim is not that judges are perfect regulators of the legal profession or that self-regulation should be supplanted by a regime of total judicial regulation. The analysis here does, however, seriously undermine any arguments that external regulation, as a general rule, should be off the table and will hopefully encourage a

200. Take for example, the Final Report to Convocation of the Law Society of Upper Canada Task Force on Independence that states that the independence of the bar requires, in part, that lawyers “remain free of external manipulation, state interference or ulterior influence in performing his or her duties” (23 November 2006) at 11, online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/convnov2306_taskforce.pdf>.

more open discussion about how external actors can help regulate the legal profession in a beneficial manner.

Going forward, this account can also assist in inspiring more creative discussion about what possible future reforms might improve lawyer regulation in Canada. When it is talked about, the issue of reforming the regulation of lawyers in Canada is often presented as a blunt choice between self-regulation and governmental regulation. The fact that judges have played a positive role in the past several decades of Canadian lawyer regulation suggests that our discussions about potential models of lawyer regulation ought to become more nuanced to include an acknowledgment and consideration of the role that the judiciary may play. In England and Wales, for example, where there has been arguably the most significant move away from self-regulation, legislative reforms have specifically allocated new regulatory roles for the judiciary in reviewing and, if necessary, enforcing directions made by new independent governmental bodies.²⁰¹ At the very least, in order to be useful, any discussion about what changes to professional regulation are required or predictions about how certain changes may reform the regulatory environment needs solid grounding in a complete picture of the capacities and tendencies of the current regulatory actors.

The account of judicial regulation of the Canadian legal profession provided here by no means ends questions about the future of lawyer regulation in Canada. One hopes it works, however, to better inform our responses to them. An understanding of the history and the complexities of the current regulatory environment governing Canadian lawyers opens up the possibility of a more thoughtful and creative dialogue about the future shape of this environment. Such thoughtfulness and creativity is surely needed if the Canadian legal profession is going to carve out a meaningful place for itself in the coming years as it faces new challenges brought on by increased commercialization, globalization and technological automation of legal services.

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