

# Lawyer Regulation in Canada: Towards Greater Uniformity

ALAIN ROUSSY\*

Canada is a federation comprised of ten provinces and three territories. Each of these jurisdictions has a law society (or two, in the case of Quebec)<sup>1</sup> governed by lawyers that is mandated to regulate the legal profession in the public interest.<sup>2</sup> Some of these law societies are older than Canada itself.<sup>3</sup> Law societies are explicitly recognized by provincial and territorial legislation as the sole self-regulating authorities of the legal profession within each jurisdiction.<sup>4</sup> Among other things, they decide matters of admission, competence, and discipline.<sup>5</sup> Few have questioned their existence or authority.<sup>6</sup> Aside from matters of tradition, there are a number of reasons that explain adherence to such a self-regulation model, including efficiency, expertise, and independence from the bar and the judiciary.<sup>7</sup> Though law societies have been working in a much more concerted fashion in recent

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\* Assistant professor and Ontario Bar Association Foundation Chief Justice of Ontario Fellow in Legal Ethics and Professionalism Research for 2016-2017, Faculty of Law, Common Law Section, University of Ottawa, Ottawa, Canada. The author would like to thank Rebecca Porter, J.D. student, for her research assistance.

1. Quebec is Canada's only jurisdiction with a civil law system. It also has a clear distinction between lawyers and notaries, each profession having its own area of practice and each being governed by a separate law society—the “Barreau du Québec” for lawyers and the “Chambre des notaires du Québec” for notaries. See Fiona M. Kay, *Intraprofessional Competition and Earnings Inequalities Across a Professional Chasm: The Case of the Legal Profession in Québec, Canada*, 43 L. & Soc'y REV. 901, 904-05 (2009).

2. See, e.g., Law Society Act, R.S.O. 1990, c L.8, s 4.2 (Can.). The regulation of legal services is one of provincial (as opposed to federal) jurisdiction under the Canadian Constitution. See Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app VI, no. 92 (Can.).

3. For example, Ontario's law society, the Law Society of Upper Canada, was created in 1797, well before the Canadian Confederation in 1867. This explains the society's historical name, “Upper Canada,” which was the former name for Ontario. See *History*, LAW SOC'Y OF UPPER CAN., <http://www.lsuc.on.ca/with.aspx?id=427> (last visited June 17, 2017).

4. See, e.g., *About the Law Society*, LAW SOC'Y OF UPPER CAN., <http://www.lsuc.on.ca/with.aspx?id=905> (last visited June 18, 2017); Law Society Act at ss 4.1, 4.2, 5.

5. See Alan Treleaven, *Moving Toward National Bar Admission Standards in Canada*, 83 BAR EXAMINER 17, 17 (2014), [http://www.ncbex.org/pdfviewer/?file=/assets/media\\_files/Bar-Examiner/articles/2014/830314-Treleaven.pdf](http://www.ncbex.org/pdfviewer/?file=/assets/media_files/Bar-Examiner/articles/2014/830314-Treleaven.pdf).

6. See, e.g., Richard Devlin & Porter Heffernan, *The End(s) of Self-Regulation?*, 45 ALTA. L. REV. 169, 171 (2008); Jeff Roberts, *Time to Streamline the Societies?*, CANADIAN LAWYER (Jan. 1, 2009), <http://www.canadianlawyermag.com/468/Time-to-streamline-the-societies.html>.

7. See generally ALICE WOOLLEY ET AL., *LAWYERS' ETHICS AND PROFESSIONAL REGULATION* (Markham, Ont.: LexisNexis Can. ed., 2d ed. 2012).

years, each law society remains an independent body with full statutory authority to regulate the legal profession within its jurisdiction.

The Federation of Law Societies of Canada (Federation) is the national “coordinating body” for Canada’s provincial and territorial law societies.<sup>8</sup> From its humble beginnings in 1972, the Federation’s influence has grown enormously.<sup>9</sup> The Federation is involved in a number of national regulatory initiatives that are creating substantially more uniformity amongst the law societies.<sup>10</sup> The increasingly important role of the Federation cannot be overstated. In fact, it could be said that, at least in some instances, the law societies are “uploading” their traditional and fundamental responsibilities to the national entity.<sup>11</sup> This is a rather remarkable development, particularly when one notes that it is not being driven by an angry public or a controlling government, but rather by the law societies themselves.<sup>12</sup>

Part 1 of this paper will briefly discuss the self-governing model for law societies in Canada and provide an overview of the Federation. Part 2 will focus on the role of the law societies and the Federation in regulating legal education in Canada. Part 3 will examine various developments in lawyer regulation in Canada spearheaded by the Federation. Finally, Part 4 will address transnational lawyering in the Canadian context. The overarching theme of the paper is one of increasing national regulatory uniformity.

## I. Part 1: The Regulatory Model

### A. THE PROVINCIAL AND TERRITORIAL LAW SOCIETIES

The universal model of lawyer regulation in Canada’s provinces and territories is one of self-regulation, meaning the regulation of lawyers is largely the responsibility of lawyers. The law societies that started appearing in the country at the end of the 18th century, generally modeled on British Inns of Court, already had a high level of independence. Education of aspiring lawyers and the accompanying control over admission to the profession were fundamental powers of the law societies. As the years went on, the level of independence and self-regulation of law societies grew to encompass the enforcement of codes of conduct, the handling of complaints against lawyers, the power to discipline lawyers (including the power to disbar a lawyer),<sup>13</sup> the creation of mandatory insurance programs,<sup>14</sup> the

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8. See *From Conference to the Nation’s Capital*, FED’N OF LAW SOC’YS OF CAN., <http://flsc.ca/about-us/yesterday-and-today/> (last visited June 18, 2017).

9. See *id.*

10. See *National Initiatives*, FED’N OF LAW SOC’YS OF CAN., <https://flsc.ca/national-initiatives/> (last visited June 19, 2017).

11. See generally *From Conference to the Nation’s Capital*, *supra* note 8.

12. See *id.*

13. See W. Wesley Pue, *Cowboy Jurists and the Making of Legal Professionalism*, 45 ALTA. L. REV. 29, 36-41 (2008).

regulation of continuing education standards,<sup>15</sup> and the power to make various other rules and regulations for the governance of lawyers and law societies themselves. These have been the hallmarks of self-regulation in Canada for at least a half century.<sup>16</sup> In return for shouldering the burdens of self-regulation, lawyers are granted a statutory monopoly on the provision of legal services within each jurisdiction.<sup>17</sup>

Self-regulation has received judicial encouragement in Canada. In a unanimous decision by the Supreme Court in 1982, Justice Estey wrote, “[t]he independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society.”<sup>18</sup> In a recent case, the Supreme Court declined to rule on the question of whether self-regulation should be recognized as a constitutionally protected principle of fundamental justice. But the Court reiterated “the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients.”<sup>19</sup>

This is not to say that there are no other actors who play a role in shaping the legal profession. Education of aspiring lawyers, for example, has largely been overtaken by university law schools. When law societies initially arose at the end of the 18th century, lawyers were principally trained through years of hands-on work in apprenticeships with experienced lawyers. Today, law societies have not completely abandoned the principle that on-the-job training should be a requirement for admission to practice. An apprenticeship period (usually called “articling”) between six and twelve months is still a requirement across the country.<sup>20</sup> There has been an ongoing debate, particularly in Ontario,<sup>21</sup> about getting rid of the articling

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14. See, e.g., *Professional Liability Insurance*, LAW SOC’Y OF UPPER CAN., <http://www.lsuc.on.ca/For-Lawyers/About-Your-Licence/Professional-Liability-Insurance/> (last visited June 18, 2017).

15. See, e.g., *Continuing Professional Development Requirement*, LAW SOC’Y OF UPPER CAN., <https://www.lsuc.on.ca/CPD-Requirement/> (last visited June 18, 2017). In March 2017, the Supreme Court of Canada held that the Law Society of Manitoba’s suspension of an attorney who failed to complete twelve hours of mandatory continuing professional development was both reasonable and within the scope of the society’s legislative mandate. *Green v. Law Soc’y of Man.*, 2017 SCC 20 (Can.).

16. For a more detailed overview of the self-regulation of law societies in Canada, see WOOLLEY ET AL., *supra* note 7.

17. See, e.g., Law Society Act, R.S.O. 1990, c L.8, s 26.1(1) (Can.).

18. A.G. Can. v. L. Soc’y of B.C., [1982] 2 S.C.R. 307, 335 (Can.).

19. Can. (A.G.) v. Fed’n of L. Soc’ys of Can., 2015 SCC 7, para. 97 (Can. B.C.); see also *Andrews v. L. Soc’y of B.C.*, [1989] 1 S.C.R. 143, 187 (Can.); *Pearlman v. Man. L. Soc’y Jud. Comm.*, [1991] 2 S.C.R. 869, 887 (Can.); *Finney v. Barreau du Qué.*, 2004 SCC 36, para. 1 (Can.).

20. See Treleaven, *supra* note 5, at 19-20.

21. This was part of an ongoing debate regarding ways to address the “articling crisis” in Ontario that dates back to 2008. See Michael McKiernan, *Articling Crisis Set to Grow*, LAW TIMES (June 6, 2011, 1:00), <http://lawtimesnews.com/201106061875/headline-news/articling-crisis-set-to-grow>. The Law Society of Upper Canada opted to create an alternative pathway to the legal profession so that one could choose between the traditional route of a longer articling

requirement, but so far, no jurisdiction has dared to make the change. Over the last two centuries, however, legal education—like education generally—has become more formalized, and the trend has shifted away from relying solely on training in the workplace toward an emphasis on a more academic legal education. A three-year law degree from a recognized law school is now the standard requirement. Apart from Quebec, a four-year undergraduate university degree is generally necessary for entry into law school,<sup>22</sup> which means that most lawyers in Canada will have at least seven years of university-level education by the time they start practicing. But law societies have not completely exited the business of training lawyers. Some law societies still offer courses that must be successfully completed after graduating with a law degree and all law societies have mandatory bar examinations that are accompanied by particular study materials.<sup>23</sup>

Apart from universities, other actors also help to shape the legal profession. Courts do not play the direct role they sometimes do in the United States when it comes to lawyer discipline. Courts do, however, act as the final arbiters in such cases. The reason is simply that law society discipline tribunals are treated as any other administrative tribunal, so the losing party can request a judicial review of the initial decision.<sup>24</sup> But when undertaking such reviews, courts are very deferential to the factual and legal conclusions reached by the discipline tribunal in accordance with general administrative law principles.<sup>25</sup> The same is true for other decisions that are made by law societies, such as the denial of admission of a particular applicant. Those decisions are also subject to review by the courts using a deferential approach.<sup>26</sup> In addition, clients can sue lawyers for professional negligence by way of a civil trial. Issues addressed in the context of those lawsuits, such as competence, will often be similar to and may even overlap with issues before law society discipline tribunals. Although the outcome of civil cases will always be a decision as to the financial liability of the lawyer to the client (and not as to the appropriate discipline, such as disbarment),

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period and the new route of coursework followed by a shorter articling period. See Simona Chiose, *Call to End Articling Alternative for Ontario Grads Sparks Controversy*, GLOBE AND MAIL (Sept. 28, 2016, 9:41 PM), <https://www.theglobeandmail.com/news/national/education/call-to-end-articling-alternative-for-ontario-law-grads-sparks-controversy/article32121475/>. The Faculty of Law at Lakehead University follows an entirely different model, approved by the Law Society of Upper Canada, in which the articling component is incorporated into a law degree, allowing graduates to bypass the usual articling requirement. See *Integrated Practice Curriculum*, BORA LASKIN Faculty of Law, LAKEHEAD U., <https://www.lakeheadu.ca/academics/departments/law/curriculum/ipc> (last visited June 18, 2017).

22. *Canadian Law Schools Guide*, POWERSCORE, <https://s3.amazonaws.com/powerscorepdfs/lawschool/guides/Canadian%20Law%20Schools%20Guide.pdf> (last visited June 18, 2017).

23. See Treleaven, *supra* note 5, at 18-19.

24. See Amy Salyzyn, *The Judicial Regulation of Lawyers in Canada*, 37 DALHOUSIE L. J. 481, 504 (2014).

25. See *id.* at 503-04.

26. See *id.* at 506.

courts nonetheless help to shape regulatory and disciplinary analysis and can, thus, have a direct impact on the conduct of lawyers.

Despite the many pronouncements related to the importance of the independence of the Bar from the state, as noted above, provincial and territorial governments do play a role in the regulation of lawyers. The nature and scope of law societies' powers are defined by provincial and territorial statutes.<sup>27</sup> Such statutes can, of course, be amended at the whim of those governments. For example, the Law Society of Upper Canada's statute<sup>28</sup> was amended in 2006 to include a duty to act at all times "so as to facilitate access to justice for the people of Ontario."<sup>29</sup> This arguably somewhat restricts the law society's regulatory freedom. At the same time, the Law Society of Upper Canada was given the power to regulate paralegals within the province,<sup>30</sup> thereby increasing the ambit of the law society's powers. Most provincial governments have a direct say in the decision-making process of law societies in that they have guaranteed representation on the highest-level boards of directors of the law societies. In Ontario, for example, this board is governed by paralegals, attorneys, and laypeople, all referred to as "benchers."<sup>31</sup> Benchers come together "most months in a meeting called Convocation to make policy decisions and to deal with other matters related to the governance of Ontario's paralegals and lawyers."<sup>32</sup> Convocation is composed of forty benchers elected by members of the law society and eight lay benchers appointed by the government of Ontario.<sup>33</sup>

Despite peripheral roles played by other actors, the core elements of lawyer regulation remain within the sphere of control of law societies in Canada. Law societies decide who is admitted into the profession, what standards they have to comply with while members, and how to discipline members who contravene their codes. Up to this point, Canada has not experienced the diminution of self-regulation that has occurred in other common law countries, such as the United Kingdom and Australia.<sup>34</sup> Self-regulation is still alive and well in Canada.

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27. Treleaven, *supra* note 5, at 17.

28. Law Society Act, R.S.O. 1990, c L.8 (Can.).

29. *Id.* at § 4.2(2).

30. *Id.* at § 2(2)(d).

31. See *Governance*, LAW SOC'Y OF UPPER CAN., <http://www.lsuc.on.ca/with.aspx?id=673> (last visited June 18, 2017).

32. See *id.*

33. Law Society Act at §§ 15(1), 23(1). Ontario's statute was the first to formally include this type of public oversight, but most other provinces have now followed suit. *Benchers*, LAW SOC'Y OF UPPER CAN., <http://www.lsuc.on.ca/with.aspx?id=1136> (last visited June 20, 2017); Alice Woolley, *Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation* 21 (SPP Research Paper No. 11-9, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1920921](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920921).

34. For a general overview of developments related to self-regulation in those two countries and elsewhere, see Devlin & Heffernan, *supra* note 6, at 1, 5.

## B. THE FEDERATION OF LAW SOCIETIES OF CANADA

As noted above, the Federation of Law Societies (Federation) is the national coordinating body for Canada's fourteen provincial and territorial law societies. The Federation was not created by provincial or federal statute. Its inception can be traced back to 1927, when the law societies first came together to form the Conference of Governing Bodies of the Legal Profession in Canada.<sup>35</sup> The primary purpose of that body was to allow the law societies to consider "matters of common interest."<sup>36</sup> In 1972, it became what is now the Federation, which was "established as a non-profit corporation" and has been based in Ottawa, the nation's capital, since 2006.<sup>37</sup>

The Federation's vision statement is: "Acting in the public interest by strengthening Canada's system of governance of an independent legal profession, reinforcing public confidence in it and making it a leading example for justice systems around the world."<sup>38</sup> The Federation has also adopted the same core mandate as the fourteen law societies—to serve the public interest.<sup>39</sup> It is involved in various endeavors, including managing the Canadian Legal Information Institute (CanLII), a free online search engine for Canada's laws and decisions,<sup>40</sup> assessing internationally-trained lawyers who wish to move to and practice law in Canada, providing continuing legal education programs, and generally being the voice of Canada's law societies.<sup>41</sup>

But the Federation's various national regulatory initiatives have transformed the body into a major agent of both change and unity. As further discussed below, these initiatives impact both regulation of legal education and regulation of lawyers.

## II. Part 2: The Regulation of Legal Education

In October 2009, the Federation undertook an initiative on behalf of the law societies "to develop national standards for admission to the legal

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35. *From Conference to the Nation's Capital*, *supra* note 8.

36. *Id.*

37. *Id.*

38. *Our Vision Statement*, FED'N OF LAW SOC'YS OF CAN., <http://flsc.ca/about-us/our-mission/> (last visited June 18, 2017).

39. *What is the Federation of Law Societies of Canada?*, FED'N OF LAW SOC'YS OF CAN., <http://flsc.ca/about-us/what-is-the-Federation-of-law-societies-of-canada/> (last visited June 18, 2017).

40. *Id.* Other countries have similar legal information institutes. See, e.g., CORNELL LAW SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/> (last visited June 18, 2017); BRITISH AND IRISH LEGAL INFO. INST., <http://www.bailii.org/> (last visited June 18, 2017).

41. *What is the Federation of Law Societies of Canada?*, *supra* note 39. The Federation's handling of a recent Supreme Court case between itself and the Canadian government is an example of how the body serves as the national voice for Canada's various law societies. See *Can. (A.G.) v. Fed'n of L. Soc'ys of Can.*, 2015 SCC 7 (Can. B.C.).

profession in Canada.”<sup>42</sup> Key goals of the initiative were “[c]onsistency in admission standards and candidate assessment.”<sup>43</sup> This initiative was a logical, and perhaps inevitable, extension of a previous initiative, further discussed in the next part of this paper, regarding lawyer mobility between the various provinces and territories. Almost ten years prior, law societies started to sign on to the National Mobility Agreement, which allowed lawyers to move “with relative ease” from one jurisdiction to another within Canada.<sup>44</sup> It was natural to address the question of national admission standards in order to establish a certain consistency between lawyers called initially in a given province and lawyers arriving from other provinces.

The first phase of the initiative had two goals: first, to identify essential competencies “required [of applicants] upon entry to the legal profession” (National Competency Profile); and second, to establish “a standard for ensuring that applicants meet the requirement to be of good character” (National Fitness and Suitability Standard).<sup>45</sup> In September 2012, the Federation released its National Entry to Practice Competency Profile for Lawyers and Quebec Notaries.<sup>46</sup> The document is divided into three sections—substantive legal knowledge, skills, and tasks—and is essentially a laundry list of things that, according to the Federation, any new lawyer should know or know how to do, from general principles of contracts and torts to more specific items like drafting demand letters and using time tracking systems.<sup>47</sup> The substantive legal knowledge section of the document is clearly aimed at law schools because those institutions provide the bulk of such knowledge. The National Competency Profile has been adopted by thirteen law societies across Canada, “on the understanding that adoption [was] subject to the development and approval of a plan for implementation.”<sup>48</sup> The second phase has proven to be more complicated than originally anticipated,<sup>49</sup> as has the adoption of a National Fitness and Suitability Standard, which is still a work in progress.<sup>50</sup> Nevertheless, there is increased willingness to standardize entrance requirements, even though

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42. FED’N OF LAW SOC’YS OF CAN., NATIONAL ADMISSION STANDARDS PROJECT: PHASE 1 REPORT 1 (2012), <http://flsc.ca/wp-content/uploads/2014/10/admission3.pdf>; see generally Treleaven, *supra* note 5.

43. *Id.* at 1.

44. See *id.*; see also National Mobility Agreement, Federation of Law Societies of Can., Nov. 7, 2002, <http://flsc.ca/wp-content/uploads/2014/10/mobility1.pdf>.

45. PHASE 1 REPORT, *supra* note 42, at 2.

46. FED’N OF LAW SOC’YS OF CAN., NATIONAL ADMISSION STANDARDS PROJECT: NATIONAL ENTRY TO PRACTICE COMPETENCY PROFILE FOR LAWYERS AND QUEBEC NOTARIES (2012), <http://flsc.ca/wp-content/uploads/2014/10/admission4.pdf>.

47. *Id.* at §§1.2(a), 1.2(c), 3.1.3(i), 3.1.1(d).

48. *National Competency and Good Character Standards*, FED’N OF LAW SOC’YS OF CAN., <http://flsc.ca/national-initiatives/national-admission-standards/> (last visited June 18, 2017).

49. The ongoing debate about the future of articling, mentioned previously, is certainly not helping.

50. See Treleaven, *supra* note 5, at 25. Some have criticized the use of a “good character” or “suitability” requirement for admission to law societies as being unworkable and unfair. See, e.g., Alice Woolley, *Can Good Character Be Made Better? Assessing the Federation of Law Societies’*

various law societies may have different views on how to assess the required competencies.

The above initiative, dealing generally with education of aspiring lawyers, has an indirect effect on the operation of law schools. Another related initiative of the Federation has had a much more direct impact on law schools. In 2009, a Federation task force recommended that Canadian law societies adopt a uniform national requirement for entry into their admission programs.<sup>51</sup> Whereas the first initiative discussed deals with standards for entry into the profession, the Federation's "National Requirement" initiative deals squarely with competencies that are expected to be acquired while in law school. The National Requirement<sup>52</sup> became effective in 2015. Law schools must now be reviewed annually to ensure they comply with the National Requirement and must be accredited by the Federation for their graduates to be eligible for law society admission programs.<sup>53</sup> This is not to say that law schools did not have to go through an accreditation process previously.<sup>54</sup> But the new process is centralized under the umbrella of the Federation, and the standards it utilizes are uniform across the country. The National Requirement specifies the various competencies that must be demonstrated while in law school. These include numerous skills including research and communication, an understanding and awareness of ethics and professionalism, and substantive legal knowledge.<sup>55</sup> A number of law schools have already had to modify their curricula in order to ensure compliance with the National Requirement, particularly regarding the mandatory ethics and professionalism component.<sup>56</sup> Though some may see the National Requirement as an encroachment on traditional law school turf, its implementation has generally—though not entirely—been rather smooth.<sup>57</sup> This is likely due to the fact that law school deans were consulted on the drafting of the National Requirement, law schools were generally given leeway in choosing how to teach the various competencies, and for the most

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*Proposed Reform of the Good Character Requirement for Law Society Admission*, CAN. J. ADMIN. L. & PRAC. 1, 40-41 (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2262863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262863).

51. FED'N OF LAW SOC'YS OF CAN., REPORT OF TASK FORCE ON CANADIAN COMMON LAW DEGREE 4 (2009), <http://docs.flsc.ca/APPRTaskForceReportOct2009.pdf>.

52. *Canadian Law School Programs*, FED'N OF LAW SOC'YS OF CAN., <http://flsc.ca/national-initiatives/canadian-law-school-programs/> (last visited June 18, 2017); NAT'L REQUIREMENT (FED'N OF LAW SOC'YS OF CAN. 2011), <http://flsc.ca/wp-content/uploads/2014/10/National-Requirement-2011.pdf>.

53. *Id.*

54. See generally LAW SOC'Y OF UPPER CAN., CONSULTATION REPORT OF THE LICENSING AND ACCREDITATION TASK FORCE (2008), <http://www.lsuc.on.ca/media/licensing.pdf>.

55. See NAT'L REQUIREMENT at §§ 1.1-1.3, 2.1, 3.1-3.3.

56. See, e.g., Kent Kuran, *Law Societies Introduce New Requirements*, ULTRA VIRES (Oct. 30, 2013), <http://ultravires.ca/2013/10/law-societies-introduce-new-requirements/>.

57. For criticism of the competencies outlined in the National Requirement, see Constance Backhouse, *The "Approved" Common Law Degree*, 3 CAN. LEGAL EDUC. ANN. REV. 141 (2009); Annie Rochette et al., *Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada*, CAN. LEGAL EDUC. ANN. REV. 151 (2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102596](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102596).

part, complying with the National Requirement did not require a radical change to the curriculum.<sup>58</sup> The National Requirement does, however, serve as a baseline for all Canadian law schools and forces a heightened level of uniformity in legal education, all under the auspices of the Federation.

### III. Part 3: The Regulation of Lawyers

The Federation has also been the center of activity for a number of national initiatives that have a direct impact on the regulation of lawyers. These efforts have become the main building blocks of a much greater level of uniformity in the Canadian legal profession. The initiatives include mobility agreements, a model code of professional conduct, and national discipline standards.<sup>59</sup>

#### A. MOBILITY AGREEMENTS

Mobility and uniformity go hand in hand: increased mobility—whether actual or desired—creates the need for more uniformity, and increased uniformity enables greater mobility. In 2002, building upon a previous and simpler mobility agreement,<sup>60</sup> the National Mobility Agreement<sup>61</sup> was signed and implemented under the auspices of the Federation. All provincial law societies signed the agreement and, by so doing, recognized that it was “desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures”<sup>62</sup> while still maintaining each law society’s exclusive authority. The stated purpose of the agreement was to “facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions.”<sup>63</sup> The agreement achieved this by allowing lawyers licensed in one common law province to practice for up to 100 days per year in another (“temporary mobility”)<sup>64</sup> and by allowing lawyers in one common law province to become regular members of the law society of another with little hassle—passing a new bar examination is not required (“permanent mobility”).<sup>65</sup> In 2006, the Territorial Mobility Agreement<sup>66</sup> extended permanent mobility rights to Canada’s three territories.

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58. See generally FED’N OF LAW SOC’YS OF CAN. TASK FORCE ON CAN. COMMON LAW DEGREE, CONSULTATION PAPER (2008), <http://docs.flsc.ca/Common-Law-Degree-Consultation-Paper-2008.pdf>.

59. *National Initiatives*, *supra* note 10.

60. Inter-Jurisdictional Practice Protocol, Federation of Law Societies of Can., Feb. 18, 1994, <https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/IJP-Protocol.pdf>.

61. National Mobility Agreement, *supra* note 44.

62. *Id.* at 2.

63. *Id.*

64. *Id.* at cl. 7.

65. *Id.* at cl. 32-33.

66. Territorial Mobility Agreement, Federation of Law Societies of Can., Nov. 3, 2006, [https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/mobility-agreement\\_territorial.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/mobility-agreement_territorial.pdf). This initial Territorial Mobility Agreement was in place for five

Though Barreau du Québec—the law society governing lawyers in Quebec—was a signatory to the 2002 National Mobility Agreement, all other signatories recognized that the particular realities of Quebec would entail a delayed and different implementation. As noted above, Quebec is Canada’s only civil law jurisdiction. In 2010, the Quebec Mobility Agreement<sup>67</sup> brought Quebec into the mobility regime, and in 2012, an addendum to this agreement extended mobility rights to Quebec notaries.<sup>68</sup> But these agreements did not open the doors as fully as between the common-law provinces. The agreements allowed lawyers in common law jurisdictions to acquire certain restricted practice rights if they wished to practice in Quebec and vice-versa by creating a so-called “Canadian Legal Advisor” regime.<sup>69</sup> These restrictions only allowed transferring members to practice in areas of federal law, the law of their home jurisdiction, and public international law.<sup>70</sup>

The mobility agreements noted above are still in force today. In 2013, however, all Canadian law societies agreed on a new National Mobility Agreement<sup>71</sup> that will, when implemented, permit lawyers to transfer with ease between all provinces, including Quebec, regardless of whether they are trained in Canadian common law or civil law. Under this new mobility agreement, the Canadian Legal Advisor regime will be eliminated except regarding Quebec notaries.<sup>72</sup> The overarching principle of the new agreement is that lawyers can only practice in areas of the law in which they are competent. The 2013 National Mobility Agreement will come into effect only once implemented by each law society, and it will replace all previous mobility agreements.<sup>73</sup>

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years. A 2011 agreement renewed the Territorial Mobility Agreement without a termination date. See Territorial Mobility Agreement, Federation of Law Societies of Can., Dec. 2011, <https://flsc.ca/wp-content/uploads/2014/10/mobility3.pdf>.

67. Quebec Mobility Agreement, Federation of Law Societies of Can., Mar. 19, 2010, <https://flsc.ca/wp-content/uploads/2014/10/mobility5.pdf>.

68. Quebec Mobility Agreement: Addendum to Extend Mobility Rights to Members of Chambre des notaires du Québec (Chamber of Notaries of Quebec), Federation of Law Societies of Can., Mar. 15, 2012, <https://flsc.ca/wp-content/uploads/2014/10/mobility6.pdf>. In Quebec, there is an important distinction between a lawyer and a notary, the latter having generally received the same training, but specializing in matters such as wills, real estate transactions, and family law. A notary cannot represent a client in contested matters. See Kay, *supra* note 1.

69. *National Mobility of Legal Profession: Quebec Mobility Agreement & Addendum*, FED’N OF LAW SOC’YS OF CAN., <http://flsc.ca/national-initiatives/national-mobility-of-the-legal-profession/> (last visited June 18, 2017).

70. *Id.*

71. National Mobility Agreement 2013, Federation of Law Societies of Can., Oct. 17, 2013, <http://flsc.ca/wp-content/uploads/2014/10/mobility7.pdf>. This agreement extended to Canada’s three territories through an agreement signed in early 2014. Territorial Mobility Agreement 2013, Federation of Law Societies of Can., Apr. 3, 2014, <http://flsc.ca/wp-content/uploads/2014/10/mobility4.pdf>.

72. *Id.* at cl. 43.

73. See *id.* at cl. 2, 52-53.

The signing of this new National Mobility Agreement is an extremely important milestone in Canadian legal regulation. The coexistence of two legal regimes, common law and civil law, in one country has long been seen as a barrier for national regulatory uniformity. By signing this expansive national agreement, Canadian law societies have recognized that “there are more similarities in legal training and in daily practice in Canada’s two legal traditions of common and civil law, than there are differences.”<sup>74</sup>

The impetus behind the desire for enhanced mobility within Canada is most likely a multi-faceted one. Among these facets, one could point to the declining importance of borders and barriers, the desire of lawyers, like other workers, to be free to move around the country as they please, the reality that some lawyers were already doing cross-jurisdictional work who would benefit from formal regulation, the increasing presence of national and international law firms that handle cross-border matters, and an increased—though still very limited in Canada—internationalization of the practice of law. Regardless, it is clear the mobility agreements have broken down barriers between Canada’s provincial and territorial jurisdictions and have become the catalyst for other national initiatives undertaken by the Federation, including a model code of professional conduct and national discipline standards.

## B. MODEL CODE OF PROFESSIONAL CONDUCT

A written code of professional conduct is a *sine qua non* for modern Canadian lawyer regulation. Though some critics exist,<sup>75</sup> written codes have been around for such a long time that they are generally seen as a necessary feature of the profession. The existence of written codes does not, however, date back as far as the existence of law societies. The first written code of professional conduct in Canada can be traced back to the Canons of Legal Ethics, adopted as a model code in 1920 by the Canadian Bar Association.<sup>76</sup> The Canadian Bar Association amended and updated its model code for decades and it served as the basis for many codes of professional conduct in Canadian provinces and territories.<sup>77</sup> As time went on, a certain level of uniformity became apparent amongst the jurisdictions in light of this model code, but many differences still existed. The Canadian Bar Association is, after all, an association of Canadian lawyers and not an association of Canadian law societies. This meant that the law societies did not have a

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74. *New National Mobility Agreement Bridges Common Law and Civil Law Traditions*, FED’N OF LAW SOC’YS OF CAN., (Oct. 22, 2013), <http://flsc.ca/new-national-mobility-agreement-bridges-common-law-and-civil-law-traditions/>.

75. See, e.g., Margaret Ann Wilkinson et al., *Do Codes of Ethics Actually Shape Legal Practice?*, 45 MCGILL L. J. 645, 678-80 (2000).

76. Adam M. Dodek, *Canadian Legal Ethics: Ready for Twenty-First Century at Last*, 46 OSGOODE HALL L. J. 1, 4 (2008).

77. MERVYN D. ABRAMOWITZ & ISIDA RANXI, PRACTICE MANAGEMENT AND RULES OF PROFESSIONAL CONDUCT 10, <http://www.krmmc-law.com/1Rules-of-Conduct-Paper.pdf> (last visited June 18, 2017).

direct formal role in shaping the Canadian Bar Association's model code. Accordingly, some jurisdictions adopted a slightly amended version of the model code while others adopted more radically modified versions.

In 2009, the Federation adopted its own Model Code of Professional Conduct (Model Code)<sup>78</sup> to harmonize the codes of conduct across Canada. Because this was a Federation initiative, the law societies now have a direct say in the drafting of the Model Code. The purpose of the Model Code is to set out common ethical principles and expected minimum standards of conduct "so that the public can expect the same high ethical standards to apply to the legal profession everywhere in Canada."<sup>79</sup> The Federation treats the Model Code as "a living document that must remain contemporary and reflect changes in the law."<sup>80</sup> The Model Code is permanently monitored by a Standing Committee that has not shied away from recommending changes to it as needed.<sup>81</sup>

The Model Code is a nearly 120-page document that covers both general and specific ethical issues that may arise in practice. It deals with the lawyer's relationship to clients,<sup>82</sup> the administration of justice,<sup>83</sup> employees,<sup>84</sup> the law society, and other lawyers.<sup>85</sup> It addresses quality of service,<sup>86</sup> confidentiality,<sup>87</sup> conflicts of interest,<sup>88</sup> and marketing,<sup>89</sup> amongst other issues. It is meant to be a complete code of professional conduct, not just a foundation onto which individual law societies need to tack on various other important matters.

The Model Code has been approved and implemented, with some changes, by all law societies in Canada, except the Barreau du Québec and the law society regulating notaries in Quebec.<sup>90</sup> Again, things were understandably a bit slower to occur in Quebec, but the new 2015 Quebec Code of Professional Conduct of Lawyers is generally in line with the Federation's Model Code, although the presentation and format are

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78. MODEL CODE OF PROF'L CONDUCT (FED'N OF LAW SOC'YS OF CAN. 2016), <http://flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf>.

79. *From Conference to the Nation's Capital*, *supra* note 8.

80. *Consultations Begin on Amendments to Model Code of Professional Conduct*, FED'N OF LAW SOC'YS OF CAN. (July 16, 2014), <http://flsc.ca/consultations-begin-on-amendments-to-model-code-of-professional-conduct/>.

81. *See, e.g., Consultations Begin on Model Code Amendments*, FED. OF LAW SOC'YS OF CAN. (Feb. 2, 2017), <https://flsc.ca/consultations-begin-on-model-code-amendments/>.

82. MODEL CODE OF PROF'L CONDUCT at c 3.

83. *Id.* at cl 5.

84. *Id.* at cl 6.

85. *Id.* at cl 7.

86. *Id.* at § 3.2.

87. *Id.* at § 3.3.

88. *Id.* at § 3.4.

89. *Id.* at cl 4.

90. *See Implementation of the Model Code*, FED'N OF LAW SOC'YS OF CAN., <http://flsc.ca/resources/implementation-of-the-model-code/> (last updated Nov. 15, 2016).

somewhat different.<sup>91</sup> The *Chambre des notaires du Québec* is reviewing the Model Code.<sup>92</sup> Implementation of the Model Code across Canada means that almost all lawyers in the country are now subject to codes of conduct that are nearly identical, or that at least present very few significant differences.

### C. NATIONAL DISCIPLINE STANDARDS

As noted above, the power to discipline lawyers is a fundamental power of law societies. Coming on the heels of the 2009 Model Code and the 2013 National Mobility Agreement, a set of National Discipline Standards<sup>93</sup> was adopted by all law societies in 2014 for implementation in 2015. The National Discipline Standards were “established to raise the bar on how law societies carry out discipline functions and how complaints are handled.”<sup>94</sup> According to the Federation, they were “designed to inspire public confidence in this important aspect of law society work across Canada.”<sup>95</sup> The standards are based on the premise that, in a world with increased lawyer mobility, consumers of legal services across Canada should be able to count on a basic level of service and accountability from the law societies that are supposed to be regulating the providers of those legal services.

The standards aim to ensure that members of the public are treated promptly, fairly, and openly by setting out a number of specific benchmarks and general principles to which law societies are to adhere. For example, the standards spell out specific targets on items such as the timeliness of responses to inquiries and written complaints, including a timeline to resolve or refer a complaint.<sup>96</sup> The standards also touch on broader principles such as public participation<sup>97</sup> and transparency.<sup>98</sup>

But the National Discipline Standards are not as extensive as one would perhaps expect. The standards are only a few pages long and do not address many procedural and substantive issues that arise in the context of complaint and disciplinary processes. Differences in the current processes used by law societies may provide an explanation for this. But as is the case for the Model Code, the Federation established a Standing Committee on National Discipline Standards,<sup>99</sup> and so it may very well be that the standards will

91. See *id.*; see also Code of Professional Conduct of Lawyers, C.Q.L.R. c B-1, r. 3.1 (Can.), <http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/B-1,%20r.%203.1>.

92. *Implementation of the Model Code*, *supra* note 90.

93. NAT'L DISCIPLINE STANDARDS (FED'N OF LAW SOC'YS OF CAN. 2016), <http://flsc.ca/wp-content/uploads/2014/10/DisciplineStandardsJune2016.pdf>.

94. *Federation Adopts National Standards for Discipline Process*, FED'N OF LAW SOC'YS OF CAN. (Apr. 7, 2014), <http://flsc.ca/federation-adopts-national-standards-for-discipline-process/>.

95. *Id.*

96. See NAT'L DISCIPLINE STANDARDS at para. 1-3.

97. *Id.* at para. 10-11.

98. *Id.* at para. 12-17.

99. *National Discipline Standards: Frequently Asked Questions*, FED'N OF LAW SOC'YS OF CAN., <http://flsc.ca/wp-content/uploads/2014/10/NDSFAQpublicE.pdf> (last visited June 19, 2017).

become more extensive over time. But even in their current form, the National Discipline Standards are yet another example of a Federation initiative that moves law societies toward greater uniformity.

#### IV. Part 4: Transnational Lawyering

As mentioned above, law societies have a monopoly on the provision of legal services within their jurisdictions. It is law societies that decide who gets to practice law, and they have the power to seek court orders to prohibit any unauthorized practice of law and fine any individual involved.<sup>100</sup> The Federation's national regulatory initiatives have gone a long way toward breaking down most barriers between provinces and territories within Canada. The same, however, cannot be said regarding lawyers from other countries. Of course, it is possible for a foreign-trained lawyer to become a member of a Canadian law society. The Federation's National Committee on Accreditation<sup>101</sup> is the entity that "assesses the legal education credentials of individuals trained outside of Canada . . . who intend to apply for admission to a [Canadian] law society." This process will often require the applicant to complete a number of law school courses or pass a number of examinations, or both.<sup>102</sup> Accordingly, it is meant to serve as a process of admission to a Canadian law society on a permanent basis. For short-term or temporary practice, however, Canada essentially remains a closed shop.

A recent case from Alberta serves as a good illustration of this. In *Lameman v. Alberta*,<sup>103</sup> the Plaintiffs, a group of Aboriginal Canadians, claimed that the government had "infringed their treaty rights by taking up [too] much of their traditional territory." Because the Plaintiffs could not afford legal fees, certain lawyers from Tooks Chambers in the United Kingdom offered to provide their services on a pro bono basis.<sup>104</sup> The Court was asked to allow the Tooks lawyers, who were not members of the Law Society of Alberta, to represent the Plaintiffs in the legal proceedings.<sup>105</sup>

The Court reviewed Alberta's Legal Profession Act,<sup>106</sup> which quite clearly prohibits individuals who are not members of the Law Society of Alberta from practicing in the province. According to the Plaintiffs, however, some flexibility was warranted under the Alberta Rules of Court.<sup>107</sup> These rules

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100. See, e.g., Law Society Act, R.S.O. 1990, c L.8, ss 26.1, 26.2 (Can.).

101. Federation of Law Societies of Canada, *National Committee on Accreditation (NCA)*, FEDERATION OF LAW SOCIETIES OF CANADA (2016), <http://flsc.ca/national-committee-on-accreditation-nca/>.

102. *About the NCA*, FED'N OF LAW SOC'YS OF CAN., <http://flsc.ca/national-committee-on-accreditation-nca/about-the-nca/> (last visited June 19, 2017).

103. *Lameman v. Alberta*, 2011 ABQB 396, 521 A.R. 99 (Can. Alta.), judgment upheld on appeal, *Lameman v. Alberta*, 2012 ABCA 59, 348 D.L.R. 4th 45 (Can. Alta.) (Hereinafter *Lameman ABCA*).

104. *Id.* at para. 14.

105. *Id.* at para. 19.

106. See Legal Profession Act, R.S.A. 2000, c L-8, s 106(1) (Can. Alta.).

107. See *Lameman*, 2011 ABQB 396 at para. 21.

provide that a Court “may permit a person to assist a party before the Court in any manner and on any terms and conditions the Court considers appropriate.”<sup>108</sup> The Plaintiffs argued that the prohibition regarding the unauthorized practice of law contained in the Legal Profession Act would not be violated because even though the Tooks lawyers would be doing the bulk of the work involved in the legal proceedings, they would be controlled and supervised by Alberta lawyers who would technically still be the lawyers on the file.<sup>109</sup>

In siding with the Law Society of Alberta, which had the status of intervenor in the case, the Court refused to interpret the Alberta Rules of Court in such a broad fashion.<sup>110</sup> The Court found that the proposed involvement of the Tooks lawyers, which was to include questioning of witnesses and advocacy before the Court, would amount to practicing law and would therefore breach the Legal Profession Act.<sup>111</sup> In so ruling, the Court explained that the purpose of the law is to “ensur[e], among other things, that lawyers practicing in Alberta [are] competent and proficient, adequately insured . . . and bound by the [Alberta Code of Professional Conduct].”<sup>112</sup>

On appeal, the Plaintiffs’ main argument was that the Tooks lawyers would not be remunerated and argued that unpaid work should not be caught by the Legal Profession Act’s prohibition on legal work done by non-lawyers.<sup>113</sup> The Court was of the view that access to justice “is an important social value, but not the only one.”<sup>114</sup> According to the Court, “[t]he prime aim of the Legal Profession Act . . . is to protect the public from incompetent or unethical lawyers or advocates,”<sup>115</sup> and the fact that the Tooks lawyers were not going to be paid by the Plaintiffs changed nothing.

Some have criticized the ruling in *Lameman* by asking whether the monopoly enjoyed by lawyers in Alberta—and, by extension, everywhere in Canada—really needs to be as extensive as it presently is. In reviewing the risks and benefits of the particular facts in *Lameman*, these critics argue that the latter outweigh the former, and the concerns expressed by the Court are not as applicable when dealing with foreign lawyers like those from Tooks who are likely to be able to provide very competent and needed service, who are bound by codes of conduct similar to Alberta’s, and who likely have sufficient resources to cover any professional negligence claims.<sup>116</sup> These critics are calling for “a more nuanced or careful approach to the provision

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108. *Id.*, rule 2.23.

109. *Lameman*, 2011 ABQB 396 at para. 20.

110. *See id.* at para. 43.

111. *See id.* at para. 36, 41.

112. *Id.* at para. 37.

113. *Lameman v. Alta*, 2012 ABCA 59 at para. 15 (Can., Alta. C.A.).

114. *Id.* at para. 21.

115. *Id.* at para. 17.

116. *See, e.g.*, Alice Woolley, *Unauthorized practice and access to justice*, U. OF CALGARY FACULTY OF LAW (Aug. 3, 2011), <http://ablawg.ca/2011/08/03/unauthorized-practice-and-access-to-justice/>.

of legal services, in which consumer and public interests are protected, but the availability of competent and helpful legal advice is not irrationally restricted[.]”<sup>117</sup> But so far, such criticism has not led to any substantial reexamination of Canadian law societies’ authority, nor has it affected the monopoly currently enjoyed by Canadian lawyers.

## V. Conclusion

There is no question that national regulatory uniformity in the legal sphere is on the rise in Canada. In the last few years, the Federation’s national coordinating function has been stronger than ever. The Federation has so far succeeded where other attempts at national regulation in other spheres have failed.<sup>118</sup> This phenomenon of uniformity in the legal regulatory context should not, however, be seen as a wholesale rejection of the pre-existing model of self-regulation or an admission of failure on the part of its main actors—the law societies. In fact, the new approach can be understood as furthering the very same goals to achieve the very same advantages as before, all the while enabling increased mobility for the benefit of both lawyers and the public they serve. As such, it is also a further recognition of the increasing irrelevance of borders in a country that encourages the free movement of people. Perhaps more importantly, it can be viewed as a self-imposed exercise in modernization to prevent the erosion of the self-regulation model as seen in other countries. From that perspective, the Federation’s national initiatives are an attempt to be proactive and to better serve the public so that self-regulation will be preserved. The law societies may be making the wager that voluntarily accepting a bit of dilution of self-regulation now will assist in preventing an imposed radical dilution later. One could therefore view the phenomenon of national regulatory uniformity with a skeptical eye, but to the extent that it allows law societies to better fulfill their fundamental role of regulating the legal profession in the public interest, it should generally be applauded.

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117. *Id.*

118. There has been an attempt for many years to create a national securities regulator in Canada to unite “provincial laws for the capital markets,” so far without success. Alastair Sharp, *Canada National Securities Regulator Delayed Until 2018*, REUTERS CAN. (July 22, 2016, 2:26 PM), <http://ca.reuters.com/article/businessNews/idCAKCN102274>.