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Trends in Global and Canadian Lawyer Education

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I. INTRODUCTION

During 2012, I co-wrote with Australian regulators Steve Mark and Tahlia Gordon an article entitled "Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology."[1] When I

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1 See Laurel S Terry, Steve Mark & Tahlia Gordon, "Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology" (2012) 80:6 Fordham L Rev 2661.

was asked to deliver the Gertler Lecture[2] and to write an article for the *Saskatchewan Law Review* issue commemorating the University of Saskatchewan's Centennial Anniversary and its *Future of Law* Symposium, I thought it would be interesting to examine whether the six global trends we described in our 2012 article also seemed applicable to Canadian lawyer regulation. This article concludes that the global trends identified in our 2012 article are also taking place in Canada. Indeed, in several instances, Canada has been a leader in these developments.

II. GLOBALIZATION AND THE CANADIAN LEGAL PROFESSION

Before examining whether the global lawyer regulatory trends we identified are also present in Canada, it may be useful to have some background information about the impact of globalization on the legal profession. This information is useful because the advent of globalization has meant that it is easier for ideas to travel and for developments that take place in one country to be discussed and debated in other countries.[3] Two useful items that document the impact of globalization on the legal profession are the 1998 and 2010 World Trade Organization (WTO) reports on legal services.[4] The 2010 WTO Report summarized the situation as follows:

> The 1998 Secretariat Background Note on legal services observed that the legal services sector had experienced continuous growth as a consequence of the rise in international trade and of the emergence of new fields of practice, in particular in the area of business law. This trend has further continued over the last decade, and brought about sizable growth to the legal services sector.[5]

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2 I was very honoured to be asked to give The Fifth Gertler Family Lectureship in Law Honouring the Robert McKercher Family and to follow in the footsteps of former Canadian Minister of Justice Allan Rock, Professor David Luban from Georgetown, Supreme Court of Canada Justice Thomas Cromwell, and Canadian Assembly of First Nations National Chief Shawn Atleo.

3 See generally Laurel S Terry, "A 'How To' Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course" (2007) 51:4 St Louis ULJ 1135 at 1136-46.

4 WTO, Council for Trade in Services, *Legal Services - Background Note by the Secretariat*, WTO Doc S/C/W/43, online: <http://docs.wto.org/do12fe/Pages/FE_Search/FE_S_S001.aspx> select "Search," select "All documents," search Document number: "98-2691" [1998 WTO Report]; WTO, Council for Trade in Services, *Legal Services - Background Note by the Secretariat*, WTO Doc S/C/W/318, online: <http://docs.wto.org/do12fe/Pages/FE_Search/FE_S_S001.aspx> select "Search," select "All documents," search Document number: "10-3212" [2010 WTO Report].

5 2010 WTO Report, *ibid* at 1.

This 2010 report noted that the global market for trade in services had "an annual growth rate of 5 per cent for the period from 2004-2008"[6] and that "all available indicators pointed to sustained growth of the legal services market over the last decades."[7]

This global data is consistent with Canada's experience: Canadian exports and imports of legal services more than doubled between 1995 and 2011.[8] This growth in international legal services trade is not surprising given the overall growth in Canadian imports and exports and the inclusion of Canadian legal services in international trade agreements.[9]

According to the WTO, the Americas dominate international trade in services: a 2010 WTO graphic showed the Americas with 54 per cent of international trade in legal services, while Europe had 36.5 per cent and Asia had 9.4 per cent.[10] This statistic should not be surprising given the large trade in legal services in both Canada and the U.S. and the fact that both the U.S. and Canada are among each other's largest trading partners. The U.S. is Canada's largest legal services trading partner[11] and Canada was recently the third largest

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6 *Ibid* [footnote omitted].

7 *Ibid* at 3.

8 Canadian exports of legal services rose from $275 million in 1995 to $719 million in 2011. Canadian imports of legal services rose from $226 million in 1995 to $709 million in 2011. See Statistics Canada, *Balance of International Payments: Canada with the World*, online: <http://www.international.gc.ca/economist-economiste/assets/pdfs/Data/payments-paiments/Services/Comm_Services/Canada-World_Trade_in_Comm_Services-ENG.pdf>.

9 *Ibid*, showing that Canadian exports of services grew from $34.6 billion in 1995 to $82.77 billion in 2011, while services imports grew from $43.88 billion in 1995 to $105.79 billion in 2011. Legal services were part of the 1998 US-Canada Free Trade Agreement, the 1992 North American Free Trade Agreement (NAFTA), and the 1994 General Agreement on Trade in Services (GATS), which was one of the agreements annexed to the agreement that created the World Trade Organization. See Terry, Service Providers, *infra* note 32 at 190-92.

10 2010 WTO Report, *supra* note 4 at 2.

11 For example, in 2000, Canada's legal services exports to the U.S. were $328 million, whereas its exports to the European Union (EU) were less than one-third of that amount ($68 million) and its exports to the rest of the world were $45 million. The picture was similar a decade later. In 2009, Canada exported $592 million to the U.S., $163 million to the EU, and $84 million to the rest of the world. In 2010, Canada exported $514 million to the U.S., $82 million to the EU, and $109 million to the rest of the world. The import picture similarly shows the strong relationship between the U.S. and Canada. In 2000, Canada imported $404 million in legal services from the U.S., $63 million in legal services from the EU, and $27 million in legal services from the rest of the world. Ten years later, the U.S. was still the major source of Canadian legal services imports. For example, in 2009, Canada imported $650 million from the U.S., $98 million from the EU, and $47 million from all other countries. In 2010, Canada imported $585 million from the U.S., $102 million from the EU, and $56 million from the rest of the world. See

recipient of U.S. legal services exports and the fourth largest source of U.S. legal services imports.[12]

The impact of globalization on Canada's legal profession can also be examined from the perspective of Canadian law firms. In 1998, when the first WTO report on legal services was written, the report noted that Canada had two of the world's twenty largest law firms and was second after the U.S. (and before Australia and the U.K.).[13] In the 2010 report, however, only four of the largest one hundred firms listed were from Canada and they were described as national rather than international firms.[14] Canadian firms have, however, begun to merge with global firms. In 2011 and 2012, respectively, Canadian law firms Ogilvy Renault LLP and Macleod Dixon merged with the international law firm Norton Rose LLP, and Fraser Milner Casgrain (FMC) announced its intentions to merge with SNR Denton and Salans to form a law firm that will have twenty-five hundred lawyers and seventy-nine offices worldwide.[15] These mergers on their own will significantly expand the global reach of Canadian law offices.[16] But these mergers are likely to have a broader impact

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Statistics Canada, *Balance of International Payments: Canada with the US*; Statistics Canada, *Balance of International Payments: Canada with the EU (incl. UK)*; Statistics Canada, *Balance of International Payments: Canada with Other Countries than US and EU*. All of these tables are available from the Statistics Canada, *Balance of Payments* webpage available online: <http://www.international.gc.ca/economist-economiste/statistics-statistiques/payments-paiments.aspx?lang=eng&view=d>.

12 United States International Trade Commission, *Recent Trends in U.S. Services Trade: 2011 Annual Report*, Pub 4243 (Washington, DC: US Government Printing Office, 2011) at 7-16, online: <http://www.usitc.gov/publications/332/pub4243.pdf>.

13 1998 WTO Report, *supra* note 4 at 6. The report also provided a table listing the world's twenty leading law firms by number of partners for 1998 that included Blake Cassels as number four: *ibid* at 24.

14 2010 WTO Report, *supra* note 4 at 27-28. Annex II lists Borden Ladner Gervais as number sixty-six and Gowling Lafleur Henderson as number seventy-one.

15 Jeff Gray, "Ogilvy-Norton the first merger of many?" *The Globe and Mail* (1 February 2011), online: <http://www.globeandmail.com>. See also Norton Rose, "Macleod Dixon officially joins Norton Rose Group—Establishes Group's first offices in Latin America" (17 January 2012), online: <http://www.nortonrose.com/news/61888/macleod-dixon-officially-joins-norton-rose-group-establishes-groups-first-offices-in-latin-america>; Drew Hasselback, "FMC to link with SNR Denton and Salans to create new international law firm" *Financial Post* (7 November 2012), online: <http://business.financialpost.com/2012/11/07/fmc-named-in-potential-three-way-merger-with-snr-denton-and-salans>. See also Alice Woolley, "The Top Ten Canadian Legal Ethics Stories—2012" *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (3 January 2009), online: <http://ablawg.ca/2013/01/03/the-top-ten-canadian-legal-ethics-stories-2012>.

16 As of November 2012, FMC had more than five hundred lawyers at offices in Montréal, Ottawa, Toronto, Edmonton, Calgary and Vancouver. Norton Rose Canada had offices in Calgary, Montréal, Ottawa, Quebec, and Toronto. See Hasselback, *supra* note 15, and Norton Rose Canada, online: <http://www.nortonrose.com>.

because Canadian law firms may now feel competitive pressures to become more international in order to retain domestic business. At a minimum, these transatlantic Canadian firms will bring to Canada a heightened awareness of regulatory developments in other countries.

In the U.S. and elsewhere, commentators sometimes point to the limited number of lawyers who work in international law firms to argue that the globalization phenomenon is not relevant to the average lawyer. I disagree with this premise. As I have explained in an article entitled "The Legal World is Flat,"[17] I believe that the factors set forth in Thomas Friedman's book, *The World Is Flat*,[18] similarly apply to lawyers and clients regardless of the size of their work setting. I argued in that article that it is not only the multinational corporations and global law firms whose lives have changed but also the lives of individual (non-corporate) clients and of the solo practitioners and small firm lawyers who represent them. "The Legal World is Flat" explained that one reason for globalization among individual clients and the lawyers who represent them is the diversity of the population combined with technological advances that make it easier for individuals to cross jurisdictional boundaries for business and personal reasons. This may explain why, in the U.S., the *After the JD* study found that 44 per cent of 4160 respondents who passed the bar in 2000 had engaged in at least some work that might be described as "international."[19]

In my view, the same phenomena that affect U.S. clients and lawyers will also affect Canadian clients and lawyers and, by extension, their regulators. Similar to the U.S., Canada has a diverse population. Moreover, Statistics Canada has predicted that Canada's population will become even more diverse in the future. It predicts that by 2031, between twenty-five and twenty-eight per cent of the Canadian population will be foreign-born.[20] In other words, by 2031, more than one out of every four Canadians will be foreign born. The report also noted that the foreign-born population was expected to grow at a rate four times faster than the rest of the population.[21] By 2031, 46

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17 Laurel S Terry, "The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms" (2008) 28:3 NW J Int'l L & Bus 527.

18 Thomas L Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (Waterville, ME: Thomdike Press, 2005).

19 See Robert L Nelson, Ronit Dinovitzer & Gabriele Plickert, *After the JD II: Second Results from a National Study of Legal Careers* (American Bar Foundation and the NALP Foundation for Law Career Research and Education, 2009) at 35. See also Carole Silver, "Getting Real About Globalization and Legal Education: Potential and Perspectives for the US" (2013) 24 Stan L Pol'y Rev (forthcoming).

20 Statistics Canada, *Projections of the Diversity of the Canadian Population: 2006 to 2031* (March 2010), online: <http://www.statcan.gc.ca/pub/91-551-x/91-551-x2010001-eng.pdf> at 16 [Diversity Report].

21 *Ibid.*

per cent of Canadians who are fifteen years old or older will be foreign-born or will have one foreign-born parent.[22]

The 2010 Statistics Canada report also noted the increasing diversity of the current and projected Canadian foreign-born population compared to the foreign-born population prior to the 1980s. This is important given the projected shift in the global economy toward the so-called BRICS countries of Brazil, Russia, India, China, and South Africa.[23] According to the report's projections, by 2031, China and South Asia, which includes India, will provide the largest number of Canada's foreign-born population: 55 per cent of Canadian foreign-born residents will come from Asia as compared with 14 per cent in 1981.[24] The second largest group of foreign-born population will come from Europe (20 per cent) followed by the Americas (14 per cent) and Africa (9 per cent).[25] The report also included projections for thirty-four census metropolitan areas. According to this study, by 2031, Saskatoon and Regina will each have foreign-born populations of approximately 10 per cent.[26]

Consider what this data means for Canadian small businesses in an era of technology and globalization and in a time when the global economy is predicted to shift toward the BRICS economies. Given current technology, one need not be a multinational business to take advantage of business connections and opportunities elsewhere in the world. Many small businesses are likely to have suppliers elsewhere in the world or to sell their goods or services elsewhere in the world. Moreover, it is increasingly likely that private individuals will have contact with other countries' legal systems, likely through family law or inheritance matters. The increased diversity of Canada's foreign-born population means that Canada will be well-situated to take advantage of this global economic power shift towards the BRICS economies. For all of these reasons, I am convinced that the globalization

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22 *Ibid* at 19.

23 Experts predict that in the future, most of the growth in the world's economy will take place in the BRIC or BRICS countries. See generally Dominic Wilson & Roopa Purushothaman, "Dreaming with the BRICs: The Path to 2050" *Goldman Sachs Global Economics Paper No: 99* (1 October 2003) at 1, online: <http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf>. BRIC is the acronym for Brazil, Russia, India, and China. The term BRICS emerged in 2010 after China formally invited South Africa to join the BRIC countries in an official meeting of heads of state: Bloomberg News, "South Africa Invited to Join Emerging Nations Group" *The New York Times* (24 December 2010), online: <http://www.nytimes.com/2010/12/25/business/global/25bizbriefs-SOUTHAFRICA_BRF.html?_r=0>.

24 See Diversity Report, *supra* note 20 at 17.

25 *Ibid.*

26 *Ibid* at 29.

trends that affect lawyers elsewhere in the world will also affect Canadian lawyers and clients, regardless of the size of the community within which they live. With this background about globalization and Canada, I will now discuss global trends in lawyer regulation and whether these trends are also applicable in Canada.

III. TRENDS IN CANADIAN AND GLOBAL LAWYER REGULATION

As the introductory section explained, this article was inspired by my curiosity about whether the global regulatory trends identified in our 2012 article seemed to apply to Canadian lawyer regulation. Although one could identify a number of doctrinal lawyer regulatory developments,[27] our 2012 article set forth a thematic framework for analyzing global lawyer regulatory developments. To make these thematic questions easier to remember, we framed them as a series of "who-what-when-where-why-and-how" questions. The six global regulatory trends we identified were the following:

(1) *Who* should regulate the legal profession? For example, should there be a self-regulatory system or a co-regulatory system? Or are lawyers simply service providers, the regulation of whom should be included in general societal regulations?
(2) *Who* or *what* should be regulated? In other words, what or whom is the *object* of regulation? Should regulators regulate lawyers or legal services? Should they regulate law firms or only individuals? If a regulator focuses on providers rather than services, should it regulate providers other than lawyers (such as paralegals)?
(3) *When* should regulation occur? For example, should regulation occur *ex ante* or *ex post*? To state it differently, to what extent should regulation be proactive rather than reactive?
(4) *Where* should regulation occur? Our traditional system of lawyer regulation and enforcement is geographically based, but this regulatory system does not match the

27 In 2010, for example, during the Federation of Law Societies of Canada's annual meeting, I explored the impact in Canada of nine doctrinal developments: 1) global trade agreements; 2) global regulatory reform initiatives; 3) global antitrust (competition) initiatives; 4) alternative business structure developments; 5) global money laundering and terrorism financing initiatives; 6) global legal education initiatives; 7) global multijurisdictional practice, recognition and lawyer admission issues; 8) global lawyer accountability initiatives; and 9) market forces such as outsourcing and litigation financing.

current reality in which legal practice is increasingly virtual and is not limited by geography.

(5) *Why* should regulation occur? What goals should it be trying to accomplish?

(6) *How* should regulation occur? For example, should regulation differ depending on the size or sophistication of the client? Should a regulator use a rules-based approach or an outcomes-based approach?

In the sections that follow, I provide global examples of each of these trends and then examine whether there are Canadian examples of these trends.

A. GLOBAL TRENDS REGARDING WHO REGULATES LAWYERS

One of the most pressing issues of lawyer regulation is the question of who should regulate lawyers. This question has been asked more frequently in recent years and it has become increasingly common for countries to move away from self-regulation and toward co-regulation.

Australia, the United Kingdom, and Scotland are examples of jurisdictions that have adopted a co-regulatory approach to lawyer regulation.[28] In each of these jurisdictions, regulatory oversight is placed in a body that is separate from the legal profession. In the United Kingdom, for example, lawyer regulation is subject to oversight by a regulatory board that must have a non-lawyer majority and a non-lawyer chair.[29] Australia has agreed upon a national legal profession model that places regulatory oversight in a national legal services board that would include non-lawyer members and a National Legal Services Commissioner who is permitted to, but need not, be a lawyer (at the time this article was written, none of the Australian states or territories had implemented this national law).[30] Ireland has pending a controversial legal services bill; the original draft would have removed the legal profession from a regulatory role.[31]

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28 See e.g. *Legal Profession Act 2004* (NSW, Australia); *Legal Services Act 2007* c 29 (UK); *Legal Services (Scotland) Act, 2010*, ASP 16; Australian Government Attorney-General's Department, National Legal Professional Reform, *Legal Profession National Law* (31 May 2011), online: <http://www.ag.gov.au/Consultations/Pages/NationalLegalProfessionalReform.aspx> select: "National Legal profession Legislation-September2011" [COAG Draft National Law]. For additional information, see Terry, Mark & Gordon, "Trends," *supra* note 1 at 2712, n 137.

29 *Legal Services Act 2007* (UK), *ibid.*

30 See COAG Draft National Law, *supra* note 28; email from Tahlia Gordon, Research and Projects Manager, Office of the Legal Services Commissioner of New South Wales, Australia to author (4 February 2013).

31 See House of Oireachtas, "Legal Services Regulation Bill 2011," online: <http://www.oireachtas.ie/documents/bills28/bills/2011/5811/b5811d.pdf>.

Another global trend regarding the question of who regulates lawyers is the interest in ensuring that a *regulatory* entity rather than a representational entity regulates lawyers.[32] This is one of the reasons why, in the United Kingdom, the Solicitors Regulation Authority and the Bar Standards Board were created; their creation ensured that the regulatory bodies would be separate from the Law Society of England and Wales and the Bar Council, which are the representational entities for solicitors and barristers.[33]

In addition to the move away from a more self-regulatory system toward a co-regulatory system and the pressure to separate regulatory and representational entities, there has been a trend to make lawyers subject to generally-applicable regulations.[34] In other words, lawyers are increasingly treated as just one of many types of service providers and are regulated accordingly. This development has been referred to as the new service providers paradigm.[35]

There are several different ways in which the service providers paradigm can manifest itself. First, lawyers may be included in the generally applicable legislation of the governing jurisdiction, such as

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32 See e.g. Laurel S Terry, "The European Commission Project Regarding Competition in Professional Services" (2009) 29:1 NW J Int'l L & Bus 1, discussing EU, OECD, and Canadian competition reports that focused on this issue; Council of Bars and Law Societies of Europe, *CCBE Position on Regulatory and Representative Function of Bars*, online: <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf>; Canadian Competition Report, *infra* note 44 at 38, discussing why the regulatory process needs to be impartial and not self-serving and the risk of lawyer overrepresentation; Organization for Economic Cooperation and Development, *Competitive Restrictions in Legal Professions*, *infra* note 40 at 27-30.

33 See e.g. Bar Standards Board, "The Legal Services Act 2007: Implications for the Regulation of the Bar in England and Wales," online: <http://www.barstandardsboard.org.uk/media/1390704/legal_services_act_2007_regulation_implications.pdf>; The Bar Council, "About Us," online: <http://www.barcouncil.org.uk/about-us>, which states that "The Bar Council represents barristers in England and Wales"; Solicitors Regulation Authority, "How We Work," online: <http://www.sra.org.uk/sra/how-we-work.page>; Bar Standards Board, "What We Do," online: <http://www.barstandardsboard.org.uk/about-bar-standards-board/what-we-do/>, stating "We regulate barristers called to the Bar in England and Wales in the public interest."

34 See e.g. Renee Newman Knake, "The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?" (2010) 59 Am U L Rev 1499, discussing the US Supreme Court's 2009 term, which included approximately thirteen cases raising issues relevant to lawyer regulation; John Leubsdorf, "Legal Ethics Falls Apart" (2009) 57 Buff L Rev 959, citing numerous examples of the federal regulation of lawyers; and Laurel S Terry, "The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as 'Service Providers'" (2008) J Prof Law 189-93.

35 See generally Terry, "Service Providers," *ibid.*

consumer protection laws.[36] Second, government authorities may become increasingly less tolerant of what they may view as lawyer exceptionalism. For example, domestic antitrust authorities around the world have been increasingly interested in scrutinizing their own systems of lawyer regulation.[37]

The service providers paradigm also operates on a global scale and thus lawyer regulation is increasingly affected by the actions of international entities. For example, in Europe, the so-called "Troika" has insisted on controversial lawyer regulatory reform as one of the conditions of the bailouts of financially troubled European countries.[38] The World Trade Organization (WTO) and the Asia Pacific Economic Cooperation (APEC) treat lawyers similar to other service providers and have had an impact on lawyer regulation.[39] The Organization for Economic Cooperation and Development (OECD) has developed policies that it applies to lawyers and others; while these policies are non-binding, they have also had an impact on lawyer regulation. For example, several of the antitrust studies cited appear to have been inspired at least in part by the OECD's meetings and reports.[40] The Financial Action Task Force (FATF) provides the final and perhaps the most significant example of the impact of international entities on domestic lawyer regulation.[41] These recommendations, which some countries have implemented, treat lawyers similar to other gatekeepers even though some of the FATF's recommendations are at odds with

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36 See e.g. *American Bar Association v. Federal Trade Commission*, 636 F (3d) 641, 394 US App DC 344 (2011).

37 See Terry, "European Commission," *supra* note 32.

38 See e.g. Letter from Council of Bars & Law Societies of Europe (CCBE) and ABA to Christine Lagarde (21 December 2011), online: <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/CCBE_and_ABA_letter_1_1325686329.pdf>; Council of Bars and Law Societies of Europe, "European and US lawyers alert IMF against Troika-imposed reforms affecting the independence of the profession in 'bail-out' countries" (5 January 2012), online: <http://www.ccbe.org/fileadmin/user_upload/NTCdocument/PR_on_CCBEABA_lettel_1325761475.pdf>; Letter from the International Monetary Fund to the ABA and CCBE (3 February 2012), online: <http://www.lawlibrary.ie/viewdoc.asp?DocID=3105&UserLang=EN&m=>; Laurel S Terry, "Transnational Legal Practice Developments Outside the US 2010-2012" (2013) 47 Int'l L (forthcoming), citing John Flood's blog entries that link to IMF documents.

39 See Laurel S Terry, "From GATS to APEC: The Impact of Trade Agreements on Legal Services" (2010) 43 Akron L Rev 875.

40 See Organization for Economic Cooperation and Development, *Competitive Restrictions in Legal Professions* (2007), online: <http://www.oecd.org/dataoecd/12/38/40080343.pdf>. This report built on the work of a prior report that addressed professional services generally, rather than legal services specifically. See Organization for Economic Cooperation and Development, *Competition in Professional Services* (1999), online: <http://www.oecd.org/regreform/sectors/1920231.pdf>.

41 See Financial Action Task Force, "About Us," online: <http://www.fatf-gafi.org/pages/aboutus>.

the lawyer-confidentiality rules in many countries.[42] However, since governments around the world are interested in harnessing the power of the legal profession in their fight against money laundering and terrorism financing, many countries have adopted policies that enforce the FATF's recommendations, despite lawyer confidentiality rules.[43]

These examples illustrate the global trend in which stakeholders increasingly ask who should regulate lawyers (and sometimes add or substitute regulators beyond the traditional sources of lawyer regulation.)

1. Canadian Trends with Respect to the Question of "Who Regulates Lawyers"

A number of the developments cited in the prior section have also emerged in Canada and have led to Canadian discussions about who should regulate lawyers. This section highlights some of the Canadian developments that are relevant to the issue of who should regulate lawyers.

The Canadian Competition Bureau's study of self-regulated professions provides an example of a Canadian federal government agency whose actions raise questions about who should regulate lawyers. The 2007 Report criticized aspects of Canadian lawyer regulation, suggested possible changes for the law societies, and provided a timetable for consideration of the proposed changes.[44] Critics of this report suggested, among other things, that the Competition Bureau might not be the entity best positioned to analyze some of the issues in the report.[45] Although the Bureau's subsequent report indicated that there would be no immediate follow-up action by the Competition Bureau, regulators have undoubtedly taken notice of it, especially since the report also held

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42 See FATF Symposium Issue, (2010) J Prof Law. The symposium included articles about FATF implementation in Canada, the EU, the United Kingdom, and a number of developing countries. See *ibid.*

43 See Laurel S Terry, "An Introduction to the Financial Action Task Force and Its 2008 Lawyer Guidance" (2010) J Prof Law 3 at 10 and 24-27, summarizing FATF developments.

44 Competition Bureau of Canada, "Self-Regulated Professions: Balancing Competition and Regulation," online: <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf> at 61-78 [Canadian Competition Report].

45 Edward Iacobucci & Michael Trebilcock, "Self-Regulation and Competition in Ontario's Legal Services Sector: An Evaluation of the Competition Bureau's Report on Competition and Self-Regulation in Canadian Professions" (2008), online: <http://www.flsc.ca/_documents/Competition-in-Legal-Services-Paper-2008.pdf>.

out the possibility of regulation by governmental authorities, rather than the law societies, when it stated:

> While an examination of the interpretation and enforcement of professional restrictions was beyond the scope of the Professions Study, to ensure that Canadians have access to innovative, low-cost and high-quality professional services, it is essential that self-regulating professions *and the respective government authorities*—ensure that professional restrictions are developed and applied in a manner that favours competition.[46]

At least one commentator has observed that competition concerns were one of the reasons originally cited in support of the work by the Federation of Law Societies of Canada (FLSC) on common standards for legal education.[47]

Money-laundering legislation provides a second example of efforts that were implemented to regulate lawyers by Canadian federal governmental entities. For over a decade, the Attorney General of Canada has pursued efforts to make the legal profession subject to Canadian money laundering legislation.[48] These actions

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46 Competition Bureau of Canada, "Self-Regulated Professions Post-Study Assessment" (6 December 2011), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03407.html> [emphasis added].

47 See Harry W Arthurs, "The Tree of Knowledge/The Axe of Power: Gerald Le Dain and the Transformation of Canadian Legal Education" (2012) 8:6 Osgoode CLPE Research Paper No 25/2012 at 13: "Its ostensible purpose was to address several emerging issues of concern to the governing bodies: the recognition of foreign law degrees has the basis for admission to practice in Canada; the possible establishment of several new law faculties (the first in almost 30 years); arrangements to facilitate the national mobility of lawyers; and the possible characterization of current bar admissions practices as anti-competitive."

See also the Federation of Law Societies of Canada, "About Us," online: <http://www.flsc.ca/en/about-us>. The Federation of Law Societies of Canada (FLSC) is the national coordinating body for Canada's 14 provincial and territorial law societies (although Canada has 13 provinces and territories, there are 14 law societies because Quebec has a law society for lawyers and a law society for notaries). Every lawyer in Canada and notary in Quebec is required by law to be a member of a law society and to be governed by its rules. Canada's law societies govern over 100,000 lawyers and 3,500 Quebec notaries.

48 See e.g. *Federation of Law Societies of Canada v Canada (Attorney General)*, 2011 BCSC 1270, 339 DLR (4th) 48 [*FLSC v Canada*]; Federation of Law Societies of Canada, "Submission of the Federation of Law Societies of Canada to the Senate Committee on Banking, Trade and Commerce: Review of the Proceeds of Crime (Money Laundering) and *Terrorist Financing Act* (SC 2000, c 17) pursuant to section 72 of the Act" (4 April 2012), online: <http://www.flsc.ca/_documents/Federation-Presentation-April-4-2012.pdf>.

have been controversial on both substantive and procedural grounds.[49]

Canada has adopted provincial-level consumer protection laws that include lawyers and that have led to questions about who should regulate lawyers. For example, in Ontario, the Law Society has a duty to act in a "timely, open and efficient manner" when carrying out its functions.[50] Manitoba and Nova Scotia have both adopted legislation that requires regulated professions, including the legal profession, to provide registration practices that are transparent, objective, impartial and fair.[51] These controversial legislative acts show the increasing tendency of provincial legislatures to regulate lawyers beyond the simple adoption of legal profession acts.[52]

Canadian law societies are aware of developments elsewhere in the world and these developments have prompted discussions about who should regulate lawyers and whether there should be a move away from the traditional provincial regulation of lawyers towards a co-regulatory or national regulation system. Manitoba benchers, for example, have reviewed the UK developments and discussed whether a national regulator would be desirable.[53] At least one commentator has pointed to the Australia and U.K. lawyer regulatory systems; one commentator asked whether Canada should adopt a similar system, noting that "if you feel you've been bamboozled by a lawyer, complaining to his or her membership group can quickly undermine faith in the system."[54]

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49 *FLSC v Canada*, *ibid*; Federation of Law Societies, "Submission," *ibid* at paras 13-14, noting that the law societies should address the risks of money laundering and the solicitor-client privilege and independence of the legal profession should be preserved.

50 *Law Society Act*, RSO 1990, c L8, s 4.2(4).

51 *The Fair Registration Practices in Regulated Professions Act*, CCSM c F12; *Fair Registration Practices Act*, SNS 2008, c 38.

52 Laurel S Terry, Steve Mark & Tahlia Gordon, "Adopting Regulatory Objectives for the Legal Profession" (2012) 80 Fordham L Rev 2685 at 2706.

53 See e.g. Law Society of Manitoba, *2012 Annual Report* at 4, online: <http://www.lawsociety.mb.ca/publications/annual-reports/2012_Annual_Report.pdf>: "In June of 2011 our Benchers explored the big idea of moving away from provincial regulation towards a national regulator for the legal profession. They noted a similar initiative underway in Australia and discussed the challenges of regulating a mobile legal profession locally. In the end, the Benchers decided a good first step is the development of national regulatory standards. They commended the ongoing work coordinated by the Federation of Law Societies of Canada on developing national discipline standards, a national reimbursement scheme for theft by mobile lawyers, national admission standards and a national Model Code of Conduct."

54 See e.g. Kate Lunau, "Law societies under fire" *Maclean's* (30 April 2009), online: <http://www2.macleans.ca/2009/04/30/law-societies-under-fire/#more-3103>; Alice Woolley, "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation" (2012) 45 UBC L Rev 145; Paul D Paton, "Between a Rock and a Hard Place: The Future of Self-Regulation—Canada Between the United States and the English/Australian Experience" (2008) J Prof Law 87.

When considering the issue of who regulates Canadian lawyers, one would be remiss not to consider the Federation of Law Societies of Canada (FLSC). The FLSC has taken a leading role in the efforts to develop national lawyer regulation standards that are then implemented by provincial and territorial law societies.[55] For example, Canada was a global leader among federal jurisdictions in adopting national standards to respond to issues of lawyer mobility and its approach has been shared with other jurisdictions.[56] More recently, the FLSC has led efforts to develop national standards on issues such as legal education,[57] bar admission rules,[58] lawyer

55 See *supra* note 47 for information about the FLSC. The Canadian Bar Association (CBA) is a voluntary bar association that has been involved in a few such efforts, including its *Code of Professional Conduct*, which was first adopted in 1920 and most recently updated in 2009. See Canadian Bar Association, "Ethics and Professional Responsibility Committee," online: <http://www.cba.org/cba/activities/code>.

56 See e.g. Federation of Law Societies of Canada, "National Mobility Agreement," online: <http://www.flsc.ca/_documents/mobility_agreement_aug02.pdf>; Federation of Law Societies of Canada, *Territorial Mobility Agreement*, online: <http://www.flsc.ca/_documents/Territorial_mobility_agreement_nov_2006.pdf>; Federation of Law Societies of Canada, *Québec Mobility Agreement*, online: <http://www.flsc.ca/_documents/Quebec-Mobility-Agreement-July-2010.pdf>; Federation of Law Societies of Canada, *Québec Mobility Agreement: Addendum to Extend Mobility Rights to Members of the Chambre des notaires du Québec* (March 2012), online: <http://www.flsc.ca/_documents/Addendum%20March%202012%20Notaires.pdf>. Both the ABA Commission on Multijurisdictional Practice and the ABA Commission on Ethics 20/20 have heard about Canadian rules and experiences. See e.g. ABA Commission on Ethics 20/20, "Introduction and Overview" at note 15, online: <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf>, citing Canadian foreign lawyer *pro hac vice* cases in connection with the Commission's inbound foreign lawyer proposals; ABA Commission on Ethics 20/20, "Issues Paper Concerning Multijurisdictional Practice" (29 March 2011) at 6-7, online: <http://www.americanbar.org/content/dam/aba/administrative_ethics_2020/mjp_issues_paper.authcheckdam.pdf>, citing the Canadian mobility agreements; ABA Commission on Multijurisdictional Practice, "Written Comments/Position Papers," online: <http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice/mjp_written_comments.html> (see last items on the page submitted by Laurel S Terry).

57 See e.g. Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree, *National Requirements for Canadian Common Law Degree Program: Final Report* (October 2009), online: <http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf>; Federation of Law Societies of Canada, *Common Law Degree Implementation Committee: Final Report* (August 2011), online: <http://www.flsc.ca/_documents/Implementation-Report-ECC-Aug-2011-R.pdf>; Federation of Law Societies of Canada, *Ad Hoc Committee on Approving New Law Degree Programs; Report on Applications by Lakehead University and Thompson Rivers University* (January 2011), online: <http://www.flsc/ca/_documents/Task-Force-Report-new-law-schools.pdf>.

58 Federation of Law Societies of Canada, *National Admission Standards Project: National Entry to Practice Competency Profile for Lawyers and Quebec Notaries* (September 2012), online: <http://www.flsc.ca/_documents/NASCompetenciesSept2012.pdf>;

discipline,[59] and legal ethics rules.[60] Although some of the FLSC's policies have been controversial,[61] my impression is that, overall,

Federation of Law Societies of Canada, *National Admissions Standards Project: Phase 1 Report* (September 2012), online: <http://www.flsc.ca/_documents/NASReportPhase1Sept2012.pdf>; and Federation of Law Societies of Canada, *National Committee on Accreditation*, online: <http://www.flsc.ca/en/nca/>, assessing the credentials of internationally-trained law students. The FLSC has also adopted model good character requirements, but this part of the report had not been publicly distributed as of December 2012. See Alice Woolley, "Tending the Bar: The 'Good Character' Requirement for Law Society Admission" (2007) 30 Dal L J 27.

59 See Federation of Law Societies of Canada, *National Complaints and Discipline Standards*, online: <http://www.flsc.ca/en/national-complaints-and-discipline-standards>, stating "The Federation of Law Societies of Canada is working with Canada's law societies to develop high national standards for how they handle complaints to ensure that members of the public are treated promptly, fairly and openly wherever in Canada they have used the services of members of the legal profession." See also Law Society of Saskatchewan, *Annual Report 2011* at 9, online: <http://www.lawsociety.sk.ca/media/40905/ar2011.pdf>, noting that the timeliness of Saskatchewan lawyer discipline "compared favorably" with that of other provinces, reflecting the use of national benchmarking.

60 See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, online: <http://www.flsc.ca/_documents/ModelcodeWTCCrevdec2012FI.pdf> [*Model Code*]. The "future harm" confidentiality exception was addressed after the original adoption of the *Model Code*. See Federation of Law Societies of Canada, *Advisory Committee On The Future Harm Exception: Final Report* (2 June 2010), online: <http://www.flsc.ca/_documents/Future-Harm-Report-June-2010.pdf>. The conflict of interest provision was added after the rest of the *Model Code* had been adopted in October 2009. See Federation of Law Societies of Canada, *Standing Committee on the Model Code of Professional Conduct: Report on Conflicts of Interest* (21 November 2011), online: <http://www.flsc.ca/_documents/Conflicts-of-Interest-Report-Nov-2011.pdf>.

Saskatchewan Benchers approved the FLSC *Model Code* as the new *Code of Professional Conduct* on February 10, 2012 and it took effect July 1, 2012. See Law Society of Saskatchewan, (1 March 2012), online: <http://www.lawsociety.sk.ca/for-lawyers-and-students/legal-research/news-archives/news-archives-2012>. There have been minor and not so minor variations between the FLSC's *Model Code* and the versions adopted by provincial law societies. See *ibid*, referring to minor provincial variations, and Alice Woolley, "The Top Ten Canadian Legal Ethics Stories—2012," *supra* note 15, pointing out significant differences in Alberta's implementation of the conflict of interest provision. Professor Woolley noted, however, that "the willingness of the law societies to work towards creating a common set of ethical standards for Canadian lawyers is a remarkable development in Canadian lawyer regulation, which has not generally featured a high level of national coordination. That coordination may prove helpful in the event that lawyer regulation faces any significant crisis or change."

61 See e.g. Richard Devlin 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, Canadian Association of Law Teachers/Canadian Law and Society Association" (2008), online: SSRN <http://ssrn.com/abstract=2102596>; Arthurs, "The Tree of Knowledge," *supra* note 47 at 19, questioning whether regulators should decide which law school courses are mandatory; June 1, 2009 letter from the Council of Canadian Law Deans to the FLSC Task Force on the Canadian Common Law Degree, Appendix 5 to FLSC, *National Requirements for Canadian Common Law Degree Program: Final Report, supra* note 57.

the FLSC's efforts to develop national standards have been viewed very positively.[62] There seems to be a consensus about the useful coordination role that can be played by the profession's national umbrella organization, but it has also triggered statements reiterating the fact that, notwithstanding the FLSC's policies, the provincial law societies retain the authority to regulate lawyers in their jurisdictions.[63]

International entities constitute another significant set of actors relevant to the question of who regulates Canadian lawyers. As noted earlier, many countries have elected to sign international agreements or participate in international organizations that develop hard law or soft law policies that directly or indirectly affect lawyer regulation.[64] Canada is a member of the World Trade Organization (WTO), the Asia-Pacific Economic Cooperation (APEC), the Financial Action Task Force (FATF), and the Organization of Economic Cooperation and Development (OECD), all of which have hard law or soft law initiatives that have the potential to affect lawyer regulation. For example, as

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62 See e.g. Law Society of Saskatchewan, *Annual Report 2011*, *supra* note 59 at 2, stating "many decisions are made at the Federation level, which have a direct impact on how we regulate the legal profession in our province. This should come as no surprise. Since the signing of the National Mobility Agreement, it has been a common goal of all Law Societies to achieve national standards for the governance of the legal profession"; Law Society of Manitoba, *2011 Annual Report* at 4, online: <http://www.lawsociety.mb.ca/publications/annual-reports/2011_Annual_Report.pdf>, stating "this Code follows a new Model Code adopted by the Federation of Law Societies of Canada. Canadian law societies have come to realize that more and more we need to harmonize our rules and practises"; Law Society of Manitoba, *2012 Annual Report*, *supra* note 53 at 4, stating "In June of 2011 our Benchers explored the big idea of moving away from provincial regulation towards a national regulator for the legal profession...In the end, the Benchers decided that a good first step is the development of national regulatory standards."; Law Society of Newfoundland and Labrador, *2011-12 Annual Report* at 13, online: <http://www.lawsociety.nf.ca/reports/Annual%20Report%202011%20-%202012.pdf>, stating "Matters of national importance which are discussed at the Federation level quite often lead to the creation of and implementation of common policies in each jurisdiction."

63 See e.g. Law Society of Newfoundland and Labrador (Spring 2012) 14 *Benchers' Notes* at 4, online: <http://www.lawsociety.nf.ca/reports/Benches%20Notes%20-%20Spring%202012%20-%20Vol%2014%20No%201.pdf>, stating "While Benchers agreed that the Federation could adopt the Model Code, including the Conflict of Interest Rule, as its own they did so with the knowledge that they did not have to adopt the Model Code in its totality for Newfoundland and Labrador if they felt it would not be appropriate"; Law Society of Saskatchewan, *Annual Report 2011*, *supra* note 59 at 2, stating "The Federation can be best described as an umbrella organization of all 14 Law Societies in Canada. While each individual Law Society maintains its autonomy, many decisions are made at the Federation level, which have a direct impact on how we regulate the legal profession in our province."

64 For a discussion of the ways in which these organizations have developed policies that affect service providers, including lawyers, see Terry, "Services Providers," *supra* note 34.

noted earlier, Canadian law societies have been involved in litigation with the Attorney General for approximately a decade regarding money laundering legislation. Former FLSC President Ronald MacDonald has written about the impact of FATF anti-money-laundering provisions on Canadian lawyer regulation[65] as have Canadian academics.[66] The FATF recommendations undoubtedly are part of the reason why Canada now has a Model Rule on Client Identification and Verification Requirements.[67]

The General Agreement on Trade in Services (GATS), which is one of the agreements that applies to WTO Member States such as Canada, has the potential to provide an additional level of regulation which Canadian lawyer regulation must meet (or else face trade sanctions).[68] The FLSC and the Canadian Bar Association have recognized the potential impact on Canadian lawyer regulation of any GATS "disciplines" and provided commentary on an early set of draft disciplines.[69] The FLSC continues to respond to the federal government's request for comments about Canada's GATS legal services negotiating position in the WTO[70]

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65 Ronald J MacDonald, "Money Laundering Regulation—What Can be Learned from the Canadian Experience" (2010) J Prof Law 143. See also Federation of Law Societies of Canada, *Model Rule on Cash Transactions*, online: <http://www.flsc.ca/_documents/Cash_transactions_2004.pdf>; Federation of Law Societies of Canada, *Model Rule on Client Identification and Verification Requirements*, online: <http://www.flsc.ca/_documents/Client-Identification-Dec-2008.pdf>; Federation of Law Societies of Canada, "Federation highlights law society anti-money laundering measures at Senate committee" (2012), online: <http://www.flsc.ca/en/federation-news/2012/money-laundering>.

66 See e.g. Adam M Dodek, "Lawyers, Guns and Money: Lawyers and Power in Canadian Society" in David L Blaikie, Thomas A Cromwell & Darrel Pink, eds, *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) at 65-66.

67 See e.g. FLSC, *Model Rule on Client Identification and Verification Requirements*, *supra* note 65; Federation of Law Society of Canada, "Submission," *supra* note 48 at 2, stating "The development and adoption by the Federation of a model No Cash Rule and a model Client Identification, or 'Client ID' Rule is evidence of its commitment to proactively regulate in this area."

68 See generally Terry, "From GATS to APEC," *supra* note 39 at 875.

69 See Canadian Bar Association, *Submission on The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession* (August 2000), online: <http://www.cba.org/cba/submissions/pdf/00-30-eng.pdf>; Federation of Law Societies of Canada, *Meeting Canada's Current Obligations for the Legal Profession under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO)* (adopted by the Law Societies on February 24, 2001, on file with author). See also Paul Paton, "Legal Services and the GATS: Norms as Barriers to Trade" 9 New Eng J Int'l & Comp L 361, criticizing parts of the CBA and FLSC submissions.

70 See Federation of Law Societies of Canada, *Government Policy: International Trade Negotiations*, online: <http://www.flsc.ca/en/government-policy>, stating "The Federation is regularly consulted by the federal government on matters relating to negotiations on trade in services. The Federation's goal is to ensure that any liberalization in access to the Canadian legal services market by legal professionals from other countries does not compromise the protection of the public.... The Federation has

(when asked, the FLSC also provides commentary about the bilateral and regional trade agreements that apply to legal services[71]). The OECD's work on regulatory reform and competition in legal services also appears to have had an impact in Canada; as noted earlier, its work was cited by the Canadian Competition Bureau in its report on self-regulated professions.[72]

The question of who should regulate lawyers has also been a topic of interest among Canadian academics. When discussing the question of who should regulate lawyers, most Canadian academics will—sooner or later—cite Professor Harry Arthurs and his famous 1995 statement that lawyer self-regulation in Canada was a "dead parrot."[73] While these commentators approach the issues from different perspectives, it is clear that the question of who should regulate Canadian lawyers has been a topic of discussion among Canadian academics such as Richard Devlin,[74] Adam Dodek,[75] John Law,[76] Paul Paton,[77] Michael Trebilcock[78] and Alice Woolley[79] to name just a few.[80] Some

provided ongoing feedback to the government on proposals to expand the rights of foreign legal consultants."

71 See generally Foreign Affairs and International Trade Canada, Negotiations and Agreements, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx>, linking to a number of bilateral and regional agreements.

72 See Canadian Competition Report, *supra* note 44 at 39, citing the OECD's regulatory reform principles: OECD, *Guiding Principles for Regulatory Quality and Performance* (2005), online: <http://www.oecd.org/regreform/liberalisationandcompetitionintervention inregulatedsectors/37318586.pdf>. This Canadian competition initiative may have been inspired, at least in part, by the OECD's examination of the legal profession. See also OECD, *Competitive Restrictions in Legal Professions*, *supra* note 40; and OECD, *Competition in Professional Services*, *supra* note 40.

73 See e.g. Dodek, "Lawyers, Guns and Money," *supra* note 66 at 64-67, citing Harry W Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 Alta L Rev 800.

74 See e.g. Richard F Devlin & Porter Heffernan, "The End(s) of Self Regulation?" (2008) 45:5 Alta L Rev 169 at 171, where self-regulation is described as a "sacred cow" in Canada despite changes elsewhere in the world.

75 See e.g. Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 Osgoode Hall LJ 1 at 40-41.

76 See e.g. John Law, "Regulation and the Legal Profession" (2008) 45:5 Alta L Rev 255 at 256.

77 See e.g. Paton, "Between a Rock and a Hard Place," *supra* note 54 at 87-88.

78 See e.g. Michael J Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alta L Rev 215.

79 See Deborah L Rhode & Alice Woolley, "Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada" (2012) 80:6 Fordham L Rev 2761.

80 See also W Wesley Pue, "Death Squads and 'Directions over Lunch': A Comparative Review of the Independence of the Bar" in Law Society of Upper Canada, *In the Public Interest: The Report and Research Papers of the Law Society's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007) at 83. In discussing the concept of the independence of the bar, he asks independent

Canadian academics have wondered whether Canada will be able to hold on to its current system of lawyer self-regulation. Professor Dodek, for example, has stated that "Canadian lawyers face practical hurdles in the battle against future incursions against self-regulation. This is because experience elsewhere demonstrates that lawyers' double monopoly does not necessarily need to go together."[81] In their article entitled "The End(s) of Self-Regulation,"[82] Professors Devlin and Heffernan argued that "if we really do want an effective, responsive, coherent, and democratically defensible regulatory regime for the Canadian legal profession then we must acknowledge that calibrated regulation is knocking on our door—and that it is not the big bad wolf."[83] Professor Paton argued that "the key to preserving self-regulatory authority by and for the legal profession may lie in a more open debate and a broader conception of service in the public interest, accompanied by some form of co-regulation or a recasting of the roles to be played by other regulatory bodies or agencies in conjunction with self-regulatory bodies."[84] Professors Rhode and Woolley concluded that "international comparisons suggest that such independence can be maintained through co-regulatory structures that also provide greater checks on professional self-interest and greater responsiveness to consumer concerns. The challenge remaining for the United States and Canada is to build on these insights from abroad to inspire national reforms that are long overdue."[85]

Whether one agrees with these excerpts or not, they illustrate that Canadian academics are actively engaged in discussing the issue of who should regulate lawyers. Moreover, in light of the examples cited in this section, I believe that Canada's robust history of self-regulation will not insulate it from the ongoing global trend in which stakeholders increasingly ask who it is that should regulate the legal profession. Canadians should expect to be asked about who should regulate lawyers ever more frequently, and to justify the regulatory structure they recommend, even if those questions are sometimes uncomfortable.[86]

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from whom and independent for whom; these questions are intertwined with questions about who should regulate and why we should regulate. But see Devlin & Heffernan, *supra* note 74 at 206, reflecting on why the debate about who regulates has been so muted in Canada and why Canadians have been "regulatory laggards."

81 Dodek, "Lawyers, Guns and Money," *supra* note 66 at 66.

82 Devlin & Heffernan, *supra* note 74.

83 *Ibid* at 212 [footnote omitted].

84 Paton, "Between a Rock and a Hard Place," *supra* note 54 at 118.

85 Rhode & Woolley, *supra* note 79 at 2790.

86 See Law Society of Yukon, *Update Toward a New Legal Profession Act* (2012), online: <http://lawsocietyyukon.com/forms/updatetowardanewlegalprofessionactpolicypaper.pdf> at 1 [Yukon Updated Report], where the question of self-regulation is noted as having "come under increasing scrutiny both within and outside of Canada."

B. GLOBAL TRENDS REGARDING WHAT (AND WHOM) IS REGULATED

The second global trend we identified in our 2012 article was the issue of the *object* of regulation, or who or what should be regulated. To state it differently, are regulators in the business of regulating providers (who correspond to GATS Mode 4) or are they in the business of regulating services (which correspond to GATS Mode 1)?[87]

This question of who—or what—is regulated is going to be increasingly important in the future. Historically, this question was not asked frequently because there was a more perfect overlap between lawyers and legal services. Legal services were what lawyers provided and if you wanted legal services, you went to a lawyer. Today, however, there is much less overlap between services and providers because lawyers no longer dominate the legal services market the way they once did. Given technology and market developments, the issue of who or what is regulated is one that many regulators have faced, or will face, regardless of their location. Things that look a lot like legal services are being offered by paralegals, by software providers such as Intuit (Willmaker), by internet sites such as LegalZoom, and by publicly traded law firms such as Australia's Slater & Gordon. Regulators now face the question of whether to regulate these providers who are offering things that look very much like legal services. Another significant development related to this issue is the U.K. *Legal Services Act 2007*,[88] which authorized alternative business structures (ABS). In March 2012, the Solicitors Regulation Authority, which is the front-line regulator for solicitors in England and Wales, began issuing ABS licenses.[89] ABS licenses have now been issued to the Co-operative, by an insurance claims company, and to a firm backed by a private equity judge firm, among others.[90] This has added a new wrinkle to the issue of who or what is regulated.

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87 I would like to thank Jordan Furlong for helping me see this distinction so clearly. This was one of several key points he made during his keynote speech at the 2010 Annual Meeting of the Federation of Law Societies of Canada. See Jordan Furlong, "Transformation: Five Catalysts at Work in the Canadian Legal Services Marketplace, A Paper to Accompany the Keynote Presentation," a paper delivered at the 2010 Semi-Annual Conference of Law Societies of Canada, Toronto, Ontario, 19 March 2010 (unpublished, on file with author). For information on GATS Modes 1 and 4, see Terry, "From GATS to APEC," *supra* note 39 at 904.

88 See *Legal Services Act 2007*, *supra* note 28 at Part 5.

89 See e.g. Solicitors Regulation Authority, "SRA announces its first ABS" (28 March 2012), online: <http://www.sra.org.uk/sra/news/press/sra-authorises-first-abs.page>; Solicitors Regulation Authority, "Register of licensed bodies (ABS)," online: <http://www.sra.org.uk/absregister>.

90 *Ibid.*

Another issue related to the question of who or what is regulated is the issue of whether to regulate entities as well as individuals.[91] The U.K. Solicitors Regulation Authority, for example, has decided that it regulates not only solicitors, but also the firms in which they work.[92] Some Australian states regulate entities that have opted to become incorporated legal practices.[93] New York and New Jersey discipline law firms as well as individual lawyers.[94] The ABA Commission on Ethics 20/20 sought input on the concept of entity regulation.[95] In sum, the issue of who or what is regulated is an issue of great interest on the global stage and is one where there have been a number of developments.

1. Canadian Trends Regarding the Object of Regulation

The issue of who or what should be regulated is an issue that has been discussed—and acted upon—in Canada. Indeed the first time I heard this "who or what" issue succinctly framed was when Canadian consultant and "futurist" Jordan Furlong spoke at the 2010 FLSC annual meeting.[96] He advised Canadian regulators that sooner or later, they would have to decide whether they want to regulate providers

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91 Entity regulation might be analogized to GATS Mode 3. For a discussion of the GATS Modes, see Terry, "From GATS to APEC," *supra* note 39 at 904.

92 See generally Solicitors Regulation Authority, "FAQs: Legal Services Act and ABSs," online: <http://www.sra.org.uk/sra/legal-services-act/lsa-questions-faqs.page>. Entity-based regulation began in July 2010.

93 See Terry, Mark & Gordon, "Trends," *supra* note 1 at n 69.

94 See e.g. New York Rules of Professional Conduct, Rule 8.4 (2012), online: <www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/RulesofProfessionalConductasamended122012.pdf>: "Misconduct: A lawyer or law firm shall not...."; Rules Governing the Courts of the State of New Jersey, Rules of Professional Conduct, Rule 5.1(a) (2011), online: <www.judiciary.state.nj.us/rules/apprpc.htm>: "Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct."; Rules of Court Governing the Courts of the State of New Jersey, Part I, Rule 1:20-1(a), online: <www.judiciary.state.nj.us/rules/r1-20.htm>: "Every attorney and business entity authorized to practice law in the State of New Jersey, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3."

95 See American Bar Association Standing Committee on Client Protection, Comments on ABA Commission on Ethics 20/20, "Issues Paper Concerning Alternative Business Structures" (2011), online: <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110627_abs_issues_paper_comments_for_ posting.authcheckdam.pdf>.

96 See Furlong, *supra* note 87.

(such as lawyers) or whether they want to regulate the "product" of legal services. He explained that in the past, these two categories overlapped so much that the question was rarely asked. Because clients can now acquire something that looks very much like legal services from someone other than a lawyer, this has become a more critical question.

Canadian law societies are actively engaged in the types of discussions Jordan Furlong recommended. British Columbia regulators have framed the question broadly by asking who—or what—they should regulate in order to improve access to legal services.[97] The Yukon Law Society has recommended legislative amendments that would allow it to regulate legal services rather than just lawyers.[98] British Columbia has also discussed the question of "whether the Law Society should regulate just lawyers or whether it should regulate all legal services providers."[99] The Law Society of Upper Canada has chosen to regulate paralegals presumably because it wanted to ensure the quality of the legal services clients received.[100] British Columbia Benchers received in their July 2012 agenda a news report about the Washington Supreme Court's adoption of a rule authorizing non-lawyers to assist in certain civil legal matters.[101] The British Columbia Benchers

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97 See Law Society of British Columbia, "Benchers' Agenda" (13 July 2012), online: <http://www.lawsociety.bc.ca/docs/about/agendas/2012-07-13_agenda.pdf> [Law Society of BC Agenda] at 10001-5.

98 See Yukon Updated Report, *supra* note 86 at 2: "In order to be able to respond to changes that may arise in the future, we are proposing that the legislation include enabling provisions to allow for the unbundling of legal services to permit limited retainers and ensure the Law Society is the entity authorized to regulate non-lawyers providing legal services, recognizing that it may not be acted upon for many years, if at all."

99 Law Society of BC Agenda, *supra* note 97 at 10010-14. The Law Society of British Columbia expects to begin work in 2013 on the issue of whether to regulate firms: *ibid* at 6023-34.

100 See generally Law Society of Upper Canada, "Resources for Paralegals," online: <http://www.lsuc.on.ca/for-paralegals/resources-for-paralegals/>. But see Canadian Competition Report, *supra* note 44 at 69, where it is recommended that the Law Societies should not regulate paralegals "given the obvious conflict of interest that arises from having one competitor regulate another." See also David J Morris, *Report to the Attorney General of Ontario: Report of Appointee's Five-Year Review of Paralegal Regulation in Ontario* (November 2012) at 2-12, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/paralegal_review/Morris_five_year_review-ENG.pdf>. The report includes the following findings: "[s]atisfaction levels are...generally high among members of the public who have consumed paralegal services;" "regulation has elevated the reputation and image of the paralegal sector;" "the Law Society has proven to be the appropriate regulatory authority;" and "fees...compare favourably with other sectors." See also Dodek, "Lawyers, Guns and Money," *supra* note 66 at 63, suggesting that the battle between lawyers and paralegals was about a "raw struggle over power."

101 Law Society of BC Agenda, *supra* note 97.

have also considered a pilot project to allow paralegals to appear in Family Court.[102] The President of the Nova Scotia Barristers' Society has asked whether paralegals should be able to provide legal services.[103]

Canada has also experienced discussions—and action—on the question of whether law societies should regulate law firms as well as lawyers. Nova Scotia's *Legal Profession Act*[104] authorizes findings of professional misconduct against law firms.[105] The *Legal Profession Act* in British Columbia now permits the regulation of law firms and the Law Society of British Columbia expects to begin work on the issue of law firm regulation in 2013.[106] Other provinces are also interested in this topic. In August 2012, the Manitoba Law Society newsletter asked whether law firms as well as lawyers should be regulated.[107]

A number of Canadian law societies have also discussed the U.K. ABS developments. For example, this topic has been the subject of a FLSC meeting and discussions among Manitoba[108] and British Columbia regulators.[109] Alberta has discussed with U.K. regulators the issue of ABSs and how consumer interest changes the role of the regulator.[110] The Law Society of Upper Canada has heard from U.K.,

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102 See *ibid* at 14000.

103 See Nova Scotia Barristers' Society (April 2012) 30:1 *The Society Record* at 5, online: <http://nsbs.org/sites/default/files/cms/publications/society-record/srapril2012.pdf>: "First, is it necessary that all legal services and all legal advice must be given only by lawyers?...And if paralegals can adequately represent clients in traffic court, might they also do so in the Small Claims Court? In family Court? Might insurance adjusters represent clients in personal injury matters? Does it require a lawyer to incorporate a company?"

104 SNS 2004, c 28.

105 *Ibid*, s 45(5).

106 Law Society of BC Agenda, *supra* note 97 at 6026.

107 Allan Fineblit, QC, "Regulating Firms" *Communique* (August 2012) at 3, online: The Law Society of Manitoba <http://www.lawsociety.mb.ca/publications/communique 2012/LSM%20-%20August%202012.pdf/view>, stating "You likely have never given it much thought, but those of us who do regulation for a living sometimes wonder why we regulate lawyers and not law firms."

108 See *supra* note 53.

109 Law Society of BC Agenda, *supra* note 97 at 10014: "The Benchers asked the Committee to continue monitoring the development of ABSs in the United Kingdom and the United States of America."

110 See e.g. Law Society of Alberta, "News: Message from the President: June Bencher Retreat Discussed Alternative Business Structures" (14 June 2012), online: <http://www.lawsociety.ab.ca/files/bulletins/Bulletin_2012_06June_14.htm #article1030379>: "For several days, Benchers met in Jasper with invited guests from several other Law Societies and discussed the theme of *Alternative Business Structures: How the consumer interest changes the role of the regulator.* As we strive to be a model regulator, we need to be aware of what is happening in the legal profession and with legal regulators across Canada and around the world. The guest speaker, Samantha Barass, of the Solicitors Regulation Authority in England provided several insightful presentations on her organization's consumer-based regulation which is risk-based and outcome focused. In England, the regulatory objectives are

Australian and U.S.A. representatives regarding ABS.[111] The President of the Nova Scotia Barristers' Society has asked whether the U.K.'s ABS developments should be implemented in Nova Scotia.[112] The Executive Director of the Law Society of Saskatchewan reported to the Benchers on the U.K.'s issuance of an ABS license to the Co-operative and asked, "Could this be the future in Saskatchewan?"[113]

Canadian academics have been engaged with the issue of what or whom should be regulated. Adam Dodek, for example, has remarked that the Law Society of Upper Canada has "morphed from the regulator of the legal profession to the regulator of legal services in Ontario."[114] Professor Dodek has also called for the regulation of law firms.[115] He has tied this "who versus what is regulated" issue to moral questions about access to justice.[116]

In sum, Canadians have certainly been aware of the global trend of asking what should be the object of regulation and whether regulators, whoever they are, should regulate lawyers, firms, legal services, or any combination of these. I expect these Canadian discussions will be ongoing as global events continue to evolve.

C. GLOBAL TRENDS REGARDING WHEN LAWYERS ARE REGULATED

The third development discussed in our 2012 *Trends* article concerned the timing of lawyer regulation. In the U.S.A. and in many other places, the traditional approach to lawyer regulation and enforcement was to wait until a lawyer violated a regulatory provision and then

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centered on protecting and promoting the public interest, improving access to justice, promoting competition in the provision of services, and increasing public understanding of citizens' legal rights and duties" [emphasis in original].

111 See Telephone Conference with Law Society of Upper Canada Alternative Business Structures Working Group (8 January 2013). The author participated in part of this conference call and was advised of these meetings.

112 *The Society Record*, *supra* note 103 at 5.

113 See Tom Schonhoffer, QC, "Bencher Election 2012...and other interesting things you should know" (May 2012) 25:2 *Benchers' Digest* at 2, online: Law Society of Saskatchewan <http://www.lawsociety.sk.ca/media/39218/bd_2012_may.pdf>.

114 Dodek, "Lawyers, Guns and Money," *supra* note 66 at 64.

115 See e.g. Adam M Dodek, "Regulating Law Firms in Canada" (2012) 90:2 *Canadian Bar Rev* 383.

116 "Chief justice warns of 'epidemic' of self-representation in courts," CanWest News Service (13 August 2006), online: <http://www.canada.com>, reporting on Supreme Court of Canada Chief Justice Beverly McLachlin's remarks at the Canadian Bar Association Annual Meeting that due to rising legal fees, the legal system is becoming inaccessible to many Canadians with nearly half of those going to trial representing themselves. See also Dodek, "Canadian Legal Ethics," *supra* note 75 at 40, where he notes that "Access to justice will be the ethical issue for our generation" and links ABS and access to justice issues.

impose a penalty.[117] Although it is not uncommon for U.S.A. disciplinary authorities to now impose educational and other requirements that are intended to be proscriptive to help lawyers avoid future mistakes, disciplinary authorities typically wait until a lawyer has violated a rule of professional conduct before stepping in.

In contrast to this fairly typical *ex post* approach to lawyer regulation, some regulators, in an effort to prevent lawyer mistakes and misconduct, are increasingly turning to *ex ante* regulation and enforcement. The example that has received the most publicity is from New South Wales, Australia. The New South Wales *Legal Profession Act 2004* included language that required "appropriate management systems."[118] The New South Wales Office of the Legal Services Commissioner (OLSC) used this "appropriate management systems" statutory language as the anchor around which it developed an *ex ante* approach to regulation. After consulting with various stakeholders, the OLSC developed a list of ten objectives that an "appropriate management system" should address.[119] The OLSC required each incorporated legal practice to conduct a self-assessment to determine its level of compliance with each of these ten objectives.[120] The OLSC developed a self-assessment form and guidelines that identified key concepts that practitioners might want to consider when determining their compliance with each objective.[121]

New South Wales' switch to an *ex ante* approach has produced impressive results. One empirical study found that incorporated legal practices (ILPs) had a complaints rate that was approximately one-third of the complaints rate of non-incorporated law firms, and that, on average, the complaint rate for self-assessed ILPs dropped by two-

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117 See e.g. ABA, *Model Rules For Lawyer Disciplinary Enforcement* (2002), Rule 9(1): "It shall be a ground for discipline for a lawyer to: (1) violate or attempt to violate the [State Rules of Professional Conduct], or any other rules of this jurisdiction regarding professional conduct of lawyers; (2) engage in conduct violating applicable rules of professional conduct of another jurisdiction." There is some *ex ante* regulation in the United States, such as random trust account audits and mandatory continuing legal education requirements, but regulators do not generally intervene until a disciplinary violation occurs. See also Council of Bars and Law Societies of Europe (CCBE), *Summary of disciplinary proceedings and contact points in the EU and EEA member states* (31 March 2011), online: <http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Table_discipline__Ma1_1335781934.pdf>.

118 *Legal Profession Act 2004* (NSW), *supra* note 28, s 140(3).

119 Office of the Legal Services Commissioner, "Suggestions Concerning the Elements of 'Appropriate Management Systems' for Incorporated Legal Practices in NSW," online: <http://www.olsc.nsw.gov.au/lawlink/olsc/11_olsc.nsf/pages/OLSC_ilp> select "Self-Assessment document Word version."

120 *Ibid.*

121 *Ibid* at 6-7.

thirds after they had completed their first self-assessment.[122] Since these results have been widely publicized, the question of "when" to regulate has become a topic of global discussion.[123]

1. Canadian Trends Regarding the Question of "When" to Regulate

Canadian law societies, like regulators elsewhere in the world, consciously or unconsciously have to decide how proactively to regulate. In other words, by their actions, they reveal the position they have taken on the question of "when" to regulate.

Canadian regulators do not seem to perceive themselves as especially proactive. For example, during the September 2012 International Conference of Legal Regulators, the Director of Regulation for the Law Society of Upper Canada indicated that the Law Society "had adopted a stance that was midway between proactive and reactive," but observed that it was "possibly closer to a reactive approach."[124] She also noted that there was "no gathering storm" that required a change of approach.[125]

Despite the observation that there is no "gathering storm" on this issue, I suspect that in the future, Canadian regulators will more explicitly consider the issue of the timing of regulation. First of all, I would note that some law societies, such as the Law Society of Saskatchewan, will respond proactively at least on occasion.[126] Second, Canadian regulators were early leaders in taking a proactive role to make sure that Canadian lawyers used technology competently and appropriately.[127] Finally, Canadian regulators are familiar with the

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122 Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37:3 J L & Soc 466 at 485, 488.

123 See e.g. International Conference of Legal Regulators, "Proactive Regulation" (28 September 2012), online: <http://www.international-conference-of-legal-regulators.org/the-london-conference/proactive-regulation>. See also The Fordham Colloquium on Globalization and the Legal Profession (2011), online: <http://law.fordham.edu/louis-stein-center-for-law-and-ethics.1962.htm>.

124 International Conference of Legal Regulators, *ibid.*

125 *Ibid.*

126 See Law Society of Saskatchewan, *Annual Report 2010* at 2, online: <http://www.lawsociety.sk.ca/media/1642/ar2010.pdf>: "The Law Society continues to proactively assist members with practice management challenges as a matter of first recourse wherever appropriate."

127 See e.g. Federation of Law Societies of Canada, *Guidelines on Ethics and New Technology* (1999) at 1, noting that a lawyer must either maintain "a reasonable understanding of the technology used in the lawyer's practice" or have access to someone with technological competence. See also Canadian Bar Association, "Information to Supplement the Code of Professional Conduct: Guidelines for Practicing Ethically with New Information Technologies" (September 2008), online: <http://www.cba.org/cba/activities/pdf/guidelines-eng.pdf>. In 2012, technological competence was added to the comment to American Bar

proactive approach used in Australia and the results that have been achieved. Many Canadian regulators attended the September 2012 International Conference of Legal Regulators, which included a session on the topic of proactive regulation.[128] Indeed, Australian regulators have travelled to Canada to meet with Canadian regulators to talk about the Australian proactive system.[129] The proactive Australian approach has been discussed at Canadian law society meetings and in law society publications.[130] Thus, it is clear that Canadian regulators are familiar with the "when to regulate" issue and consider it a topic worthy of discussion.

It is also noteworthy that several Canadian academics have called for a more proactive system of regulation. For example, in 2012, Canadian professor Alice Woolley and U.S.A. professor Deborah Rhode wrote an article on comparative lawyer regulation.[131] This article included, *inter alia*, a discussion of the Australian system of proactive lawyer regulation and cited the empirical study that found that complaints went down by one-third after imposition of the proactive "appropriate managements systems" approach.[132] The final section of their article was entitled "An Agenda for Reform" and included a number of very specific reforms for the U.S.A. and for Canada. This section included a call for more proactive Canadian regulation: "Law societies should emphasize standard-setting and other proactive oversight activities, rather than simply responding to specific instances of serious professional misconduct."[133]

Professor Woolley is not the only Canadian legal academic to have called for a more proactive system of lawyer regulation. As the

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Association Model Rule of Professional Conduct 1.1, upon the recommendation of the ABA Commission on Ethics 20/20. See American Bar Association, "Amended Resolution 105A" (August 2013), online: <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808/revised_resolution_105a_as_amended.authcheckdam.pdf>, amending comment six to state "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

128 The conference included regulators from British Columbia, Manitoba, Nova Scotia, Ontario, and the President, Chief Executive, and Senior Director of Regulatory and Public Affairs from the Federation of Law Societies of Canada. See *supra* note 123.

129 See e.g. email from Tahlia Gordon to author (10 January 2013) confirming meetings between Australian regulators and representatives from the Law Society of Upper Canada (available from the author).

130 See e.g. Law Society of Saskatchewan, *Annual Report 2011*, *supra* note 59 at 3: "Beyond Canada's borders the changes become truly shocking for most local practitioners. Our common law cousins in Britain, Scotland, Ireland and Australia are undergoing a revolution in the delivery of legal service, which is being driven by consumer needs."

131 Rhode & Woolley, *supra* note 79.

132 *Ibid* at 2783.

133 *Ibid* at 2789.

prior section noted, Professor Adam Dodek has called for regulation of law firms. In his "Regulating Law Firms" article, he recommended that Canada adopt a rule similar to the ABA Model Rule of Professional Conduct 5.1, which requires law firm partners and those with supervisory authority to have "systems" in place to reduce ethical violations.[134] As I have suggested in remarks to the National Organization of Bar Counsel and to the U.S. Conference of Chief Justices, ABA Model Rule 5.1 could easily be adapted to implement the Australian type of proactive lawyer regulation.[135] If Professor Dodek's recommendation were heeded and if the Canadian Code of Professional Conduct were amended to include a rule that was analogous to ABA Model Rule 5.1, then this rule could become the lynchpin of a system of proactive *ex ante* regulation.

In sum, while it may be true that there is no gathering storm on the issue of when lawyers are regulated, I suspect that the existing "sprinkles" described in this section will spur additional discussions and perhaps even lead to changes in when Canadian lawyers are regulated.

D. GLOBAL TRENDS REGARDING WHERE LAWYERS ARE REGULATED

The fourth section of our 2012 article identified developments related to the location of regulation. As our prior article noted, lawyer regulation seems to be in the midst of a Copernican revolution. Historically, the legal profession and its regulators were defined by geography. Lawyers practiced in one geographic area, and the regulators with jurisdiction over those lawyers were located in the same geographic area. Today, regulatory jurisdiction is still associated with a specific political geographic entity, but the practice of law can be, and often is, virtual, transnational, and borderless. Technological advances, including the Internet, are the primary reasons why there are new questions about where regulation applies. If a lawyer is physically located in one jurisdiction but operates online and deals with clients in another jurisdiction, where is the lawyer subject to regulation? If a lawyer operates a website, is that website and that lawyer subject to regulation in all jurisdictions from which the

134 *Supra* note 115 at 436: "Law societies should impose positive obligations on law firms to create systems and policies to ensure compliance with law society rules. The model here is a combination of ABA Model Rule 5.1(a) and IIROC's rule for registered firms."

135 I have suggested adding two questions to lawyers' bar dues statements:

1) *Are you subject to Rule 5.1? (Note: asking this question should make all active lawyers read the rule at least once a year); and*
2) *If so, are you in compliance with this rule?*

I would have a relevant webpage provide resources that would help lawyers who do not currently have systems to develop them (much of these systems are law practice management systems). This is one of the articles I plan to write during my sabbatical.

website may be viewed? May the lawyer's home jurisdiction regulate the lawyer for conduct that occurs when the lawyer physically leaves the geographical boundaries of the jurisdiction in which the lawyer was licensed?

As these examples illustrate, the switch away from a geographically-based system of law practice creates difficult issues for regulators. Around the world, regulators are having to decide how to reconcile the realities of virtual law practice with the traditional regulatory approach in which their authority was framed in geography-based terms.

1. Canadian Trends Regarding the Question of "Where" One Regulates

Canadian regulators and legal service providers, like those elsewhere in the world, cannot escape questions about where they regulate or are regulated. For example, regulators and lawyers have had to decide how to handle issues of cloud computing in Canada.[136] Regulators have had to decide how Canadian rules apply to virtual law firms.[137] Canadian virtual law firms exist and there have already been disagreements between regulators and such firms.[138] Commentators

136 See Shane Schick, "Clearing the Air on Cloud Computing" *Canadian Lawyer Magazine* (December 2012), online: <http://www.canadianlawyermag.com/4442/clearing-the-air-on-cloud-contracts.html>. One of the leading cloud computing providers is Canadian. See CLIO, "About CLIO," online: <http://www.goclio.com/about> (a web-based management system). See also Jack Newton, "Ten Reasons to Adopt Cloud Computing for your Law Office" *Family Lawyer Magazine* (9 May 2012), online: <http://familylawyermagazine.com/articles/10-reasons-to-adopt-cloud-computing-for-your-law-office>.

137 Law Society of Upper Canada, "Running a Virtual Law Office" (2010), online: Law Society of Upper Canada <http://ecom.lsuc.on.ca/cpd/product.jsp?id+CLE10-0110301> select "Program Details"; Law Society of British Columbia, "The Law Society and virtual firms" (Fall 2010) *Benchers' Bulletin*, online: <http://www.lawsociety.bc.ca/page.cfm?cid=164&t=The-Law-Society-and-virtual-firms>; Law Society of Alberta, "Alternative Law Firms Leverage Technology to Meet Client Needs: An Excerpt of Panel Presentations made at the Law Society of Alberta's Plenary" (March 2011) 9 *The Advisory* at 6, online: <http://www.lawsociety.ab.ca/files/newsletters/Advisory_Volume_9_Issue_1_Mar2011.pdf>.

138 See e.g. Law Society of British Columbia, "The real world of virtual law firms" (Fall 2010) *Benchers' Bulletin*, online: <http://www.lawsociety.bc.ca/page.cfm?cid=162&t=The-real-world-of-virtual-law-firms>; "Law Society of British Columbia Comments on Virtual Law Practice" (2010), online: Virtual Law Practice <http://virtuallawpractice.org/2010/10/law-society-of-british-columbia-comments-on-virtual-law-practice/>. Nicole Garton-Jones, owner of Heritage Law BC, a virtual law firm in Canada, wrote a blog post taking note of the most egregious misstatements from an article found in the Fall 2010 issue of the Law Society of British Columbia's *Benchers' Bulletin* in "Thoughts on the Law Society of BC Bencher Bulletin Feature Article: The Real World of Virtual Law Firms" (15 October 2010), online: Slaw <http://www.slaw.ca/2010/10/15/thoughts-on-the-law-society-of-bc-bencher-bulletin-feature-article-the-real-world-of-virtual-law-firms>.

are also very interested in figuring out how technology will change legal practice and regulation in Canada.[139]

This issue about "where" one regulates can surface in contexts other than virtual law offices or cloud computing. Legalwise, for example, is a leading Canadian legal services outsourcing provider that uses Canadian lawyers to supervise work outsourced to India.[140] In other countries, there has been significant controversy over the extent to which domestic regulators should assume responsibility for outsourced work, especially if outsourced overseas.[141] Given the existence of Canadian-based outsourcing companies, it is certainly easy to imagine that the same issues could arise in Canada. Third party litigation funding can also create issues as providers seek creative ways to make this type of funding consistent with local regulations.[142]

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139 See e.g. Mitchell Kowalski, *Avoiding Extinction: Reimagining Legal Services For The 21st Century* (Chicago: American Bar Association, 2012). This well-received book by a Canadian lawyer was the subject of a panel session at the University of Saskatchewan's 2012 Future of Law Conference. See also Darryl Mountain, "Regulatory Barriers to Virtual Law Practice" (14 January 2011), online: Slaw <http://www.slaw.ca/2011/01/14/regulatory-barriers-to-virtual-law-practice>; Richard Granat, "The Kre8tive Law Group Launches First DirectLaw Virtual Law Firm in Canada" (18 February 2010), online: eLawyering Blog <http://www.elawyeringredux.com/2010/02/articles/virtual-law-firms/the-kre8tive-law-group-launches-first-directlaw-virtual-law-firm-in-canada/>; David J Bilinsky, "2013 Tips and Predictions—Part Three!" (31 December 2012), online: Thoughtful Legal Management <http://thoughtfullaw.ca/2012/12/31/2013-tips-and-predictions-part-three>. Mr. Bilinsky is a Practice Management Consultant and lawyer for the Law Society of British Columbia. His final blog post of 2012 discussed advice from Stephanie Kimbro, who is one of the most high-profile American lawyers practicing virtual law.

140 See Legalwise, online: <http://www.legalwise.ca>: "Legalwise provides high quality legal services at lower costs to law firms and in-house lawyers in Canada. Services are performed by English common law trained lawyers in India and are vetted for quality control by lawyers in Canada."

141 See e.g. UK Solicitors Regulation Authority, "SRA Consultation on Handbook Amendments Relating to International Practice" (14 March 2013), online: <http://www.sra.org.uk/sra/consultations/international-practice.page>; Attorneys' Liability Assurance Society, "Comments to the ABA Commission on Ethics 20/20 on Revised Draft Resolution for Comment—Outsourcing" (2 April 2012), online: American Bar Association <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/alas_finalreviseddraftproposals.authcheckdam.pdf>. Although the first sentence of the comment appropriately directs lawyers to competently choose outsourcing service providers, the last sentence effectively requires lawyers to guarantee the quality of the outsourced work. See also ABA Commission on Ethics 20/20, *Work Product*, online: <http://www.americanbar.org/groups/professional_responsibiilty/aba_commission_on_ethics_20_20/work_product.html>, which includes links to material on outsourcing.

142 See e.g. Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third Party Litigation Funding" (2013) 61 Am J Comparative L 93 at 139-40, noting the different approaches in the three countries and pointing out that in the absence of formal

Let me offer two final observations regarding the issue of "where regulation occurs." Professor Adam Dodek has commented that one of the macro ethical challenges for Canadian legal ethics in the twenty-first century will be the question of the ethical jurisdiction over Canadian lawyers' conduct abroad.[143] I also note that the issue of boundaries was one of the themes of the University of Saskatchewan's November 2012 Future of Law conference.[144] In short, there is every reason to believe that in Canada, as elsewhere, one of the key regulatory trends in the future will be determining where one regulates (or is subject to regulation).

E. GLOBAL TRENDS REGARDING WHY LAWYERS ARE REGULATED

Our 2012 *Trends* article (and our 2012 *Regulatory Objectives* article) noted that there has been increasing global discussion about *why* lawyers are regulated. It is important to realize that this *why* variable is independent from the other variables of *who* regulates, *who* is regulated, *what* conduct is regulated, *when* regulation occurs, and *how* regulation occurs.

Many jurisdictions, including the U.S., have not succinctly articulated their regulatory goals and purposes.[145] Although the lack of explicit regulatory objectives seems to be the global norm, there are exceptions. The legal services acts adopted in the U.K. and in Scotland identify in their first section the "regulatory objectives" that must be the basis of all lawyer regulation.[146] Regulatory objectives are included in draft laws currently pending in Ireland, India, and Australia.[147] Legal regulators and others have commissioned or

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rules requiring disclosure, as they have been introduced in Australia, Canadian judges appear intent on crafting guidelines favouring transparency; Arnold Ceballos, "Third Party Litigation Funding: Will It Increase Access to Justice in Canada?" *Lawyers Weekly* (7 March 2008), online: <http://www.lawyersweekly.ca/index.php?Section=article&articleid=632>.

143 See e.g. Dodek, "Canadian Legal Ethics," *supra* note 75.

144 See University of Saskatchewan, Future of Law Conference, online: <http://www.law.usask.ca/documents/FutureofLawScheduleFinalVersion.pdf>: Panel 1: Legal Traditions and Disappearing Jurisdictional Boundaries; Panel 3: Future Models of Legal Services—Readers Meet Author of *Avoiding Extinction: Reimagining Legal Services for the 21st Century*; Panel 9: Technology and the Law. The four themes of this conference were: 1) developing technology and the nature of legal practice; 2) disappearing jurisdictional boundaries and resulting impacts on the practice of law; 3) ongoing evolution of modes of dispute resolution and challenges associated with those evolutions; and 4) changing expectations for legal education and the self-regulating profession.

145 See Terry, Mark & Gordon, "Trends," *supra* note 1.

146 *Legal Services Act 2007* (UK), *supra* note 28, s 1; *Legal Services (Scotland) Act, 2010*, *supra* note 28, s 1.

147 See generally Terry, Mark & Gordon, "Trends," *supra* note 1.

prepared studies that address the objectives of regulation.[148] In short, there seems to be increased global interest in the question of why lawyers should be regulated.

1. Canadian Trends Regarding the Question of "Why" One Regulates

For a number of years, Canada has had express regulatory objectives in its provincial and territorial legal profession acts.[149] Until recently, however, Canada's regulatory objectives do not appear to have been the subject of much debate.[150] Probably as a result of the 2007 U.K. *Legal Services Act* and the vigorous debates surrounding the adoption of its regulatory objectives,[151] however, there has been increased

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148 See e.g. Christopher Decker & George Yarrow, *Understanding the economic rationale for legal services regulation* (31 October 2010), Legal Services Board (UK) <http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/economic_rationale_for_Legal_Services_Regulation_Final.pdf>; Laurel S Terry, "Understanding the Economic Rationale for Legal Services Regulation: The Importance of Interdisciplinary Dialogue" in Legal Services Board (UK), *Understanding the economic rationale for legal services regulation—a collection of essays* (March 2011), online: SSRN <http://papers.ssrn.com/5013/papers.cfm?abstracvt_id=1909644>; Rt Hon Lord Hunt of Wirral, MBE, *The Hunt Review of The Regulation of Legal Services* (October 2009), online: <http://www.johnflood.com/summerschool/Hunt_Review.pdf>; Nick Smedley, *Review of The Regulation of Corporate Legal Work* (31 March 2009), online: <http://www.johnflood.com/summerschool/Smedley_Report_2009.pdf>; OECD Reports, *supra* note 40; Copenhagen Economics, *The Legal Profession: Competition and Liberalisation* (January 2006), online: <http://www.ccbe.org/fileadmin/user_upload/NTCdocument/The_legal_profession/1-1195120689.pdf>.

149 See Terry, Mark & Gordon, "Trends," *supra* note 1 at 2703-04; *Legal Profession Act*, RSA 2000, c L-8, s 49(c); *Legal Profession Act*, SBC 1998, c 9, s 3(a); *Legal Profession Act*, CCSM, c L107, s (3)(1); *Law Society Act*, SNB 1996, c 89, s 5(a); *Law Society Act*, SNL 1999, c L-9.1, s 18(1)(1); *Legal Profession Act*, RSNWT 1998, c L-2, s 22(a); *Legal Profession Act*, SNS 2004, c 28; *Law Society Act*, RSO 1990, c L.8; *Legal Profession Act*, SPEI 1992, c L-6.1; *An Act Respecting the Barreau du Québec*, RSQ, c B-1; *Legal Profession Act*, 1990, SS 1990, c L-10.1; *Legal Profession Act*, RSY 2002, c 134.

150 See e-mail from Don Thompson, Executive Director of the Law Society of Alberta, to Laurel S Terry (20 September 2011; on file with author); e-mail from Malcolm L Heins, Chief Executive Officer, Law Society of Upper Canada, to Laurel S Terry (17 October 2011; on file with author), indicating that there had been little issue when Ontario amended its objectives since they largely mirrored the Law Society's role or purpose statement and its commentary from 1994; e-mail from Marilyn Billinkoff, Executive Director, Law Society of Manitoba, to Laurel S Terry (19 October 2011; on file with author), stating that when the current Manitoba *Legal Profession Act* was enacted in 2002, "the [governing body of the Law Society, which consists of individuals who are called] benchers recommended that a purpose statement be added." The government agreed and there was no debate about the purpose.

151 See Terry, Mark & Gordon, "Adopting Regulatory Objectives," *supra* note 52 at 2698-2700.

interest in Canada in the topic of why lawyers should be regulated.[152] The advent of alternative business structures in the U.K. may also have prompted Canadian discussions about regulatory objectives. The following are a few examples that illustrate increased Canadian interest in the topic of regulatory objectives. The Yukon Law Society issued a lengthy discussion paper in 2011 that asked, *inter alia*, whether to amend the Yukon *Legal Profession Act*, including its regulatory objectives.[153] Regulatory objectives (and ABSs) were one of the topics at the 2012 FLSC conference held in Yellowknife.[154] Saskatchewan amended its *Legal Profession Act*[155] in 2010 to codify the duty of the Law Society; section 3 now states that the Law Society shall discharge its responsibilities "in the public interest." In 2012, British Columbia revised its objectives for the legal profession.[156] The Law Society of Upper Canada held a briefing session in 2013 concerning the objective of access to justice and whether alternative business structures might be a way to achieve that.[157]

Canadian academics and commentators have also been engaged in discussions about the purposes of regulation. Professor Woolley, for example, concluded in 2007 that "as currently justified, administered and applied the good character requirement cannot be defended and must not be maintained" but recommended that a reformed version of the good character requirement be retained.[158] Her 2012 Fordham article offered a number of specific ideas for reforms in the operation of the lawyer regulatory and disciplinary system. Gavin MacKenzie, who is the author of a legal ethics casebook and a leading commentator, as well as a Bencher in the Law Society of Upper Canada, has argued

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152 The Northwest Territories is considering an amendment that would spell out the Act's objectives more clearly. See e-mail from Linda Whitford, Executive Director, Law Society of the Northwest Territories, to Laurel S Terry (18 October 2011; on file with author). See also Law Society of Yukon, "Toward a New *Legal Profession Act*: A Discussion Paper" (12 May 2011), online: <http://www.lawsocietyyukon.com/forms/towardanewlegalprofessionact.pdf> [Yukon Discussion Paper].

153 See Yukon Discussion Paper, *ibid.* See also Yukon Updated Report, *supra* note 86 at 1, asking the question: "What is the duty owed by the Law Society and to whom?"

154 See email from Jonathan G Herman, Chief Executive Officer, Federation of Law Societies of Canada to author (4 February 2013; on file with author).

155 *Supra* note 149.

156 The *Legal Profession Act*, *supra* note 149, was amended in 2012. A red-line version showing the changes is available online: <http://www.lawsociety.bc.ca/docs/publications/ebrief/LegalProfessionAct-Bill40.pdf>. Among other things, the 2012 amendments deleted the provision that said that one of the objects of the Law Society was to "uphold and protect the interests of its members."

157 *Supra* note 111, citing the January 8, 2013 teleconference.

158 See Woolley, "Tending the Bar," *supra* note 58 at 23: "the assertion that the good character requirement is necessary for maintenance of the legal profession's reputation...can be criticized on the basis that it is simply an attempt to ensure that lawyers 'look good' to the public, and can maintain their 'regulatory autonomy and economic monopoly.'"

that the law societies have often overlooked their obligation to ensure the competency of their members.[159] Professors Richard Devlin and Porter Heffernan have criticized the current system, noting, among other things, that it "is disconcerting that the most effective method of regulating legal fees is the one which removes control from the hands of the profession. If consumers can be guaranteed fair billing only through recourse to the courts, that would seem to be a significant institutional failure of self-regulation."[160] This latter article was one of a number of articles that addressed the goals of regulation in the 2008 Alberta Law Review Symposium honoring the Law Society of Alberta's 100th Anniversary.[161] This interest by academics and the law societies suggests that in Canada, as is true elsewhere in the world, there will be ongoing discussions about why one regulates lawyers (and that these discussions will inform the discussion of the issues mentioned in this article.)[162]

F. GLOBAL TRENDS REGARDING HOW LAWYERS ARE REGULATED

The sixth item discussed in our *Trends* article was increased interest in issues related to the method of regulation, or *how* one regulates. There are at least two different kinds of "how" questions that have been the subject of recent discussions. A number of commentators and entities have questioned the desirability of continuing to use a "one size fits all" method of lawyer regulation.[163] They have asked,

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

160 *Supra* note 74 at 180.

161 See "Special Issue: Law Society of Alberta 100th Anniversary Conference: Canadian Lawyers in the 21st Century" (2008) 45:5 Alta L Rev. Some of these articles focus on the objectives that seemed to be motivating lawyer self-regulation in the past. See also W Wesley Pue, "Cowboy Jurists & the Making of Legal Professionalism" (2008) 45:5 Alta L Rev. 29. Others took a more contemporary approach. See e.g. Devlin & Heffernan, *supra* note 74.

162 The issue of why regulation exists (and whether it is for lawyer's self-interest or for public interest) is a topic of interest to regulators themselves. For example, Gordon Turriff, QC, who is a Bencher in the Law Society of British Columbia, is a vocal advocate in favor of lawyer independence and self-regulation. He is a strong defender that the purposes of regulation are appropriate. See Gordon Turriff, "The Consumption of Lawyer Independence" (2010) 17 Int'l J Legal Profession 283; Gordon Turriff, "Self-governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia" (17 September 2009; speech on file with author). Professor Dodek has argued that law firms should be regulated "primarily on the basis of ensuring public confidence in self-regulation and respect for the rule of law and only secondarily out of concerns regarding public protection." See Dodek, "Regulating Law Firms," *supra* note 115 at 387.

163 See e.g. Smedley, *supra* note 148. In 2009, the influential Smedley Report recommended differentiated types of regulation depending on the size of the law firm and the sophistication of the clients.

for example, whether large firms who represent sophisticated clients should be regulated differently than lawyers who represent "one-off" clients who may need extra protection.[164]

A second question concerns the style of regulation. Whether regulation should use "rules" or "standards" is not a new debate.[165] However, there seems to be increased interest in this topic, which recently has been framed as whether jurisdictions should adopt an "outcomes-based" approach to lawyer regulation.[166] An outcomes-based approach to lawyer regulation uses broad principles instead of detailed rules for regulation.[167] The most high profile example of outcomes-based regulation is the U.K. Solicitors Regulation Authority's new Handbook for solicitors.[168] The U.K. Handbook took effect on October 6, 2011 and uses an outcomes-based regulatory approach.[169] It has garnered a lot of attention.[170] Outcomes-focused regulation is also a fundamental feature of the system in New South Wales, Australia, for regulating incorporated legal practices and was incorporated within the underlying Australian legislation that authorized ILPs.[171]

These domestic discussions about how one should regulate lawyers have happened against the backdrop of greater global interest in

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164 See e.g. Commission of the European Communities, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Professional Services—Scope for More Reform," COM (2005) 405 final (Brussels: EC, 2005) at para 13, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0405:FIN:EN:PDF> [CEC Report]: "The key finding is that one-off users, who are generally individual customers and households, may need some carefully targeted protection. On the other hand, the main users of professional services—businesses and the public sector—may not need, or have only very limited need of, regulatory protection given they are better equipped to choose providers that best suit their needs.... The differing interests of these groups should therefore be paramount in reviewing existing regulation and rules."; Hunt, *supra* note 148; Smedley, *supra* note 148.

165 See e.g. Mary C Daly, "The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers" (1999) 32 Vand J Transnat'l L 1117 at 1117.

166 See generally Solicitors Regulation Authority, "Outcomes-focused regulation at a glance" (10 October 2011), online: <http://www.sra.org.uk/solicitors/freedom-in-practice/OFR/ofr-quick-guide.page>.

167 See Terry, Mark & Gordon, "Trends," *supra* note 1 at 2681, n 100, citing the Hunt report and articles by Professor Julia Black and others.

168 *Supra* note 166. See also The Law Society of England and Wales, "Outcomes-Focused Regulation: Overview" (20 September 2011), online: <http:www.lawsociety.org.uk/advice/practice_notes/ofr-overview/>; and Solicitors Regulation Authority, "About the SRA Handbook," online: <http://www.sra.org.uk/handbook>, which includes information about, and links to, the current handbook.

169 SRA Handbook, *ibid.*

170 See e.g. Anthony Davis & Frank Maher, "New law firm regulations in England and Wales will affect US firms" (21 July 2011) Nat'l LJ, online: <http://www.law.com>.

171 See Terry, Mark & Gordon, "Trends," *supra* note 1 at 2681.

regulatory principles. The OECD and APEC, for example, have ongoing projects that focus on regulatory "best practices."[172] Thus, as these examples illustrate, there is great interest in the topic of how one regulates.

1. Canadian Trends on "How" to Regulate

Canada has also experienced the sixth trend of discussions about "how" to regulate. One such topic of discussion has been the desirability of unified regulation for the entire legal profession. For example, in 2008 Professor Allan Hutchinson questioned whether government lawyers should be subject to the same type of evaluation as lawyers in private practice:

> Of course, not all lawyers practice in the same circumstances. Indeed, it can be persuasively argued that it is no longer accurate or useful to talk about a Canadian legal profession or a typical Canadian lawyer. Instead, there is now a multiplicity of roles and positions, ranging from the solo practice to the large corporate bureaucracy to the small partnership to government. The days of the fungible lawyer or legal practice are long gone. A diverse group of lawyers is engaged in a wide variety of practices.... It might be thought, therefore, that this changing landscape of professional practice would have significant implications for how the rules and models of ethical lawyering apply: different kinds of lawyers might be treated differently in terms of the ethical obligations placed upon them and the professional expectations demanded of them. Whether and how this will be done has not yet become clear.[173]

The same rationale that Professor Hutchinson used in his argument might be used to suggest differential regulation for lawyers who represent sophisticated, repeat-player multinational corporate clients

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172 See OECD, "Regulatory Reform," online: <http://www.oecd.org/regreform>; OECD, "The APEC-OECD Co-operative Initiative on Regulatory Reform," online: <http://www.oecd.org/gov/regulatory-policy> select: "Our work with countries," select: "Cooperation with non-member countries," select: "APEC-OECD Co-operative Initiative." The United States, Canada, and Australia are members of APEC and the OECD. See OECD, "Members and partners," online: <http://www.oecd.org/about/membersandpartners> and APEC, "Member Economies," online: <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

173 Allan C Hutchinson, "'In The Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46 Osgoode Hall LJ 105 at 111-12 [footnotes omitted].

and lawyers who represent individuals.[174] The 2007 Canadian Competition Bureau report on self-regulated professions, which was described earlier in this article, also shows Canadian interest in the topic of how one should go about regulating. The beginning of that report included a chapter devoted to the principles of regulation which relied in part on the OECD's work on competition and regulatory theory.[175] The provincial best practices acts cited earlier provide a third set of examples that demonstrate Canadian interest in the topic of how one regulates. At least three provincial legislatures thought it necessary to provide statutory guidance for law societies in regulating lawyer admissions.[176]

Legal academics have also been engaged in discussions about how one should regulate lawyers. For example, in 2012, Professor Alice Woolley wrote an essay that posed the following questions about regulation: "Why does Canada regulate lawyers in the way that it does? How should Canada regulate lawyers? Should it regulate the practices it currently regulates? Should Canada regulate other things as well (or instead)?"[177] She argued that her contribution should be "understood as part of a larger project of encouraging the public, the government, the judiciary, and lawyers themselves to engage with regulation of lawyers as a serious matter of interest and inquiry."[178] In another article, she compared the Canadian approach to regulation with the outcomes-focused approach that has been adopted in the U.K. and suggested specific aspects that Canadian regulators should adopt.[179]

On the issue of outcomes—focused regulation, it is perhaps worth noting that in other fields, Canadian regulators have adopted an outcome-focused, or a principles-based approach to regulation.[180]

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174 See *supra* notes 148 and 164, citing the Smedley Report and the CEC Report, respectively, both of which suggested that differential regulation might be appropriate; ABA Commission on Ethics 20/20, "Issues paper Choice of Law in Cross Border Practice" (18 January 2011), online: <http://americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/20111801.authcheckdam.pdf>.

175 *Supra* note 44, at Chapter 2, especially at 39-40 where the OECD's work is cited. There was a significant, but unnoted, overlap between the Competition Bureau's principles of effective regulation set forth on pages 27-29 and the principles cited in Recommendation 1 in OECD, *Guiding Principles for Regulatory Quality and Performance*, *supra* note 72.

176 See *supra* notes 50 and 51 for a discussion of the Ontario, Manitoba, and Nova Scotia Acts.

177 Alice Woolley, "Why Do We Regulate Lawyers?" in David L Blaikie, Thomas A Cromwell & Darrel Pink, eds, *Why Good Lawyers Matter* (Toronto: Irwin Law Inc, 2012) at 106.

178 *Ibid* at 118.

179 See Woolley, "Rhetoric and Realities," *supra* note 54 at 167-94 with her specific suggestions made at 192-93.

180 See e.g. Government of Saskatchewan, "Results-Based Regulation," online: Ministry of Environment <http://www.environment.gov.sk.ca/regulations>.

This principles-based approach has some strong supporters.[181] At least one commentator has called for a compliance-based system of lawyer regulation, which presumably reflects a similar type of principles-based approach.[182]

In sum, the same types of "how" questions that have been raised elsewhere in the world have also been raised in Canada and, undoubtedly, will continue to be raised. Thus, it appears that all six of the global trends we identified in our 2012 article have been the topic of discussion or action in Canada.

IV. THE RELEVANCE OF THESE TRENDS TO SASKATCHEWAN

This article has argued that some of the same lawyer regulatory trends that are relevant globally also appear in Canada, but what about Saskatchewan? Are any of the trends described in this article relevant to the future of lawyer regulation in Saskatchewan?[183] At first glance, it might appear that none of the global or Canadian trends identified in this article are particularly relevant to Saskatchewan lawyers, its lawyer regulators, or the public. After all, Saskatchewan does not have the same type of global law firms that one might find in Toronto, New York, or London. Whereas in 2010 Ontario had 5,335 law firms with 51 or more lawyers, Saskatchewan had only three law firms with more than 51 lawyers and only one law firm with 26-50 lawyers.[184] Indeed, in 2010, Saskatchewan only had 1,929 practicing lawyers.[185] One can certainly understand why Saskatchewanians might believe that there are more pressing issues than the global regulatory trends identified in this article. They might believe that issues related to aging lawyers,[186] the shortage of lawyers in rural areas,[187] the cost of

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181 See e.g. Cristie Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45:1 Am Bus LJ 1, endorsing British Columbia's principles-based approach to securities regulation; Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55 McGill LJ 257, endorsing British Columbia's principles based approach to securities regulation, even in the wake of the global economic collapse.

182 See Dodek, "Regulating Law Firms in Canada," *supra* note 115 at 420-39, where he discusses the emergence of compliance-based systems in other countries and argues for elements to be implemented into the Canadian regulation system.

183 A similar question might be asked with respect to provinces other than Ontario.

184 See Federation of Law Societies of Canada, "2010 Statistical Report," online: <http://www.flsc.ca/_documents/2010-Statistical-Report.pdf>.

185 *Ibid.* This represents a total membership of 2,416 less 487 non-practicing members.

186 Law Society of Saskatchewan, *Annual Report 2011*, *supra* note 59 at 3: "Inside the province we watch developing problems with access to legal services from several different causes. The first is the demographics of the profession...At current rates of admissions and attrition, and assuming economic and population growth, there will be a shortage of lawyers. The shortage will likely be exacerbated in rural areas."

187 Nova Scotia Barristers' Society, *Annual Report 2012* at 33, online: <http://nsbs.org/annual-reports> select: "2012 NSBS Annual Report."

legal services, or access to justice are more important.[188] After all, in 2010, approximately 40 per cent of Saskatchewan lawyers had been members of the bar for twenty-six or more years.[189]

Although it might be tempting to conclude that the trends identified in this article are not particularly relevant to those who live in Saskatchewan, I disagree. Although other issues may be equally or more pressing, I submit that Saskatchewan lawyers and their regulators also need to be aware of these global trends. Although Saskatchewan may not have experienced globalization to the same degree as some other provinces, it is not immune from globalization and the technological forces which have changed, and will continue to change, the world. For example, on December 6, 2012, the Law Society of Saskatchewan posted on its website a letter from the Farm Land Security Board that said "Saskatchewan is seeing an unprecedented increase in the demand for land...not only coming from local farmers, but from investors across Canada and beyond."[190] Saskatchewan is a major supplier of potash and uranium and is home to a substantial oil industry, all of which are of international interest.[191]

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188 See e.g. Canadian Bar Association, "CBA launches three initiatives on access to justice, future of legal practice, and enhancing inclusion in law firms" (12 August 2012), online: <http://www.cba.org/CBA/News/2012_Releases> select under August 2012; Dodek, "Canadian Legal Ethics," *supra* note 75 at 38: "the leading ethical challenge for the profession and for the legal system is access to justice"; Roy McMurtry, "More and More Lawyers; Less and Less Justice" in David L Blaikie, Thomas A Cromwell & Darrel Pink, eds, *Why Good Lawyers Matter* (Toronto: Irwin Law Inc, 2012); Law Society of Saskatchewan, *Annual Report 2011*, *supra* note 59 at 3: "Inside the province we watch developing problems with access to legal services from several different causes. The first is the demographics of the profession. At current rates of admissions and attrition, and assuming economic and population growth, there will be a shortage of lawyers. The shortage will likely be exacerbated in rural areas"; Law Society of New Brunswick, "Strategic Planning Document" (January 2011) at 5, online: <http://www.lawsociety-barreau.nb.ca/assets/other_documents/Strategic_Plan.pdf>: "Demographic trends including age, geographic location and an increasing trending to either sole practitioners or big box firms is increasingly fueling the issue of Access to Justice"); Ryan Van Horne, "21st Wickwire Lecture examines access to justice as a professional responsibility" (2012) 30:2 *Society Record* at 20, online: Nova Scotia Barristers' Society <http://nsbs.org/sites/default/files/cms/publications/society-record/srapril2012.pdf>.

189 *Supra* note 184 at 3, showing that 1,271 of 3,127 had been members for twenty-six or more years.

190 Letter from Mark T Folk, General Manager, Farm Land Security Board to the Law Society of Saskatchewan (5 December 2012), online: Law Society of Saskatchewan, <http://www.lawsociety.sk.ca>, select: "Previous Entries," select: "2012," see December 6, 2012.

191 See Government of Saskatchewan, "Economy-Key Sectors," online: <http://www.gov.sk.ca/keysectors>; John Burton, "Potash Industry" in *The Encyclopedia of Saskatchewan* (2006), online: <http://esask.uregina.ca/entry/potash_industry.html>; David Hanly, "Oil and Gas Industry" in *The Encyclopedia of Saskatchewan* (2006), online: <http://esask.uregina.ca/entry/oil_and_gas_industry.html>.

Furthermore, I predict that changes in Saskatchewan clients and law practice won't just come from outside the province. Virtual law practices and technology tools will be increasingly available to Saskatchewan citizens, regardless of the existing regulatory structure. As I noted in my article entitled "The Legal World is Flat," many of the same globalization and technological factors that have affected large corporate clients and law firms will also affect individual clients and solo lawyers and small firms.[192] Finally, there is no reason to think that Saskatchewan will be entirely exempt from the demographic changes that Statistics Canada has predicted. As noted earlier, by 2031, approximately one-quarter of Canadians will either be foreign-born or have one parent who is foreign-born. By 2031, 10 per cent of Saskatoon's population is forecasted to be foreign-born.[193] For all of these reasons, I conclude it is important for Saskatchewan stakeholders to be familiar with the trends identified in this article. Recognizing these types of issues will help Saskatchewan regulators, lawyers and citizens better identify these issues, understand them, and find or reject solutions that are appropriate. In short, the more we understand each other, the better off we all are. For this reason, I was particularly pleased to have been invited to share my perspectives during the Fifth Gertler Family Lectureship in Law and to contribute this article to the *Future of Law* Symposium.

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192 See Terry, "The Legal World is Flat," *supra* note 17.

193 See Statistics Canada, Diversity Report, *supra* note 20, Figure 12 at 29.