"THERE'S NOTHING 'ALTERNATIVE' ABOUT LEGISLATION"

AN ENQUIRY INTO THE INFLUENCE OF REGULATORY CULTURE AND LEGAL CONSCIOUSNESS ON REGULATORS' RESPONSES TO ADR LEGISLATION

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ABSTRACT

Legislation regarding Alternative Dispute Resolution (ADR) can legitimize its use as an alternative to a more formal, law- or court-centred dispute resolution process. However, recent studies warn that prescribing and concretizing this alternative process in legislation may paradoxically undermine, limit or prevent its use. The combination of robust theoretical and empirical research and investigation described in this dissertation seeks to advance the debate about ADR legislation - whether and what to legislate and why. Current legal theories of *regulatory culture*, *legal consciousness* and *administrative discretion* are presented and analyzed. These, in turn, inform the design of a case study that seeks to confirm or challenge the theory, based on in-depth, issue-focused, phenomenological interviews with key informants in the Ontario health professions self-regulatory field regarding recent ADR legislation governing their complaints resolution process. The case study data reveal a variety of individual and collective perceptions of the power of legislation, legality, non-law and alternatives-to-law, as reflected in comments about the requirements and expectations of the ADR legislation in a politically dynamic and evolving professional self-regulatory context. The empirical evidence both supports and challenges the ADR regulatory theory and demonstrates how legitimate administrative discretionary power to interpret and adapt the law permits regulatory practices to align with, contest, resist or escape the power of law, thus accomplishing or frustrating the increased efficiency, transparency, accountability, and consistency the ADR law was intended to achieve.

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symposium; and to teach and coach Osgoode JD students in the theory and practice of mediation and negotiation. In my experience, Osgoode emphasizes and supports the critical contribution of evidence-based theory to improving the "real-world" practice of law, dispute resolution, regulation and governance, and has therefore provided the ideal dynamic, creative, reflective practice environment for the research in this paper.

I have also been most fortunate in the community of friends, colleagues and family who have enquired, listened to and encouraged me along the way, especially my colleague Carolyn Filteau. I thank them all most sincerely for their unfailing support.

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Finally, I would like to thank the members of the professional self-regulatory community in Ontario for their generous cooperation in this study. It was a privilege to be given such free access to the ideas, beliefs and values that guide their decisions. Their helpful contributions to this research will hopefully strengthen understanding of and improve the development of public policy and legislation and the use of ADR in the self-regulatory field and beyond.

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Chapter One

INTRODUCTION

Overview of the Study

This dissertation arises from the debate about whether, and, if so, how to legislate terms and conditions for the practice of alternative dispute resolution, particularly in the professional self-regulatory complaints resolution process. By examining and presenting both theoretical and empirical research into ADR legislation in the professional self-regulatory process, this study exposes the tensions and struggle reflected in the theoretical literature, as well as in the enactment of administrative discretionary policy and practices, between the role and power of law and of non-law – the hegemony of law and the resistance by areas of "non-law" or "alternative to law" to capture by law. By the choice of regulatory field – professional self-regulation – this study also reveals parallel tensions and struggle between increasingly centralized state control of professional regulation and professional self-regulatory autonomy. This research is therefore also about the perceptions and exercise of power in certain aspects of the professional self-regulatory field.

The original question that piqued my interest in this area of research is the extent to which social and political forces within societies that press for greater freedom from legislative constraints are opposed by forces that might use the law to limit the "alternativeness" of alternative dispute resolution and, as an interesting corollary, whether these forces might be related to the forces that seek to constrain professional

regulatory autonomy. Could qualitative research reveal whether the forces attempting to keep alternative dispute resolution free of cumbersome legal constraints are being challenged, weakened or defeated by the forces of "law and order," resulting in the "alternativeness" of ADR becoming "captured" and weakened by legislation governing its use?

The dissertation first examines the theoretical debates behind these issues and then presents a robust, in-depth, qualitative case study of recent ADR legislation in the health profession self-regulatory system in Ontario. The case study enquires about and reports the responses of a significant sample of key informants in the regulatory field regarding the perceived reasons for the ADR legislation, the perceived appropriateness of the specific ADR legislative provisions and the perceived impact of the ADR legislation on actual regulator practice in carrying out regulatory policy.

The purpose of conducting such a robust, in-depth case study was to determine whether the theoretical debate about alternative dispute resolution (ADR) legislation – whether and how much to legislate ADR and why – is clarified and enhanced by qualitative empirical research based on theories of regulatory culture, constitutive legalism and legal consciousness that expose individual and collective assumptions about law, legality and the requirements and expectations of ADR. The theories of the *regulatory community* and *regulatory culture* are explored as providing a

theoretical framework for the exercise of *administrative discretion* in regulatory administration.

The concept of *legal consciousness* and the responses of *before*, *with,* or *against the law* (conformity or compliance with, contestation of and resistance to the law) are examined as suggesting possible explanations for the wide range of strategies and tactics employed by regulators in response to the ADR legislation and for the reasons they give for their actions. By studying a specific community of regulators (healthcare profession self-regulatory officials) under significant political, bureaucratic, managerial and ideological pressures either to adopt or avoid the legislated requirements, the theory about what constitutes regulatory culture and legal consciousness may be observed, robust qualitative data generated and presented, and important key questions regarding the relationship among ADR legislation, regulatory culture and administrative discretion addressed. For example, does the scholarship regarding legal consciousness and regulatory culture provide a useful theoretical framework with which to explore and understand attitudes toward ADR legislation and explain the consequences of legislating ADR in a professional self-regulatory environment? Can this research approach be usefully applied to other regulatory "communities" and can it help to explain why ADR law – or perhaps any new legislation – is accepted, adopted, "gamed," avoided or resisted by those whose regulatory and/or administrative responsibility it is to carry it out?

The subject of the case study research is the Ontario *Health System Improvements Act* 2007 (HSIA), that amended the *Regulated Health Professions Act* 1991 (RHPA) to authorize, with certain conditions, the use of alternative dispute resolution (ADR) to resolve certain types of complaints by the public against members of Ontario healthcare profession self-regulatory colleges. The HSIA received Royal Assent on June 4, 2007, with the ADR and related provisions taking effect on June 4, 2009. Focusing on the RHPA regulatory community and the internal and external trends and pressures that produced the ADR legislation, I examine stakeholder perceptions regarding the reasons for the legislation, the content and clarity of the legislation as direction, as well as the political and social context, regulatory culture and discretionary decision-making within a regulatory community confronting new ADR legislation.

Put another way, the research attempts to address and answer the following questions: What was/were the "problem(s)" that the ADR legislation was intended to resolve? How effective is the legislation likely to be as a solution to the perceived problem(s)? Will well-established bureaucratic practices "subvert" the legislative intent? This study presents the empirical research needed to address these questions as well as the larger issue of whether the decision to legislate the use of ADR in healthcare profession complaints resolution processes is an effective or ineffective solution to the perceived problem(s).

The Government of the Province of Ontario and the officials of the Ministry of Health and Long-Term Care, particularly those in the Ministry Branch and Unit responsible for developing policy, regulatory and legislative proposals that support the regulation of health professionals in the public interest are the public officials most closely involved in monitoring and directing the health regulatory Colleges that apply the RHPA in day-to-day procedures. The 21 Colleges[1] comprise a significant element of the RHPA regulatory community, as do the Health Professions Regulatory Advisory Council (HPRAC)[2] and the Health Professions Appeal and Review Board (HPARB).[3] The Colleges, HPRAC and HPARB all derive their authority and jurisdiction from the RHPA and are accountable to the Government and the Minister of Health and Long-Term Care for the fulfillment of their responsibilities. For the purposes of this case study, it is assumed that the institutions referred to in the RHPA constitute an identifiable regulatory community, whose members may have similar or different

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[1] At the time this study was conducted. Five new Colleges are to be proclaimed pursuant to the HSIA (2007) in 2013 or 2014.

[2] From the HPRAC website (http://www.hprac.org/en/): HPRAC advises the Minister on whether unregulated health professions should be regulated, whether regulated professions should no longer be regulated, amendments to the *Regulated Health Professions Act*, a health profession act or a regulation under those acts, quality assurance and patient relations programs of Ontario's health regulatory Colleges, and on other matters referred to it by the Minister. (retrieved March 2013)
Members of the Council are appointed by the Lieutenant-Governor in Council. In formulating its advice, HPRAC seeks knowledgeable information and comment from members of the public, community organizations, interest groups, health professional regulatory colleges and associations, and conducts extensive research. The Council aims to be accessible and open, and its consultative processes may include written submissions, public hearings, focus groups, research projects and community meetings in order to capture the experience and expertise of those with an interest in the matter. (retrieved March 2013)

[3] From the HPARB website (http://www.hparb.on.ca/): The Health Professions Appeal and Review Board is an independent adjudicative agency. On request, it: Reviews decisions made by the Inquiries, Complaints and Reports Committees of the self-regulating health professions Colleges in Ontario; Conducts reviews and hearings of orders of the Registration Committees of the Colleges; and Holds hearings concerning physicians' hospital privileges under the *Public Hospitals Act*. (retrieved March 2013)

perspectives on the purpose of the community, its values, history, current and future states. My research included extensive, in-depth, open-ended key informant interviews with senior officials of the Ministry, the Chair of HPARB, and 20 officials representing more than two-thirds of the health profession self-regulatory Colleges.

This research is situated within an ongoing debate in the ADR community about the benefits and pitfalls of legislating ADR, what is appropriate ADR legislation and what is the optimal process for developing and implementing it. I am not the only legal scholar who has been intrigued by the underlying paradox in establishing laws that govern alternative dispute resolution processes – laws that mandate, prescribe or proscribe the circumstances and ways in which ADR may be practiced and the procedures to be followed in an activity that is characterized and championed by many as *alternative* to and significantly different from traditional law-based dispute resolution processes. This debate reflects a larger discussion about the dominance of a legalistic paradigm – constitutive legalism[4] – that influences thinking about rules and directives within the regulatory community and society at large. In other words, as the ADR legislation drama plays out within a specific community of RHPA regulators, the web of power dynamics that affect or limit the "alternativeness" of ADR in this or any other context may not, in fact, be directly or solely related to ADR

[4] The definition and properties of constitutive legalism used here derive principally from L. Edelman & R. Stryker, "A Sociological Approach to Law and the Economy" in N. Smelser & R. Swedberg, eds., *The Handbook of Economic* Sociology (Newbury Park, Ca.: Sage Publications, 2005) 530 [*Edelman & Stryker*]

itself, but may also involve other political, legal or practical issues within or impinging from outside the regulatory community.

Previous research suggests that legislation recognizing and defining the use of ADR can legitimize its use as an authorized alternative to a more formal, traditional, law-based, court-model dispute resolution process. There is significant debate about how far such legislation should go in detailing when and how ADR can or should be used or avoided. Recent theoretical studies[5] warn that prescribing and/or concretizing this alternative process in legislation may paradoxically undermine, limit or even prevent its use by diminishing its "alternativeness," and hence its usefulness and benefits. These studies also emphasize the importance of involving the relevant stakeholders in the ADR legislation design and implementation process.

One key question concerns the "ideal" balance between prescription and permissiveness in ADR legislation. How clear and prescriptive should the legislation be in order to ensure public policy goals for professional self-regulation are met and how flexible and permissive should the legislation be in order to achieve the optimum benefits of having ADR at all? How is the right balance or tension achieved between

[5] For example, J. Lande, "Principles for Policymaking About Collaborative Law and Other ADR Processes" (2007) 22 Ohio State Journal on Dispute Resolution, 619 [Lande 2007]; J. Lande, "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA Law Review 69 [Lande 2002]; C. Pou, Jr., "Legislating Flexibility: Things that ADR Legislation Can and Cannot Do Well" (2001) 8 Dispute Resolution Magazine 6 [Pou]

flexibility, adaptability and discretion regarding administration of the complaints resolution and ADR processes on the one hand, and standardization, consistency and similar treatment of participants throughout the RHPA complaints resolution process on the other? This tension between flexibility and standardization has been a common theme throughout the life of the RHPA, which has served as a regulatory template for all the self-governing health professions in Ontario. The Government rhetoric at the time the ADR legislation was introduced referred to the need for standardization and streamlining of the complaints resolution process (consistency and efficiency). Because the current ADR legislation may, on balance, be a combination of permissive and prescriptive (although interpretations vary as to which dominates, or whether an appropriate balance is achieved), there would appear to be some scope for interpretation and application of the provisions, according to administrative discretion.

The argument in the literature suggests that if the legislation is too prescriptive, it may undermine many of the benefits of having an ADR process. If the legislation is too open and flexible, it may leave too many decisions about how ADR can and will be implemented to the discretion of individual bureaucrats with greater or lesser experience and knowledge of ADR and with interests of their own to satisfy, including professional, organizational and managerial concerns. The dilemma of finding the right balance between prescription and flexibility was captured in the

College of Physicians and Surgeons of Ontario (CPSO) submission to the Health Professions Regulatory Advisory Council (HPRAC) regarding the ADR legislation HPRAC proposed to the Government of Ontario in its report, *New Directions* (2006). CPSO expressed its concern that formalizing ADR would reduce ADR's flexibility and lead to inappropriate use.

> The College supports adding a definition in the legislation of alternate resolution process and views this as an important step forward. However, the College is concerned that the elaborate system of alternate resolution proposed [by HPRAC in *New Directions*] will make the use of such a system unworkable (much like the current "frivolous and vexatious" provisions for dealing with certain complaints, which the College has largely found unworkable and which are rarely used. It is simply easier and more efficient to process the complaint in the usual way). Again, the College stresses that it supports all of the goals listed by HPRAC in support of an informal resolution process: used properly, it is more efficient and expeditious, cheaper, and generates more positive outcomes than does the traditional model in many cases. These positive outcomes include broad system outcomes, which are in keeping with the vision expressed in the HPRAC Report of multidisciplinary co-operation and care. The College's concern is that these goals will not be achieved by the system envisioned, which is complex and cumbersome. We would support a truly informal process and certainly agree that in order to invoke that process, all involved should agree to participate in it. ... We wish to emphasize that any process must have flexibility in application if it is to be effective.[6]

According to several regulatory scholars, legislative development occurs within what is described as a "regulatory culture," whose power dynamics determine the form, substance, application and outcome of the legislation. My approach to this case study has been inspired by Meidinger's 1987 landmark theoretical paper that explores the

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[6] CPSO Response to HPRAC Report, June 29, 2006 (cpsodocuments/policies/positions/submissions/Response_HPRAC_Report_June06.pdf at http://www.cpso.on.ca (retrieved March 2013)

relationship among regulatory culture, the indeterminacy of rules and administrative discretion.[7] His paper addressed "the inability of scholars to comprehend large parts of regulatory activity without reference to [regulatory culture],"[8] and was contemporaneous with the exploration of the concept and influence of culture in business, organizational and legal communities, building on and expanding the concept's original use in ethnographic research. The concepts Meidinger explores reflected the increasingly influential discussions of the continuous, reflexive, evolving, self-forming and self-correcting nature of organizational cultures[9] and significantly expanded the second wave of law and society studies of legal culture and legal consciousness that followed on Friedman[10] to embrace the regulatory community and stakeholder regulatory negotiation.

Meidinger is especially skeptical about legal scholarship on regulation that is too general and theoretical and does not enquire deeply and specifically enough into the concrete issues faced by regulators in developing and implementing regulation. He calls for more empirical research in the area of regulatory culture and regulation. In particular, he describes the challenge thus: "the crucial task at present is to map ongoing relationships and describe forms of power in actual regulatory

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[7] E. Meidinger, "Regulatory Culture: A Theoretical Outline" (1987) 9 Law & Policy 355 [Meidinger 1987]
[8] *Ibid* at 356
[9] See, for example, Schein (1985) Argyris & Schön (1978), Smircich (1983)
[10] L. M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975) [Friedman]

communities."[11] He asserts the important principle for research into the dynamics of culture and power in regulatory communities that "culture cannot always be revealed simply by asking people their attitudes regarding issues. It often must be read from their behaviors and products. In an important sense, then, culture is not really just what people 'carry around in their heads'; it is what they enact in their daily lives."[12]

Meidinger theorizes that regulatory culture that organizes the daily activity of regulation is formed from the actual structural constraints within the system, the political pressures experienced consciously or unconsciously by the participants in the system, the general cultural assumptions that impinge on and influence attitudes and activities within the system, the legal requirements imposed, and the established and evolving bureaucratic procedures within the various parts of the system.

Meidinger's paper calls for more empirical research into specific, concrete situations and "problems" in the area of regulatory culture and regulation, in order to understand how regulation actually works in real life. He contends that much regulatory research avoids dealing with the actual experience of regulatory administration and therefore cannot provide relevant and accurate analyses of situations and useful recommendations for reform, since much of the reality that the regulator confronts in

[11] Meidinger 1987 *supra* note 7 at 368
[12] *Ibid* at 361

carrying out the regulatory role on a daily basis is missing from or only partially studied by experts in regulation.

> To give weight to the particular problems faced seems to be an eminently sensible approach, yet it is seldom taken in studies of regulation. Social scientists working from a cultural perspective tend to minimize the role of concrete experiences in structuring regulatory outlook. Similarly, legal scholars seem to assume that the particular nature of regulatory problems is not important. This assumption is manifested in the enormous potpourri of regulatory fields covered in most administrative law books, as well as the scholarly penchant for talking generally about regulation, administration, rationality, efficiency, expertise, etc. These tendencies may blind us to many possible insights about logical regulatory practices and also may prevent us from developing typologies of regulation that capture key differences and similarities of work practice. [13]

The case study in this paper addresses the approaches taken by those who articulated ADR policy, by those who drafted the legislation, and by those who are charged with implementing it (regulatory College officials). It examines the role of the legal "gatekeepers" – those whose job it is (or who take it upon themselves) to interpret the law, according to their own values, beliefs, understanding and interests, seen as such, or as representative of what they perceive as the cultural norm within the community of professional self-regulation they serve, or the community of law of which they form part.

ADR scholars and advocates have been concerned in recent years with the need to preserve the truly alternative, flexible nature of ADR from the "pull" of rules and

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[13] *Ibid* at 375

legalism, even though legislation may be necessary to legitimize its use by the public and practitioners. Reflecting on the discussions of the paradox of using an instrument of force (legislation) in connection with an alternative, flexible process, some parallels emerged with the currently reported movement to limit or control professional self-regulation in several jurisdictions (e.g., U.K., Ontario, Australia, New Zealand). During the course of many intensive interviews, it became apparent from comments by College officials that a good deal of the rhetoric regarding professional *self*-regulation in Ontario is confusing and misleading to many – members of the public, members of the Colleges and even some College staff – by suggesting greater regulatory autonomy than the statutorily delegated authority actually imparts and obfuscating the direct line of accountability to Government that forms the basis of the RHPA regulatory arrangement. The "self-regulatory" Colleges are, in the end, creatures of Government, created by statute, governed by statutes and accountable to the Minister. The reality is that the Government of Ontario has delegated its power to the Colleges and backs up the exercise of College delegated authority with the coercive power of the state. In daily self-regulatory practice, however, there appears to be a desire for and assumption of greater professional autonomy than the system actually supports, leading some in the system and many in the public to think of the arrangement as closer to the "co-regulation model."[14]

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[14] For a discussion of the forms of self-regulation in Canada, see M. Priest, "The Privatization of Regulation: Five Models of Self-Regulation" (1997-1998) 29 Ottawa Law Review 233. Her five categories include "statutory self-regulation," which best describes the framework for the RHPA Colleges. See also L. Bohnen, *Regulated Health Professions Act, a Practical Guide* (Aurora: Canada Law Book Inc., 1994), the first guide to explain the Ontario *Regulated Health Professions Act* 1991.

A persistent self-regulatory aspiration appears to fuel the intensity with which many of the members of the RHPA regulatory community continue to assert and defend their power/right of self-regulation and bridle at what are sometimes experienced as unwarranted intrusions by Government into the exercise of their discretion. This situation has also given rise to a certain measure of frustration and disappointment among the Colleges regarding a perceived lack of trust between Government and regulators as partners in the regulatory process. These perceptions may also arise in part from the nature of the self- regulatory arrangement whereby the members of each profession pay (sometimes quite significant) annual fees to the Colleges to fund the (often very high) expenses of the Government-directed "self"-regulatory process, which is frequently experienced as not very self-regulatory at all.[15]

Reflecting the political dimension of Meidinger's regulatory culture theory, this study therefore also considers whether the narrowing of administrative discretion within legally prescribed limits of the ADR legislation is a symptom of a larger political trend whereby professional self-regulation is being eroded as part of a continuing

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and companion health profession Acts. Bohnen worked on the development of the RHPA. Her book provides an interpretation of how the Act works, including references to the complaints resolution process.; J. Casey, *The Regulation of Professions in Canada* (Toronto: Carswell, ongoing) 2006; and R. Steinecke, *A Complete Guide to the Regulated Health Professions Act.* (Aurora: Canada Law Book, 2007) contains a useful description of the legislative history of each provision in the RHPA, providing a legal interpretive perspective on the background and intent of the current and historical versions of the Code.

[15] For an additional and interesting perspective on the self-regulatory spectrum, as seen from another jurisdiction and dimension, see G. Banks, "The Good, The Bad and the Ugly: Economic Perspectives on Regulation in Australia" (2004) 23 Economic Papers: A Journal of Applied Economics and Policy 22 [Banks] at 36. The arrangement he describes as co-regulation (rather than self-regulation) might be inferred by someone observing (as many Colleges do) that the RHPA Colleges contribute almost the entire funding of the self-regulatory enterprise which the Government directs.

power shift between government and the professions. To what extent does the approach to this ADR legislation reflect political changes that enable or restrain the various legal actors in the professional self-regulatory community from exercising power through control of their administrative decision-making discretion? Does the research, viewed from a legal consciousness perspective, suggest ways by which a community organized around the concept of self-regulation in the public interest strives - through compliance or conformity with, negotiation/contestation of and/or resistance to law – to establish an appropriate balance in the tension between autonomy/self-determination and "external" control? The empirical evidence presented in this study dramatically demonstrates the wide variety of discretionary adaptive interpretations and flexible applications (whether or not intended or expressly permitted by the legislation) of new legal rules whose stated main purpose was to produce/create greater efficiency, transparency and standardization among the Colleges' complaints resolution processes.

With the rise in interest in alternative dispute resolution, the subject of whether and how much regulation of its procedures is necessary or desirable is timely and important. I am not aware of any similar empirical or grounded research into existing ADR legislation and am confident that the results of this work, particularly the robust key informant commentary contained among the case study findings, will prove useful to those involved in ADR policy, ADR dispute system design, ADR legislation negotiation, the inclusion and drafting of specific ADR legislative provisions, and the

more general phenomenon of how self-regulatory communities view and respond to legislative initiatives. It is particularly timely and useful to learn from direct empirical evidence how regulatory officials respond and adapt their practices to conform to or comply with, avoid or resist any legislation which they view as restrictive or overly directive, especially during the current conditions of economic and political constraint and reaction.

This study contributes to legal culture and legal consciousness studies by adding empirical evidence about whether the theories of *legal consciousness*, *regulatory culture* and *administrative discretion* explain the very different health regulatory College responses to the new ADR legislation. It evaluates the particular RHPA ADR provisions against the "ideal" ADR provisions described in the literature cited. It also answers the (frequently expressed) critical need/call for in-depth empirical research to understand how the perceptions held by key actors in the regulatory field determine the outcomes of legislation through the exercise of administrative discretion.

However, this study does not attempt to determine whether alternative dispute resolution processes are appropriate in the College complaints resolution processes. The views of other College complaints system stakeholders, principally College members and the public as complainants, have not been canvassed or included in this study, but could well be the subject of future research. This study's principal focus is on the regulator's response to legislation and the theoretical literature that examines

the context of regulatory policy- and decision-making – regulatory community, regulatory culture, legal consciousness and administrative discretion – and on whether and how that context influences the beliefs and attitudes of the principal legal actors within this regulatory community, which, in turn, determine their choices and behaviour in response to this ADR legislation, as compared with and demonstrated through a case study of recently enacted ADR legislation. Hopefully, however, by comparing the political rhetoric with practical reality, it will be possible for policymakers to draw useful inferences from the data concerning the consequences of the legislative process and the particular legislative provisions about how to design and frame ADR legislation in a way that takes into account the possible obstacles that might arise in the implementation process and how to overcome them.

Organization of the Dissertation

Chapter Two briefly describes the historical background to the 2007 ADR legislation and highlights the stages of development, including the HPRAC reviews and reports, the introduction of the legislation in 2007 and proclamation of the legislation in 2009.

Chapter Three provides a theoretical foundation and framework for the discussion of whether and how to legislate ADR and for the analysis of the findings from the key informant interviews. The first section deals with the concepts of regulatory culture and regulatory community, tracing their source in organizational culture and legal culture theory. This discussion leads to the literature on the constitutive legal

environment and the constitutive power of law as part of society, influencing myriad decisions within and beyond the field of law, and identifies this basic premise as a critical element of the work on regulatory culture as described and demonstrated in the writings of Friedman (1975), Meidinger (1987 & 1992), Edelman and Suchman (1997), Edelman and Stryker (2005) and Ewick and Silbey (1992 & 1998). The section focuses on Meidinger's theory that regulatory culture comprises the impact of general cultural assumptions, political pressures, legal requirements, bureaucratic procedures and structural constraints on regulators' administrative decisions in response to law. These influences within the regulatory community determine how regulators respond to rules, regulation and legislation, given that these are always ambiguous, indeterminate and subject to interpretation (Meidinger; Lange[16]). The literature cited suggests that other influences, besides the legislation itself, including cultural norms, values, beliefs, meanings and expectations contribute to the individual regulator's choices of how and whether to act or not. Recent empirical research from the risk management regulatory culture literature bears out these observations and provides further insight into the responses to introducing new rules into the culture of an established regulatory community, particularly with respect to the intent and purpose of the rules and the relationship of trust between those establishing the rule and those with the responsibility to carry it out.[17]

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[16] B. Lange "What does Law Know? – Prescribing and Describing the Social World in the Enforcement of Legal Rules" (2002) 30:2 International Journal of the Sociology of Law 131 [Lange 2002]; B. Lange, "Regulatory Spaces and Interactions: An Introduction", in: B. Lange (ed.) *Regulatory Spaces and Interactions*: Special Issue of (2003) *Social and Legal Studies* 411 [Lange 2003]

[17] See in particular, T. Reiman, & P. Oedewald, "The assessment of organisational culture. A

The following sections therefore focus on the relationship between the Government and the professional regulatory Colleges in the context of a changing economic and political environment. Loss of professional autonomy and greater control over agencies with delegated authority as reflected in the juridification of more aspects of "local" government, as well as the contemporaneous rise in the assertion of consumer rights, are the subjects of recent theoretical and empirical research on the professions, professional self-regulation and co-regulation. Recent empirical studies that enquire into the nature of the changing relationship between the Ontario Government and the health professions self-regulatory system encourage a comparison between the data in this study and a similar U.K. study on the juridification of local government discretionary decision-making, and provide evidence of the tension between authority, control and flexibility and the changing power dynamics in Ontario's professional sector.

The theoretical studies of administrative discretion (e.g., Meidinger, Edelman and Suchman,[18] Black,[19] Rubin[20]) which support Pratt's landmark study of Canadian

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methodological study." VTT Tiedotteita - Research Notes 2140 (Espoo 2002) [Reiman & Oedewald 2002] and J.-E.Tharaldsen & K. Haukelid, "Culture and behavioural perspectives on safety – towards a balanced approach" (2009) 12:3-4 Journal of Risk Research 375 [Tharaldsen & Haukelid]

[18] L. Edelman & M. Suchman "The Legal Environments of Organizations" (1997) 23 Annual Review of Sociology 479 [Edelman & Suchman]

[19] J. Black, "Constitutionalizing Self-Regulation" ((1996) 59 Modern Law Review 24 [Black 1996]; J. Black, "Managing Discretion" (2001) Published as: ARLC Conference Papers - Penalties: Policy, Principles and Practice in Government Regulation www.lse.ac.uk/collections/law/staff/black/alrc%20managing%20discretion.pdf [Black 2001a] J. Black, "Decentring Regulation: The Role of Regulation and Self- Regulation in a 'Post-Regulatory' World" (2001) 54 Current Legal Problems 103 [Black 2001b]

[20] E. Rubin, "Discretion and its Discontents" (1997) 72 Chicago-Kent Law Review 1299 [Rubin]

immigration officers' discretionary decision-making within a normative cultural context,[21] emphasize the myriad individual and cultural influences on discretionary decision-making, which they show to be a natural and necessary part of the policy-making process. Ewick and Silbey's influential work on legal consciousness[22] is discussed in order to portray the phenomenon of how individuals think about law and the ways that individual "street-level bureaucrats" continue to develop law in the process of interpreting and applying it. Their detailed narratives of individuals' relationships with the constitutive legal environment and with particular laws and legal situations provide a theoretical and practical approach to the study of bureaucratic responses to the ADR legislation. Their categorization of the three typical responses as conformity, contestation, or resistance, reflecting attitudes of deference to the power of law, taking advantage of the many opportunities to engage with or "game" the law, or finding ways to avoid or resist the law, offer a paradigm for interpreting the varying responses to the ADR legislation. The robustness of the data in legal consciousness empirical studies, several of which are included in the theoretical foundations review, also informed the key informant interview verbatim reporting in this study, with its emphasis on providing sufficient detail for the readers to form their own impression of

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[21] A. Pratt, " Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act" (1999) 8 Social & Legal Studies 199 [Pratt]

[22] P. Ewick & S. Silbey, "Conformity, Contestation, Resistance: An Account of Legal Consciousness" (1992) 26 New England Law Review 73 [Ewick & Silbey 1992]; P. Ewick & S. Silbey *The Common Place of Law: Stories From Everyday Life* (Chicago: University of Chicago Press, 1998) [Ewick & Silbey 1998]; S. Silbey, "Legal Culture and Legal Consciousness," in *International Encyclopedia of Social and Behavioral Sciences*, Smelser & Baltes eds. (New York: Pergamon Press 2001) [Silbey 2001]; S. Silbey, "After Legal Consciousness" (2005) 1 *Annual Review Law & Social Science* 323 [Silbey 2005]

the legal consciousness and decision-making processes of the key informants interviewed.

The literature on whether and how much to legislate ADR is presented to demonstrate the differences in views regarding what types of legislation, if any, appear appropriate for ADR and, specifically, what purpose and what aspects of ADR such legislation should address. The views of Lande, Pou and Kleefeld[23] on ADR legislation are reviewed, and the empirical research carried out in Australia and New Zealand into health professions self-regulatory Board members' attitudes toward the possibility of ADR legislation is reported and serves as a useful comparison with the Ontario situation.[24] The question for the Australian regulators was hypothetical, as no such legislation had been introduced, whereas the data in this study reflect the situation where the ADR legislation is already in place, and therefore advances the research in this important area. Meidinger, Freeman,[25] Lande and Ewick and Silbey are sources of perspectives on the importance of stakeholder consultation and involvement in the legislative design process and whether such participation, or lack of it, and the sense of procedural fairness or lack of it, influence legal consciousness regarding the legislation and administrator attitudes that affect its implementation.

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[23] J. Kleefeld, "ADR and Professional Regulation" in *Self-Governing Professions: Regulatory Issues* (Vancouver: Continuing Legal Education Society of British Columbia, 2001) [Kleefeld]

[24] G. Howse, C. Naksook, D. Halstead, & R. Honigman, *The Use of Alternative Dispute Resolution in Australia and New Zealand by Health Practitioner Registering Bodies* (Melbourne: La Trobe University Centre for Public Health Law, 2004) [Howse]

[25] J. Freeman, "The Private Role in Public Governance" (2000) 75 New York University Law Review 543

Chapter Four provides a brief overview of the methodology (presented in comprehensive detail in Appendix A) and the detailed Research Findings resulting from the qualitative in-depth key informant interviews focused on the particular case study. Three sets of questions (or avenues of discussion and exploration) posed to the key informants reflect Friedman's division of the legal "system" into three aspects: the socio-cultural context that gives rise to legislation, the structure and substance of the legislation itself (including the procedures and organizations for rule development and management), and the ways that the legislation influences the behaviour of the "legal actors" within or connected in some significant way to the legal system, or, as Friedman expresses it, "how and why rules are made and what effect they have on people's lives."[26] Interviews commenced from each of three "neutral" starting points about the ADR legislation, reflecting Friedman's legal studies foci:

1. What do you think gave rise to the ADR legislation?
2. In your opinion, how appropriate is the ADR legislation?
3. What impact has the ADR legislation had on College practices?

Each interview section started with a form of the general question and followed up with ever-deepening probes to uncover the underlying individual and cultural perspectives in each area of questioning. The informant responses were often dense, complex and intense, with interviewees providing thoughtful, discursive comments within each of the three areas. The interviews were open-ended, conversational exchanges, with most lasting slightly over one hour.

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[26] Friedman *supra* note 10 at 2

Informant responses to the first set of questions (What do you think gave rise to the ADR legislation?) and the subsequent probes for clarification identified the following official and unofficial goals of the legislation: to improve public protection; legitimize the use of ADR in the College complaints resolution process; standardize the ADR processes across the regulatory community of Colleges; increase efficiency in relation to resolving complaints regarding publicly funded health professionals; relieve pressure on the publicly funded Health Professions Appeal and Review Board; and the perceived shift in discretionary power away from the professions and the Colleges to the Government.

In very general terms, attitudes towards the legislation fell into one of four categories:

1. The ADR legislation is important and needed, and will have a positive and beneficial effect on the use of ADR in the College complaints process;

2. The ADR legislation is important and needed, but this version of it is too rigid, onerous, unrealistic, burdensome, complicated and costly and has, or may have, a "chilling" effect on ADR use in the College complaints process;

3. The ADR legislation is not needed and will have a negative effect;

4. The ADR legislation is not needed and will have neither a negative nor a positive effect.

Responses to the second set of questions (In your opinion, how appropriate is the ADR legislation?) elicited comments on the legislation's overall appropriateness, as well as the appropriateness of each of the individual provisions of the ADR legislation. There was considerable discussion of the definitions within the legislation and the fact that a complaint must be recorded in order to be a complaint and thus subject to the ADR legislation. This discussion revealed in some an underlying need and an identified opportunity for routes of "escape" from legislative "capture."

Three other issues caused considerable concern and controversy – the confidentiality of ADR proceedings, time limits on the disposal of a complaint, and the need to separate the ADR facilitator from all other aspects of the complaints resolution process. Informants expressed widely divergent opinions about how the legislation was developed, particularly regarding College participation in the design process. Interesting perspectives emerged regarding whether or not a complaint is a dispute and whether ADR is appropriate to complaints resolution, as well as whether the ADR process should have been authorized within individual College regulations, as opposed to a "one size fits all" piece of legislation, given the perceived diversity of the regulatory community in terms of types of complaints, resources available and the perceived and experienced cultures of the different professions.

The third set of questions (What impact has the ADR legislation had on College practices?) elicited a wide variety of responses among the Colleges surveyed. In

summary, and for various reasons given (which are discussed later), it was reported that the particular College either will:

1. Stop doing ADR for complaints; or
2. Not start doing ADR for complaints; or
3. Adjust their own complaints system to
    a) avoid the legislated ADR process, while maintaining their own informal resolution/ADR process; and/or
    b) modify their own informal resolution/ADR process to comply with legislation; or
4. Delay taking action on implementing the legislated ADR system because of other more pressing regulatory imperatives (it not being a mandatory process); or
5. Delay taking action on ADR until others have tested the new system and worked out all the potential problems (through considerations of efficiency or fear of "getting it wrong" and angering authority or looking foolish to others).

The views of the Ministry officials on the likely impact of the ADR legislation on the regulatory Colleges are also reported, as well as College informants' views of the role and potential of the voluntary Federation of Health Regulatory Colleges and its ability to serve the needs of the regulatory community, particularly in future relations with the Government.

Chapter Five analyzes and discusses the case study findings in relation to the theory regarding regulatory culture, legal consciousness, constitutive legalism, administrative discretion and how these combine to illuminate the important questions raised in the ongoing debate about the benefits and costs, rewards and risks of ADR legislation.

1. It reflects on how the data help expose the tension between law and alternative-to-law ("other than," or "non" law) and can highlight the presence of and resistance to constitutive legalism in ways that are relevant to ADR legislation, and whether the insights achieved through the lens of the ADR legislation might be applicable to understanding the intended and unintended consequences of legislation and regulation more generally.

2. It discusses how ADR legislation in particular presents challenges that help illuminate individuals' attitudes to the purpose and efficacy of legislation – how law helps and how law hinders decision-making.

3. It explores whether the data validate Meidinger's five elements of regulatory culture – general cultural assumptions, political pressures, legal requirements, bureaucratic procedures and structural constraints – as the *causes* or justifications for types of discretionary decision-making in the interpretation and application of the legislation, which of these elements may have greater weight, and whether this approach provides a more robust understanding of the grounds for administrative discretion.

4. It also analyzes and discusses whether the three elements of Ewick and Silbey's legal consciousness theory regarding individual attitudes toward law and legality – conformity, contestation and resistance – help describe and explain the types of response representing the *effects* of the regulatory culture elements on administrative discretion regarding whether and how ADR legislation is adopted.

Chapter Six presents the conclusions to be drawn from the analysis and discussion, as well as recommendations for further research in this important area of study.

Finally, I believe the findings in this dissertation demonstrate (as other research studies have before this) that we don't really understand anything important about law if we don't understand the context out of which law arises, the conditions that motivate those who develop the law and the pressures, concerns, expectations and real life constraints on those whose responsibility it is to implement or follow the law. Legal scholars give these phenomena and processes names like *regulatory culture, legal culture, legal consciousness*, etc., to describe what they perceive to be happening in the minds of individuals in the field of rules and regulation. Meidinger has theories about what regulators do and why they do it, and other scholars support and add to his theories with theories of their own. However, Meidinger says we don't pay nearly enough attention to finding out what real people are thinking, feeling and doing in real situations when we think and write about regulation.

Ewick and Silbey demonstrate that when legal scholars take the time to sit down with people and encourage them by open-ended (and open-minded) questions, they may tell us what they think and feel about their circumstances and their attitudes toward rules and the legal environment with a vividness of detail and expression that may surprise us and challenge our beliefs. They suggest that we honour the trust these informants place in us by faithfully recounting, in their own words, the drama they perceive they are living. When we sincerely ask about and carefully listen to what these individuals have to say about law and regulation, we can learn a great deal about law and legal processes – what works and what doesn't work so well. This knowledge provides a firmer foundation for improvements in the process and substance of legislation.

Lande and Pou tell us that there are ideal ways to ensure alternative dispute or complaints resolution processes are appropriately designed to meet their purpose, and since legislating ADR can, as with other rule-making, have unintended consequences, very careful consideration should be given to the particulars of the legislative design process as well as to the substance of ADR legislation and to ADR legislation's potential effects. They are supported by other regulatory theorists who call the process by which individual managers or workers decide, on the basis of many discoverable considerations, which parts of law to enact, which parts are open to negotiation or "gaming," which parts to avoid, disregard or subvert and how they do so, *administrative discretion.* This dissertation seeks to go behind and beyond the

terminology to where law is daily enacted – in the workplaces where regulators juggle myriad managerial and regulatory issues, with finite resources, to discharge their responsibilities to the legislation, the Government, the members of their profession, the staff of their organizations, the complainants, stakeholders and the wider public interest, as well as to satisfy their own professional and personal values, needs and desires.

This dissertation does not address the features or benefits of ADR compared to other ways of resolving complaints or disputes in the professional self-regulatory system. It may help to clarify whether ADR *in practice* benefits or suffers from legislation governing its use. It does seek to discover whether regulators' attitudes towards ADR as a concept and a process, in the context of their other interests and concerns as regulators within a specific social, political, economic and cultural context, influence their responses to this specific ADR legislation. In so doing, this dissertation owes a great deal to the efforts of those scholars who have led the way in justifying robust evidence-based regulatory culture research and to the honesty and generosity of those in the regulatory community who proved to this scholar that the evidence is all around us if we take the trouble to find and use it to improve the regulatory environment in which we live.

Chapter Two

LEGISLATIVE BACKGROUND

This chapter sets out in summary form the history and background to the RHPA ADR legislation. It reports on what issues the legislation was intended to address, including improved transparency, efficiency, standardization, consistency, fairness and accountability, with protections against potential abuse of an alternative process, so as to maintain public confidence in the College complaints resolution process and in the regulatory system.

The Regulated Health Professions Act[27] provides the legislative authority and framework for regulatory Colleges (which have their own Acts of incorporation) to regulate the members of their profession(s) in the public interest. The RHPA currently governs some 300,000 healthcare professionals in Ontario through 21 Colleges. Each College has its own Act of incorporation. The RHPA assigns authority, duties and responsibilities to:

- the Minister of Health and Long-Term Care;
- the Colleges that regulate health professions;
- the Health Professions Appeal and Review Board (HPARB); and
- the Health Professions Regulatory Advisory Council (HPRAC).

[27] *Regulated Health Professions Act*, SO 1991, c 18 (RHPA)

The RHPA comprises two related schedules. Schedule 1 lists the "Self Governing Health Professions," and Schedule 2 comprises the extensive Health Professions Procedural Code (HPPC), which contains the detailed authority, duties and procedures for carrying out the Colleges' statutory responsibilities. Among the areas of statutory authority provided for in the RHPA HPPC is the authority to receive and investigate complaints and the requirement to dispose of them in specific ways.

RHPA 1999 – 2007

Five-Year Review

The RHPA was proclaimed on December 31, 1993 and took effect on January 1, 1994, following the necessary preparations required for compliance with the entirely new structure and approach to professional self-regulation, which was considered at the time (and many would say still is) a model of its kind in the world. Each new Act of this type is required to undergo a statutory review after five years, to ensure it is fulfilling expectations and, following a process of public consultation, to be revised as necessary. The RHPA five-year review was initiated by a Report and series of questions drafted by the Health Professions Regulatory Advisory Council (HPRAC), based on research it had previously conducted.[28] Submissions were invited from interested stakeholders and a Final Report was issued, containing extensive comments and recommendations for the revision of the RHPA. HPRAC noted in its report,

[28] Health Professions Regulatory Advisory Council, *Weighing the Balance* June 1999

Adjusting the Balance (2001),[29] a high level of concern among the many stakeholders it consulted about the use of ADR in regulatory College complaints and discipline procedures. While expressing support for the efficiency of ADR over the hearings process in some situations, the HPRAC report faulted the Colleges' use of ADR for lack of transparency, fairness and accountability and recommended strict legislative provisions to restrict the use of ADR to very limited circumstances to guard against its abuse and to maintain public confidence in the regulatory system.[30]

> Some Colleges are now using alternate dispute resolution (ADR) processes to handle complaints. These Colleges believe that, in some situations, a less complex and time-consuming process can result in an outcome that satisfies all parties. It is noteworthy, however, that ADR settlements are not part of the public record. The *Regulated Health Professions Act* does not refer to alternative methods for settling disputes since this is a relatively new approach.
>
> Fifteen out of 21 Colleges have some type of ADR process, either formally or informally (PWC Report, Vol. 6, p.17). Among the 15 Colleges that use ADR, there is no consistent approach in the use of ADR. Some do or would use ADR for professional misconduct of a sexual nature involving only comments. Some would or do use ADR for professional misconduct of a sexual nature involving more than comments.
>
> HPRAC views the use of ADR involving a complainant in cases relating to physical sexual abuse as problematic because of the inherent power imbalance between the complainant and the respondent health professional and the sense of vulnerability and potential for revictimization that can result. Furthermore, physical sexual abuse is not a "dispute" to be resolved, but a misconduct to be addressed.
>
> The lack of transparency of any of the ADR processes and lack of public access to information regarding the settlements reached is a further concern to

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[29] Health Professions Regulatory Advisory Council *Adjusting the Balance, A Review of the Regulated Health Professions Act – Report to the Minister of Health and Long-Term Care.* March 2001

[30] *Ibid* at 68 and 69

HPRAC. Accountability of the health professional is difficult to measure and ensure. Disclosure to the public is lacking and there may be implications for public safety and accountability of health professionals. Moreover, because ADR settlements are not necessarily part of the recorded discipline process, it is impossible to assess the effect ADR has, or will have, on encouraging reporting of sexual abuse, provision for funding for therapy and counselling (*HPPC*, s. 1.1), or the exercise of an individual's legal rights (*HPPC*, s. 3(1)6). Thus, use of ADR in some cases may be undermining prevention of recurrence of sexual abuse, protection of the public from harm, and overall effectiveness of the complaints and discipline processes. This concern has been addressed above by recommendation 5 on disclosure. In fact, any remediation agreements resulting from ADR would be published on the register.

To clarify when it is appropriate to permit resolution of a report or complaint of sexual abuse outside of a discipline hearing, it is recommended that:

Recommendation 25:
The Minister direct that Colleges never use ADR involving a person who was allegedly the subject of sexual abuse by a member for cases of sexual abuse as defined in s. 51(5)2 of the HPPC.

Recommendation 26:
The HPPC be amended to require that all settlements or undertakings reached with members as a result of a complaint or mandatory report alleging sexual abuse be subject to approval by a committee or panel.

These recommendations – and all the others in HPRAC's 2001 report – languished (as did HPRAC itself) for four years until a change in Government revived the statutory body and referred to it a number of initiatives, including a re-examination of the earlier HPRAC RHPA report and the recommendations in terms of their "currency and completeness."[31] The subsequent report, *New Directions* (2006), updated from 2001 and based on additional research and stakeholder consultations,

[31] Health Professions Regulatory Advisory Council, *Regulation of Health Professions in Ontario: New Directions*, April 2006 at 293 [*New Directions*]

took a different approach to ADR, recommending its use as a way of resolving complaints and other issues early in the regulatory Colleges' complaints and discipline system. In delivering the HPRAC Report and Recommendations, the HPRAC Chair wrote to the Minister:

> Many Legislative Framework issues examined by HPRAC, such as college structure and processes, complaints resolution and regulations approvals processes have been outstanding for a number of years. They address matters affecting the efficiency, accountability, performance, quality and transparency of our health professionals and the colleges that regulated them. HPRAC has concluded that some of these now require urgent attention.[32]

The Report notes that "while some colleges use alternate or informal resolution to attempt to resolve a complaint initially, there is no permissive enabling language in the statute, and no requirements for publication of the resolution in certain circumstances." It further states that "alternate resolution can resolve an issue expeditiously and find mutually acceptable solutions that are appropriate to the circumstances."[33] While also cautioning about transparency and accountability, the second HPRAC report (2006) endorsed the use of alternative dispute resolution and recommended legislative changes to legitimize the process and govern its use.

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[32] *Ibid* at 1
[33] *Ibid* at 39

HPRAC 2006 ADR Recommendations[34]

40. That a new definition of be alternate resolution be added to the Health Professions Procedural Code as follows:
"alternate resolution process" includes mediation, conciliation, negotiation or any other means of facilitating the resolution of issues in dispute.
41. That a new section be added to the Health Professions Procedural Code as follows:
Alternate Resolution
1. A panel of the Inquiries, Complaints and Reports Committee may direct a complainant and the member who is the subject of the complaint to participate in an alternate resolution process for the purposes of resolving the complaint or an issue arising from the complaint, unless the complaint relates to an allegation that the member has committed sexual abuse of the kind described in subparagraph i, ii, iii, iv or v of paragraph 2 of subsection 51 (5).
2. All settlements achieved by means of an alternate resolution process must be reviewed and approved by the panel.
3. If the panel approves of a settlement, it shall create a written record of the process conducted containing, at a minimum, a description of the settlement reached and the matters disclosed during the process, and shall place this record on the register maintained by the Registrar.
4. If a settlement cannot be reached using the alternate resolution process or if the Inquiries, Complaints and Reports Committee refuses to approve the settlement, the usual process of the Inquiries, Complaints and Reports Committee shall commence.
5. An alternate resolution process may only be used if,
(a) the complainant and the member consent, on an informed and voluntary basis, to participate in the process,
(b) the Inquiries, Complaints and Reports Committee has made written rules concerning use of the process [including rules on full and frank disclosure of all matters and comprehension by both the complainant and the member of the language used].
(c) the rules provide that a person appointed to help resolve a matter by means of this process may be a member of the Inquiries, Complaints and Reports Committee or a person independent of the Committee; however, a member of the Committee who is so appointed shall not subsequently deal with the matter if it comes before the Committee unless the complainant and the member consent.
6. No person appointed to help resolve a matter by means of an alternate resolution process shall be compelled to give testimony or produce documents

[34] *Ibid* at 105 - 107

> in a proceeding with respect to matters that come to his or her knowledge in the course of his or her assistance other than a proceeding under the *Regulated Health Professions Act*, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.
> 7. No record, document or thing prepared for or statement given concerning an alternate resolution process is admissible in a proceeding other than a proceeding under the *Regulated Health Professions Act*, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

Some seven months after receiving these recommendations, the Minister of Health and Long-Term Care introduced Bill 171, *An Act to improve health systems by amending or repealing various enactments and certain Acts* (*The Health Systems Improvements Act 2007),* an omnibus bill covering many aspects of health care and protection in Ontario, the RHPA being only one of several health-related laws reviewed and revised. ADR legislation was among the proposed changes to the RHPA, but in a different version from that recommended by HPRAC. The introduction to the Bill describes the *Regulated Health Professions Act* as being "significantly modified to reflect a new streamlined process for dealing with complaints and reports made against members [of colleges]. The Code is amended to permit the use of alternative dispute resolution with respect to a complaint."[35]

[35] *Health System Improvements Act*, SO 2007, c 10 [HSIA} at ix

Government Policy Goals

In introducing the *Health System Improvements Act* 2007 in the Legislature, the Minister identified several specific goals that the new complaints resolution provisions, including ADR, are intended to achieve:

1. Streamline the complaints process, addressing the concerns of patients and citizens frustrated by the lack of transparency or the slowness of the complaints process;
2. Standardize the response process;
3. Create very clear timelines and expectations about the appropriate response;
4. Create circumstances that will, in a very deliberate way, enhance the transparency with which these matters are addressed.[36]

The significant differences between HPRAC's advice to the Minister of Health and Long-Term Care for ADR legislation and those proposed and ultimately passed into law are

- The discretion and authority to refer (not "direct") the complaint to an ADR process (rests solely with College Registrar [not Investigations, Complaints and Reports (ICR) Committee] in legislation);
- Consent for participation (in legislation);
- Informed and voluntary participation (not in legislation);

[36] Ontario, Legislative Assembly, Debates Official Report of the Debates (Hansard), 38th Parl, 2nd Sess, No 53 (12 December 2006) at 1420 (Hon George Smitherman); Ontario, Legislative Assembly, Debates Official Report of the Debates (Hansard), 38th Parl, 2nd Sess, No 53 (20 March 2007) at 1550 (Hon George Smitherman); Ontario, Legislative Assembly, Debates Official Report of the Debates (Hansard), 38th Parl, 2nd Sess, No 53 (28 May 2007) at 1600 (Hon George Smitherman)

- Written rules for the alternative dispute resolution process (not in legislation);
- The confidentiality of all communications within the process (in legislation);
- That the ADR facilitator cannot be compelled to give testimony regarding the matter in any proceeding (in legislation)
- Publication of the settlement and matters disclosed on the public Register (not in legislation); and
- Concurrency of the ADR process with Complaints Committee investigation of the matter (in legislation).

The Legislation

Bill 171 Health System Improvements Act 2007, Schedule M: RHPA Schedule 2 Health Professions Procedural Code amendments - ADR Legislation

The Code is significantly modified to reflect a new streamlined process for dealing with complaints and reports made against members. The Code is amended to permit the use of alternative dispute resolution with respect to a complaint.[37] ix

17. (1) Subsection 1 (1) of Schedule 2 to the Act is amended by adding the following definition: "alternative dispute resolution process" means mediation, conciliation, negotiation, or any other means of facilitating the resolution of issues in dispute; ("processus de règlement extrajudiciaire des différends")

Alternative dispute resolution with respect to a complaint
25.1 (1) The Registrar may, with the consent of both the complainant and the member, refer the complainant and the member to an alternative dispute resolution process, (a) if the matter has not yet been referred to the Discipline Committee under section 26; and (b) if the matter does not involve an allegation of sexual abuse.

[37] ix [*This Explanatory Note was written as a reader's aid to Bill 171 and does not form part of the law. Bill 171 has been enacted as Chapter 10 of the Statutes of Ontario, 2007* i]

Confidentiality
(2) Despite this or any other Act, all communications at an alternative dispute resolution process and the facilitator's notes and records shall remain confidential and be deemed to have been made without prejudice to the parties in any proceeding.

Facilitator not to participate
(3) The person who acts as the alternative dispute resolution facilitator shall not participate in any proceeding concerning the same matter.

Ratification of resolution
(4) If the complainant and the member reach a resolution of the complaint through alternative dispute resolution, they shall advise the panel of the resolution, and the panel may, (a) cease its investigation of the complaint and adopt the proposed resolution; or (b) continue with its investigation of the complaint.

Timely disposal
28. (1) A panel shall dispose of a complaint within 150 days after the filing of the complaint.

Not affected by ADR
(2) A referral to an alternative dispute resolution process under section 25.1 does not affect the time requirements under this section.

In contrast to the previous definition of ADR in the *Statutory Powers Procedure Act,* which has in the past governed the use of ADR in connection with the regulatory college Discipline process, the new definition in the amended Health Professions Procedural Code describes ADR as a "process" rather than a "mechanism" and includes the listed types of ADR as well as "any other means of resolving disputes," rather than stating them as the *meaning* of ADR.[38]

When Bill 171 was referred to the Standing Committee on Social Policy for debate and public input, there were strong objections from some Colleges to the

[38] *RHPA Schedule 2, Health Professions Procedural Code* s 1 (1)

confidentiality and concurrency provisions, principally on the grounds that a) confidentiality was counter to the regulatory principles of transparency and accountability, and could prohibit the College from taking action on worrying information that might come to light about a member's practice during the ADR process; and b) concurrency with an ongoing investigation duplicated efforts unnecessarily, thus undermining what was identified as the regulatory principle of efficiency. Following the Standing Committee debates and oral representations, and several hundred written submissions, only a few of which related directly to the ADR provisions, the ADR legislation left the Standing Committee and was passed into law with only one minor alteration.

Chapter Three

THEORETICAL FOUNDATIONS AND DEBATES

This chapter explores the theoretical arguments for and against ADR legislation, and what, if any, is "ideal" ADR legislation. The theoretical foundation for this study lies in the area of socio-legal studies, particularly studies of regulatory culture, legal consciousness and administrative discretion, which offer interesting and dynamic approaches to analyzing administrative responses to new laws, and to the ADR legislation in particular, and to understanding the conditions that produce or might explain "intended" and "unintended" consequences of legislation and the legislative development process, as understood through the lens of legal consciousness and its influence on regulators' administrative policy- and decision-making.

The theoretical research, critical analysis and conclusions presented in this chapter have informed the approach taken later in this paper to designing the case study and to reporting and analyzing the responses of the RHPA regulatory community members – those who articulated ADR policy, drafted the ADR legislation, and those College officials who are charged with implementing it – to the research questions that probe their individual perceptions and understanding of the background to the legislation, whether, in their view, the ADR legislation in the form passed by the Legislature is appropriate, and what impact the ADR legislation has had or will have on their previous or current complaints resolution practices. Analysis of the theoretical debates regarding ADR legislation and administrative discretion also

support a discussion about whether constitutive legalism plays a significant (though perhaps unconscious) role, as Edelman and Stryker suggest, in influencing "how and when law matters" in regulatory culture and the direction of administrative discretion. As Edelman and Stryker state, while "[t]he constitutive legal environment is the realm of meaning-making, symbols, and culture;"[39] "institutional processes within the constitutive legal environment" and "political processes are also operative as opposing forces contest the meaning of law and justice."[40] Based on the following theoretical discussion, the case study described later in this paper seeks to expose and identify the presence of conscious and unconscious meaning-making elements of culture and the alignment or opposition of the political and institutional forces within the regulatory community that determine the meaning of (the ADR) law, whether and how (the ADR) law matters and to what extent it fails or achieves its intended purpose.

3.1 The Influence of Regulatory Community and Culture on Regulator Responses to new Legislation

This section examines the theoretical literature on social attitudes and beliefs about law, its place in regulation and the power of law in shaping behaviour, either to conform to law or to resist law, and whether these attitudes and beliefs are influenced by the environment from which the law arises and where it has application. Can theory regarding law's social environment (community and culture) offer

[39] Edelman & Stryker *supra* note 4 at 543
[40] *Ibid*

perspectives and suggest explanations of how and why regulators respond to a new law in certain ways? Does the social environment of law as expressed in the regulatory community and regulatory culture itself play a role in determining regulator behaviour?

Social culture is an anthropological and sociological concept that refers to the phenomenon of collective social construction of beliefs, norms, values and other aspects of common experience within a group or community. There are myriad types of groups and communities and all have in common the tacit and overt ideation of collective experiences, aspirations, values and expectations. One concept of a community that captures the general applicability of the term refers to it as actions and interactions that are based on shared expectations, values, beliefs and meanings between individuals – a cultural organism or system that reflects the attitudes and relationships of its members.[41] The Merriam-Webster definition of culture relevant to this study of regulatory culture is "a set of shared attitudes, values, goals, and practices that characterizes an institution or organization," and "the set of values, conventions, or social practices associated with a particular field, activity, or societal characteristic."[42]

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[41] P. Bartle, "What is Community? A Sociological Perspective" Vancouver Community Network Community Empowerment Collective, (http://cec.vcn.bc.ca/cmp/modules/com-wha.htm retrieved March 2013)

[42] Merriam-Webster online dictionary (http://www.merriam-webster.com/dictionary/culture retrieved March 2013)

In his influential work examining the role of the concept of law in society, *The Legal System: A Social Science Perspective*,[43] Friedman elaborates the notion of law as a social product, arising out of a social field or "culture." He defines legal culture as "those parts of general culture – customs, opinions, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways."[44] He identifies the elements of the general culture that give rise to law as a "network of forces, arising from interests (felt needs and desires), which is at work creating norms, rules, and orders – 'legal acts'."[45] Law itself, according to Friedman, comprises "structures and rules," and "is one of three phenomena, all equally and vividly real": "the social and legal forces that press in and make the law; the law itself; and the impact of the law on behaviour in the outside world."[46] Friedman argues that the law "on the books" and the law "in action" are not invariably the same. Indeed, once "legal acts are communicated to people in society," people respond, modifying or not modifying their behaviour, exercising choice and discretion through the myriad "leeways, options, and irrationalities" provided by the system, the law, and the cultural context in which the law is situated.

Friedman asserts that "a legal system in actual operation is a complex organism in which structure, substance, and culture interact. To explain the background and

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[43] Friedman *supra* note 10
[44] *Ibid* at 15
[45] *Ibid* at 4
[46] *Ibid* at 2.

effect of any part calls into play many elements of the system."[47] In Friedman's view, knowledge of the elements of the legal and social system in which the law arises and their relationship to one another is essential not only to understanding the substance of the law itself, but also to understanding the impact of the law on those affected by it and the choices they make in relation to modifying their behaviour (or not) in response to the law. "Legal behaviour cannot be understood except in context, including the cultural context."[48]

According to Friedman, the elements of the legal system and subsystems create a continuous feedback that interrelates with and impacts the elements of the system, whose components include institutions (legislatures, regulatory bodies, courts and enforcement agencies); rules, laws and norms; and dispute resolution processes.[49] Since, according to this view, the legal system is not a hermetic element within the larger society, what it "does and what it is reflects the distribution of power in society – who is on top and who is on the bottom; law also sees to it that this social structure stays stable or changes only in approved and patterned ways."[50]

An important element of cultural analysis in the study of organizations (as a form of community) is the inclusion of the "non-rational" elements in the understanding of

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[47] *Ibid* at 16
[48] *Ibid*
[49] *Ibid* at 17-19
[50] *Ibid* at 20

culture and its influence on individual and collective meaning- and decision-making and action, suggesting that the regulators in this study may be influenced by (conscious or unconscious) non-rational (e.g., intuitive, emotional, ideological) as well as "rational" considerations in their response to the ADR legislation.[51]

> [W]hether one treats culture as a background factor, an organizational variable, or as metaphor for conceptualizing organization, the idea of culture focuses attention on the expressive, nonrational qualities of the experience of organization. It legitimates attention to the subjective, interpretive aspects of organizational life. A cultural analysis moves us in the direction of questioning taken-for-granted assumptions, raising issues of context and meaning, and bringing to the surface underlying values.[52]

Friedman's cultural perspective on the embedded nature of the law within society, affecting and being affected by general social, political and economic trends and offering openings for individual interpretation and application of the law, has been influential in socio-legal studies of law, legal culture and legal consciousness. His discussion of legal culture as a constitutive dynamic, flowing from general culture into fields of normative, legislative and legal practice and out again, reforming the general culture, has much in common with and may have influenced Meidinger's view of regulatory culture and regulatory communities and the critical forces within and surrounding the regulatory community that determine how rules are developed

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[51] "Perhaps because [culture] is such a common-sense term, we all 'know' what it means without much explanation (precisely why organization scholars should be cautious in using it). For academics, culture provides a conceptual bridge between micro and macro levels of analysis, as well as a bridge between organizational behavior and strategic management interests. For practitioners, it provides a less rationalistic way of understanding their organizational worlds, one closer to their lived experience. L. Smircich, "Concepts of Culture and Organizational Analysis" (1983) 28:3 Administrative Science Quarterly at 346

[52] *Ibid* at 355

and applied (or not) by the members of the community – collectively and individually.

According to Meidinger, regulatory culture is what happens in a regulatory community, which comprises "the regulatory agency, the lawmaker, the regulatee(s), the public, etc.,"[53] whose members behave like any other community in the socio-political interplay that generates, favours, overthrows and regenerates ideas and governing principles and acceptable norms of behaviour within the community.

> The groups involved in regulatory policy and practice are thus larger than regulatory agencies. For this and other reasons, it may be more helpful – both for understanding the current situation and for moving it in desirable directions – to think of primary regulatory groups as *regulatory communities* rather than as bureaucratic organizations.[54]

In a regulatory community, members act both individually and collectively, according to their own perceived interests as well as from a shared vision of the community and its place in the larger society.[55] Community members influence each other, act with reference to each other and variously desire each other's respect or, conversely, consciously or unconsciously think and act outside the perceived norms of the community, which are the basis of "appropriate" behaviour,[56] while remaining constituent members of the regulatory community. Thus, "[c]ulture is not always fully conscious or cognitive. Much of the culture we carry around with us is

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[53] Meidinger 1987 *supra* note 7 at 364
[54] *Ibid* at 364 (italics in the original)
[55] *Ibid* at 365
[56] *Ibid*

uncomprehended and unexamined. We act on it simply because that is how people act in our group. ... Equally important, culture cannot always be revealed simply by asking people their attitudes regarding issues. It often must be read from their behaviors and products. In an important sense, then, culture is not really just what people 'carry around in their heads'; it is what they enact in their daily lives."[57] Meidinger claims that the sum of the decisions and interactions of all the members of the regulatory community actually *constitute* the "regulatory culture," which, in turn, has the power to determine how regulation is organized and carried out in specific instances.

> Therefore, as well as being arenas for the pursuit of preexistent interests, regulatory communities appear to have the capacity to be "constitutive" – that is, to be forums in which appropriate individual and collective behavior (and interests) are defined and redefined.[58]

Cultural values, beliefs and behaviours in a regulatory community are constantly being defined and redefined with reference to the community members and the shifting tides of power within the community and in the larger social, political and economic environment in which the regulatory community operates. Meidinger observes that inconsistencies and illogicalities are commonplace elements within a regulatory community and among the values held by the members of the community.[59] Indeed, normative and dissonant understandings and values routinely

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[57] *Ibid* at 361
[58] *Ibid* at 363
[59] *Ibid* at 365

co-exist in a regulatory environment and are resolved and then reappear as community members encounter and address constantly emerging issues.

In Meidinger's view, regulatory culture is also the result of individual and collective regulatory community interaction with general cultural assumptions held by the wider society, political pressures from within and from outside the regulatory community, including the pressure to meet the needs of the larger system, legal requirements imposed on the regulatory community, as well as bureaucratic procedures available to and structural constraints experienced by the community as a whole and by its individual constituent members.[60] Meidinger asserts that all these pressures, dynamics and dimensions both within and from outside the community together *make* regulatory culture and regulatory administration.[61]

Recent studies of regulatory culture continue to emphasize the importance of cultural understandings in accepting, interpreting, and carrying out (or distorting) regulation on the basis of "[w]ebs of significance understood as cultural meanings essential in our understanding of ourselves and others, our contextual frames and our daily handling of challenges."[62]

> In the cultural approach data is interpreted in relation to the dynamics of the context; the relation between the actor, the situation, the technology in use etc., searching for the driving forces influencing 'what's going on'; like

[60] *Ibid* at 373
[61] *Ibid* at 372
[62] Tharaldsen & Haukelid, *supra* note 17 at 377

> economical frames, project organization and rewards, values in use, strengths and weaknesses, what and how to improve, etc. Important success criteria in a cultural approach would also be related to the involvement of management and employees in the intervention to come.[63]

These studies also conclude that it is often the difficult-to-discern complexities of regulatory culture as it is actually lived and experienced by the relevant actors that can bring about paradoxical results. Regulatory culture must be taken fully into account in regulatory research, because only "[t]hen a fuller picture of why rules and procedures are not always followed, or why well-intended incentives might have paradoxical, undesired consequences might be better perceived."[64] For example, the findings from recent regulatory culture studies in high-risk regulatory environments suggest that hierarchical positioning, as evidenced in the response to social dynamics in the regulatory culture, impact whether and how new rules or legislation are adopted. The role of community leaders and the manner in which they demonstrate leadership can be seen to influence group dynamics and attitudes toward rules and the rule-making process:

> Leadership has a central position in regulatory culture. If, however, an attempt is made to explicitly 'lead' a culture, the effects might be entirely contrary to what is expected (e.g., an organisation in which the workers criticised the 'cultural propaganda' and 'ideology' spread by their manager)." By highlighting the impact of certain forms of communication ("ideology" and cultural "propaganda"), their finding and conclusions suggests a possible explanation for why some rules – and some leaders - are followed, while others produce contrary results.[65]

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[63] *Ibid* at 382
[64] *Ibid* at 384
[65] Reiman & Oedewald *supra* note 17 at 9

Reiman and Oedewald also found that "[s]ome members are seen as model representatives of the group. These individuals have a more powerful influence than others on the formation of norms."[66] Therefore, attention to and awareness of the potential effect of modeling behaviour by influential members of the community (not necessarily leaders in official status) may help explain group member behaviours that conform to or diverge from the "official" rule.

Meidinger maintains that a cultural perspective on regulation is necessary to understanding that underlying individual and community assumptions about norms and values determine how and whether rules are adopted, resisted or contested.

> [A] cultural perspective appears desirable because of the normative directions in which it points. By highlighting the processes of values construction and interest definition, for example, it opens us to understanding that we make many choices in developing and implementing regulation, and that those choices have major collective components as well as individual ones.[67]

If there is an RHPA regulatory community, are there perceived leaders in the community (individuals or organizations) and do the behaviour and practices of perceived leaders in the community constitute the norm within the community and influence the attitudes and behaviour of the other members of the community towards the ADR legislation?

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[66] *Ibid* at 10
[67] Meidinger 1987 *supra* note 7 at 376

3.2 The Influence of General Cultural Assumptions about the Role and Power of Law on Regulator Responses to the New ADR Legislation

Meidinger's "general cultural assumptions" that make regulatory culture and regulatory administration would likely include an assumption – conscious or unconscious – about the concept, presence, power, role and general impact of law and formal or informal social normative ordering in the macro and micro social, political and economic environment. The importance of cultural analysis of the constitutive legal environment is also emphasized by Susan Silbey in her studies of legal consciousness, which are dealt with in more detail later in this section. Like Meidinger, whose work she and Ewick reference in their work on legal consciousness, Silbey grounds understanding of causes, influences and manifestations of attitudes towards law and non-law in the observation and analysis of the constitutive environment.

> Constitutive analyses work to resolve these debates concerning causality, determinism, structure, and agency in studies of culture and legal consciousness. Research from a constitutive perspective emphasizes the roles of consciousness and cultural practice as communicating factors between individual agency and social structure rather than expressions of one or the other.[68]

> [C]onstitutive cultural analyses of legal consciousness describe the processes by which law contributes to the articulation of meanings and values in daily life. Attention is directed to the local contests to create controlling meanings from competing discourses within most aspects of ordinary life.[69]

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[68] Silbey 2001 *supra* note 22 at 8627
[69] *Ibid*

Edelman, Stryker and Suchman share Silbey's view of law as a pervasive belief system and general cultural assumption permeating the most fundamental values and meanings of organizational life.

> At the most fundamental level, the constitutive legal environment profoundly shapes social norms about human agency, responsibility, and accountability (Lempert and Sanders 1986). Likewise, it shapes concepts of economic rationality and efficiency, offering basic logics that seep into the culture and infrastructure of social interaction within organizations.[70]

In their analysis, law constructs and legitimates organizational forms, inspires and shapes organizational norms and ideals and helps constitute the identities of legal actors.[71] Law permeates society and influences thinking about organization structures and processes and emerges in various contexts as rules (to be followed, "gamed," ignored, resisted, avoided, escaped, broken, etc.) and, more often, as unconsciously absorbed and accepted conventions, "the way things are done around here," as noted earlier.[72] Thus a new law may be perceived as an appropriate response to the need to regularize or legitimize certain practices within the community at large, and, in this case, more specifically within a regulatory community, or as an unexpected and unwanted intrusion into a community's accepted (though perhaps imperfect) way of dealing with a particular set of circumstances or behaviours.

Edelman and Suchman observe that organizations often adopt structures and practices because the socio-legal environment constructs them as proper, responsible,

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[70] Edelman &Stryker *supra* note 4 at 541
[71] Edelman & Suchman *supra* note 18 at 493
[72] Edelman & Stryker *supra* note 4 at 540

legitimate and natural.[73] As well as having an obvious, observable influence, legal consciousness and culture often play a more subtle and invisible role in the strategies of organizations and communities.[74]

> The constitutive legal environment consists of concepts, definitional categories, labels, and ideas that play a subtle and often invisible role in how economic actors, including but not restricted to organizations, come into existence, organize their activities and relationships, and arrange their governance.[75]

As Meidinger notes, a regulatory community is constantly under pressure to respond to, reflect, and meet the needs and conform to the assumptions of the larger system, which is heavily permeated with general assumptions about the importance of law in all aspects of society.

> [V]arious direct pressures that social systems impose on regulatory communities all mean that the larger social system will continue to play a significant role in the understandings that guide regulatory practice. [76]

> A local community organized around regulation experiences pressure to produce it to fit the needs of the larger system – within certain costs, forms, organizational arrangements, etc. [based on a set of cultural understandings].[77]

While Edelman and Stryker are not unique in identifying the pervasiveness or hegemony of "legalism" or "legality" in Western societies and legalism's influence on ways of thinking about social order, organization and processes, they articulate, in ways that are relevant to the discussion of ADR, how the power and control that

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[73] *Ibid* at 532
[74] *Ibid* at 540
[75] Meidinger 1987 *supra* note 7 at 370
[76] *Ibid*
[77] *Ibid* at 369

legalism asserts over ways of seeing, understanding and articulating means of solving problems and handling complaints and concerns determine how far and in what ways alternative processes may be accepted or adopted.

> Consistent with ideas of law as legality and symbols, legal power resides not only in the overt exercise of law but also in the form of cultural hegemony – in subtle understandings of rights, responsibilities and rational action. Beliefs and practices that are highly institutionalized are a very potent form of power, acquiring mythical status as rational or proper or fair, with the result that they go unchallenged and become nonissues.[78]

The power of legalism in the general culture influences many social and political choices, including, it might be argued, the institutionalization, codification and "juridification"[79] of ADR practices by legislating ADR procedures, and reflects the conscious or unconscious movement toward the dominance of legality and "legalism" over alternative approaches to problem-solving and complaint or dispute resolution.[80]

Meidinger asserts that "[v]irtually all activity in legal arenas [including "administrative regulation"] attempts to achieve a vision of *appropriate* social arrangements," and is therefore political in nature.[81] He observes that when issues and problems arise in regulatory communities, decision-making about the issue or

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[78] Edelman & Stryker *supra* note 4 at 532

[79] See L. Blickner & A. Molander on the concept of juridification in Arena Centre for European Studies, University of Oslo Working Paper No.14, March 2005

[80] See, for example, C. Menkel–Meadow "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR'" (1991) 19 Florida State University Law Review 1; P. Brooker "The Juridification of Alternative Dispute Resolution", (1999) 28 Anglo American Law Review 1

[81] Meidinger 1987 *supra* note 7 at 378

problem usually returns to the legislature whence they derive their authority.[82] This assumes that the legislature and the law are the primary authority in regulatory culture and communities. Meidinger suggests, however, that much of regulatory administration occurs beyond legal declarations in the everyday acts and interactions among members of the regulatory community and that these daily acts and communications (overt and subliminal) constitute regulatory culture.[83]

Meidinger's conclusions reinforce the perception that events and trends in the legal environment have a profound effect on collective thinking about various aspects of society concerned with dispute resolution and justice. Some solutions come to appear preferable under the influence of various complex, inter-related and evolving trends and pressures. For example, alternative dispute resolution processes (mediation, negotiation, conciliation, private arbitration) could come to appear as an appropriate and even preferable solution to a particular perceived problem or combination of problems (e.g., court costs and wait times, a complainant/plaintiff's lack of standing or participation), and ADR legislation may be deemed to be the best way to support the implementation of that solution. However, there may be significant disagreement within the regulatory community with the definition of the "problem," and with some or all aspects of the proposed solution. Therefore, the legal paradigm or "constitutive legalism" that appears to dominate much of Western society may be a source of

[82] *Ibid* at 370
[83] *Ibid* at 373

support for the legitimation of ADR or the means of undermining what many supporters of ADR consider to be its benefits (e.g., informality, reduced costs and wait times, party participation) that ADR's "alternativeness" is intended to provide. The research in the case study presented later in this paper offers an opportunity to examine whether these considerations influence regulator responses to the RHPA ADR legislation, whether the key informants identify the paradox between legalism, ADR law and alternatives to law, and whether such awareness may influence their administrative behaviours.

3.3 The Influence of Current Political Pressures on Regulatory Community Responses to the ADR Legislation: Professional Autonomy, Self-Regulation and the Legal Environment

As Edelman and Stryker state, while "[t]he constitutive legal environment is the realm of meaning-making, symbols, and culture,"[84] "institutional processes within the constitutive legal environment" and "political processes are also operative as opposing forces contest the meaning of law and justice."[85] Among the external and internal political pressures experienced by the RHPA regulatory community recently is the major shift in public and consumer attitudes towards professional healthcare providers. Some of the issues that impact on the healthcare professional community and the paradigm of professional self-regulating bodies include general social and economic pressures towards public cost constraints, greater consumer choice and

[84] Edelman &Stryker *supra* note 4 at 543
[85] *Ibid*

control,[86] greater transparency and accountability of public bodies, including those like the regulatory Colleges in Ontario whose authority is a direct delegation from the provincial Legislature. This section examines recent theoretical and empirical studies relating to the status of professional self-regulation for political issues that may influence regulators' responses to the ADR legislation.

In many jurisdictions the professional claim to autonomy and privileged self-regulatory status has been challenged successfully by the public and by the state. Two important reasons for state intervention into and greater control of the professions appear to be the failure of the self-regulatory model to police and prevent very serious breaches of public trust, most notably in the U.K., where the autonomy of physicians (as well as lawyers) to regulate the members of their profession has been drastically curtailed as a result of public reporting of egregious professional misconduct where the regulator failed to take appropriate action to protect the public from harm and the public, rather than the professional interest, from being served. As well, the needs of a changing society for increased access to a wider range of affordable healthcare services from a wider spectrum of healthcare providers previously considered "alternative" to the mainstream health professions, and the government's need to control public expenditures by ensuring efficient access to

[86] Recently, internet technology and the democratization of information on the web have made health information available to the wider public ("Dr Google"), thus eroding one of the principal arguments and motivations for professional regulatory, social, economic and political privilege – access to and exclusive "ownership" of a body of specialized knowledge and information.

appropriate levels of care, provide impetus toward greater state control of the healthcare professions. Thus the need for greater economic efficiencies in state-financed healthcare models has combined with growing public distrust in the reliability of the professions to act transparently and effectively in the public interest and to be accountable for safeguarding public protection over the rights and interests of the profession to limit the extent of health profession self-regulation.

Some see the reduction in professional autonomy and increase in direct regulation by the state as an inevitable and irreversible trend in the provision of health services, leading to a rebalancing of social, political and economic power between consumer and service provider, mediated by the legislative authority of government. Burns is one of a number of scholars who describe Western societies as entering a period of "post-professionalism," which includes a reduction in the power of lawyers and doctors, among others, to dictate the terms of the social contract in their favour. Post-professionalism heralds "new ways to think intellectually in framing an epistemology of professions, professional organizations, professional practices, and professional discourses, not merely extrapolating the professions' standard model as a (half-baked) theory of society."[87]

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[87] E. Burns, "Developing a Post-Professional Perspective for studying Contemporary Professions and Organizations" www.mngt.waikato.ac.nz/ejrot/cmsconference/2007/proceedings/newperspectives/burns.pdf at 4. See also E. Freidson, "The changing nature of professional control" (1984) 10 Annual Review of Sociology 1; E. Freidson, "The reorganisation of the medical profession" (1985) 42 Medical Care Review 11; D. Coburn, "Freidson, then and now: An 'internalist' critique of Freidson's past and present views of the medical profession" (1992) 22 International Journal of Health Services 497; D.

> Prior to the seminal work of Freidson and Johnson around 1970, a number of opppositional pairings were posed in either or both academia and the everyday world: the knowledge imperative of professions v organisational and functional imperatives of bureaucracies, business imperatives for profit and competition v professions' ethicality and public service, professional altruism and community orientation v trade union self-interest and corporate hostility. These were never true as simply stated, though all were posited at different junctures. It is in the more recent period, however, which I have been describing as the post-professional period, that the untruth or very limited truth of such dichotomies has been shown to be part of a much more complex and changing formation of later modernity.[88]

Burns anticipates a new era where the dominant professional relationship to society and the state has been seriously and perhaps irretrievably eroded and where the accepted "truths" contained in professional discourse have lost credibility and authority.

> So there is an implicit, if not explicit, power contestation around whose discursive truths will prevail. It may be that the disaggregation of that brilliant conjunction of benefit/normativity and expertise/science that the professions managed to create in their formative period is an aspect to focus upon even as professions are increasingly closely tied to the hierarchies of corporate and political governmentality and power (Johnson, 1995).[89]

Harrison and McDonald make similar observations about legitimation and loss of professional dominance in their article[90] attributing the changes partly to the rise of

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Kenny & B. Adamson, "Medicine and the health professions: Issues of dominance, autonomy and authority," (1992) 15 Australian Health Review, 319; R. Olsen, "The Regulation of Medical Professions" http://www.scribd.com/doc/239527/Regulation-of-Medical-Professions?page=1; M. Moran & B. Wood, *States, Regulation and the Medical Profession* (Philadelphia: Open University Press, 1993) B. Salter, "Medical regulation: new politics and old power structures" (2002) 22 Politics 59; and P. Thomas & J. Hewitt, "The Impact of Clinical Governance on the Professional Autonomy and Self-Regulation of General Practitioners: Colonization or Appropriation?" (2007) http://www.management.ac.nz/ejrot/cmsconference/2007/proceedings/newperspectives/thomas.pdf

[88] *Ibid* at 9

[89] *Ibid* at 10

[90] S. Harrison & R. McDonald "Science, consumerism and bureaucracy: New legitimations of medical

consumerism and partly to a growth in the bureaucratization of the professions. Their observations are relevant to this case study for the potential political issues behind the formalization, through legislation, of heretofore informal, profession-controlled informal complaints resolution processes.

> One might say, therefore, that institutions have an associated discourse (a term that we employ rather broadly) of legitimation that includes not just the language in which the institution is presented, but also the external agencies from whom (amongst other sources) legitimation is sought, and the demands and procedures associated with those agencies. The dependence of the medical profession upon legitimacy bestowed by the state is virtually ubiquitous. Even in countries (such as the USA) regarded as bastions of market capitalist enterprise, the medical monopoly is maintained through some form of state registration or licensure and the state provides substantial "third party" public funding for medical care.[91]

Their comments about the "discourse of legitimation" and the complex influences of this discourse and its underlying political and social philosophy on all stakeholders of the professional dominance paradigm are substantiated by the research conducted in Ontario and documented by O'Reilly,[92] Spoel and James[93] and Gilmour et al.[94]

O'Reilly studies the changing political and policy climate and the public debate that led to the passage of the RHPA in 1991. She provides evidence of the self-regulatory and political power reduction among the traditionally dominant health professions

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professionalism" (2003) 16 The International Journal of Public Sector Management at 110

[91] *Ibid*

[92] P. O'Reilly, Health Care Practitioners: An Ontario Case Study in Policy Making (Toronto: University of Toronto Press, 2000) [O'Reilly]

[93] P. Spoel & S. James," Negotiating Public and Professional Interests: A Rhetorical Analysis of the Debate Concerning the Regulation of Midwifery in Ontario, Canada" (2006) 27 Journal of Medical Humanities 151 [Spoel & James]

[94] J. Gilmour, M. Kellner, B. Wellman, "Opening the Door to Complementary and Alternative Medicine: Self-Regulation in Ontario" (2002) 24 Law & Policy 149 [Gilmur et al]

(principally the physicians and surgeons), especially in the area of judicial processes, and documents the growth of a holistic, participatory, consumer-rights-driven professional regulatory paradigm. In her analysis, the new legislation was developed to bring professional self-regulation into alignment with the broad standards of the society of the day.

> Today's state officials and advisers in health policy are increasingly turning to communitarian or holistic appeals. That is, the embedded judicial orientation favouring individualism, freedom, rights, private property, adversarial confrontation, defence, and conservatism are being challenged by alternative ideas of the collective good, social obligation, compassion, stewardship, cooperation and consensus building, patient outcome, and innovation.[95] ... Nor is it an easy task to translate these ideas [holism, collectivity] and practices into the legislation, regulations, and bylaws needed to govern a highly complex, technical set of practices and practitioners while still maintaining integrity to principle. This is only to say, we have a creative potential here, and we should make use of it.[96]

The political battles O'Reilly recounts reflect the determination of the mainstream professions to maintain the autonomy they had previously enjoyed, as well as the equal determination of public policymakers to wrest a significant part of that autonomy from them, to enforce greater transparency and public accountability on their processes, and to open the professional health regulatory model to non-mainstream professions.

> The critique of the disassociated nature of the judicial sphere becomes particularly important to health care policy as the vital relationship between the care provider and patient begins to be reconstituted. The old paternal relationship between the medical profession and her or his individual patient has come increasingly under attack and may well be replaced by the judicial

[95] O'Reilly *supra* note 92 at 226
[96] *Ibid* at 227

> relationship between rights-bearing individuals, particularly as the patient or client fights for more autonomy and choice.[97]

In O'Reilly's assessment,

> The new act [RHPA 1991] has succeeded in updating its predecessor legislation with regard to the economic, political, and judicial standards or blueprints in good repute in Ontario today. With these changes comes a shift in the privileges and obligations of the key actors of the sector. Political-judicial control mechanisms for both the professions' governing bodies and the public (including those via the state) were enhanced. Our broader blueprints of governance – participation, consent, representation, responsibility, and accountability – were brought to bear on the subgoverning system of professional self-regulation. And while they remain considerably weaker than in our broader society, the latter's more demanding blueprint is now more clearly positioned as the model of good governance.[98]

Spoel and James examine the particular case of the midwives who strove to become recognized as a separate self-regulating profession under the new RHPA. They analyze the rhetoric employed by the actors in that struggle – those who advocated for the midwives and those who opposed their recognition through being granted separate self-regulating status. Spoel and James parse the terms employed in that heated debate to assert or deny legitimacy and power, especially how the concept of the "public interest" was interpreted and used by both sides in their arguments for and against self-regulation for midwives.[99] While the mainstream professions used the public interest to argue for protection against the safety risks they perceived (or at

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[97] *Ibid* at 226

[98] *Ibid* at 200

[99] Compare O'Reilly at 219 "In particular, whom does [self regulation] protect, the public or the professionals? It was made clear during this policy process that the governing bodies of the professions are meant to represent the interests of the public. But the public interest is a notoriously slippery concept, and it remains to be seen just what interpretation the new professional colleges place on this obligation."

least insisted) that regulatory autonomy for midwives would create, the midwives interpreted and argued the public interest in terms of their direct accessibility to pregnant women providing greater freedom of choice to consumers, thus identifying the public interest with consumer rights. Spoel and James conclude that the net result of this struggle among the stakeholders in the RHPA regulatory community was that the professions were increasingly becoming more state-controlled.

> [W]hile the HPLR[100] increased the number of health professions independently "self regulated" by their own Colleges, these Colleges were to be subject to more comprehensive, state-controlled regulatory procedures than previously. Further, although the concept of the "public interest" appears as a primary motivating value in the HPLR symbolic hierarchy, this value merges ambiguously with the associated, but not identical, value of consumer "freedom of choice."[101]

As Meidinger observes, the political shifts and pressures in the larger system in which the regulatory community is embedded cause structural and procedural changes in the regulatory legal environment,[102] with their attendant benefits and costs. Some healthcare professionals thought they perceived a gain for themselves in the legislative changes, while others perceived a loss. Government itself appeared to gain more control over the professions by asserting its decision-making power on behalf of the consumer of healthcare services and on behalf of the public expense accounts by including less costly, now "safely" regulated services among those available to

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[100] The Health Professions Legislation Review, an extensive research and consultation process established by the Ontario Government in 1982, which produced the report, *Striking A New Balance*, which was the foundation for policy discussions leading to the *Regulated Health Professions Act* (1991).
[101] Spoel & James *supra* note 93 at 171
[102] Meidinger *supra* note 7 at 370

consumers. At the same time, Government increasingly demanded and achieved greater transparency and accountability by legislating significant proportions of public appointments to the governing councils of the previously exclusively self-regulating professions. The members of the professions were still paying the full cost of regulating themselves, but the regulatory model was shifting away from self-regulation, with Government clearly in charge of the legislative and professional regulatory agenda.

A similar struggle to that of the midwives occurred at the time the RHPA was under review ten years later, from 2001 to 2007, in connection with the desire for professional recognition through self-regulation by other health professions. These professions undertook various lobbying initiatives to gain self-regulatory status and the benefits they expected (or hoped) that this would bestow on their members.[103] Research by Gilmour et al. documents key informant interviews with the leaders of these "complementary and alternative medicine" ("CAM") professions regarding their expectations of self-regulation and the manner in which they framed their arguments against a very vociferous and defensive opposition from the mainstream professions with long-term self-regulatory status. While previously the mainstream professions controlled entry to the practice of the professions through strict (and, some would say, arbitrary) qualifying policies, through the proposed revisions to the

[103] Such benefits might include potential coverage for their services by the government funded and administered health insurance plan (OHIP) or (more typically) by third-party insurers.

RHPA, the Government took that privilege and prerogative from them by recognizing and legitimizing other professionals practicing naturopathy, homeopathy, kinesiology, psychotherapy, acupuncture and traditional Chinese medicine. It was during that debate about including "alternative" practitioners in the pre-existing regulatory framework and community that the new legislation governing the use of ADR in the College complaints resolution process was also proposed and discussed.

The studies by O'Reilly, by Spoel and James and by Gilmour et al. are among the few examples of empirical research into how legal actors within or connected to the RHPA community perceive its culture and dynamics and how the culture and the community influence member needs, interests and practices. These studies describe the struggle by community "outsiders," who desire equal legal recognition and legitimacy through inclusion within existing legal structures, and full access to practice privileges now increasingly controlled by Government. They demonstrate how the constitutive legal environment establishes and maintains the legal framework, institutions and processes by which some may gain and some may lose power and privilege. All play within and with the rules of legal legitimacy – promoting, accepting, resisting, ignoring, flouting, manipulating or seeking to change them to their advantage. These studies provide very useful empirical data regarding the historical and political context for the ADR legislation and are a valuable resource in understanding the responses of the members of the RHPA community to the ADR legislation.

3.4 The Influence of Regulatory Culture and Politics on Regulator Legal Consciousness and the Influence of Legal Consciousness on Regulator Administrative Discretion in implementing the ADR Legislation

Does the theory of legal consciousness provide a tool for categorizing and understanding variations in regulator responses to the ADR legislation? Assuming that regulator responses will not be uniform and that variations might be related to regulators' individual and collective views of the appropriateness of the ADR legislation within the context of the regulatory bureaucratic organization, the regulatory system and the legislated duty to serve and protect the public interest, can legal consciousness theory help describe and possibly even explain variations in the exercise of regulator administrative discretion in the complaints resolution process?

Building on Friedman's identification and explanation of the role of legal culture, Silbey – independently and in empirical research carried out and reported on with Ewick – developed an approach to legal consciousness that focuses on, records, documents, values and seeks to understand how individuals relate and respond to law and legality.[104] Ewick and Silbey's approach uses individual narratives about lived experience to reveal how individuals experience and respond or react to law in their day-to-day lives. They describe legal consciousness as emergent, complex and moving, and having shapes and patterns that are determined by the situation, the organization and the position of the individual both within the general social and legal culture and

[104] Ewick & Silbey 1992; Ewick & Silbey 1998; Silbey 2001; Silbey 2005 *supra* note 22

within their particular community or organization.[105] Legal consciousness can be unconscious to the individual but revealed in their expressed or implied assumptions about social hierarchy, power relationships and dynamics, and normative understandings about appropriate or acceptable behaviour. Ewick and Silbey's research leads them to observe that, like regulatory culture, individual legal consciousness is usually local, contextual, pluralistic and filled with conflict and contradiction, as individuals navigate the moving currents of law and assumptions about social norms and legality manifest in the culture around them and embedded within their own values and beliefs.

Ewick and Silbey's focus on stories – detailed narratives in the words of the individuals studied – grounds their subsequent analysis in the conscious and unconscious, expressed and implied expressions of relationship to law, including not only the "law on the books," but law as a pervasive presence in society. Their open-ended semi- or unstructured, in-depth, phenomenological approach to informant interviews has directly influenced the methods employed in this study in the hope that this approach will provide a robust data base for understanding the RHPA regulatory community and culture, and regulator perceptions, values, assumptions, ideas and beliefs, including those not directly stated (whether conscious or unconscious), that inform their discretionary decision-making in relation to the ADR legislation.

[105] Ewick & Silbey 1992 *supra* note 22 at 742

Ewick and Silbey report that, in the face of a powerful legal presence in the culture, expressed in law or implicit in everyday transactions, individuals or communities may be uncertain how to engage effectively with the legal culture. For some, legality is a reassuring presence, preserving and promoting order, while for others, legality represents a game with interesting challenges, risks and opportunities for gain or loss, depending on the skills of those who engage its rules. However, for still others, the hegemony of legality and the tendency it engenders to seek legal solutions to myriad everyday problems are experienced as oppressive and threatening, and to be avoided or resisted in whatever ways seem available in the situation, because law appears arbitrary, capricious and dangerous.[106] Hence these individuals, organizations and communities may resort to "tactical engagements with law, which are opportunistic, transient and express a form of power.[107]

Through recording the narrative impressions of life lived in the shadow of the law (i.e., all life in Western, if not all modern-day societies), Silbey concludes that "[t]hese accounts encompass the range of cultural materials with which people produce and experience legality as a structure of social action."

> The stories incorporate alternative normative bases for legal claims to authority, varying constraints that define action as legal, varying sources for legal capacities, as well as varying temporal and spatial locations for law. In one account, the law is remote, impartial and objective, something to be invoked for solemn and collective purposes that transcend the messiness and partiality of individual lives. The law itself resides in times and spaces separate from

[106] Ewick & Silbey 1998 *supra* note 22 at 192
[107] Ewick & Silbey 1991 *supra* note 22 at 743

> everyday places and, while enacted by legal functionaries, exists apart from the words or deeds of particular persons. In a second account, legality is understood to be a game of skill, resource, and negotiation, where persons can seek their own interests legitimately against others. Law in this rendering appears as a defined arena for strategic interactions, sometimes engaged playfully and sometimes with deadly seriousness, but always simultaneously alongside and within everyday life. A third story describes the law as an arbitrary power against which people feel virtually incapacitated. Often the only means of deflecting the legal power is to employ various subterfuges and evasions. These minor forms of resistance typically leave the law unchallenged and unchanged. Their employment and effectiveness is premised, however, upon a potentially subversive recognition of the structure and organization of legality in everyday life.[108]

Legal consciousness research has produced a sizable literature upon which this case study draws. Marshall and Barclay, for example, develop the Ewick and Silbey paradigm of responses to the law – conformity, contestation and resistance – in their study of sexual harassment.[109] They note that "in the intersection of the existing law and their own preferred action lies a zone of volition in which individuals make decisions about how law will shape their behavior."[110] An individual's perception (including their beliefs and values) of the law *in general* is significant in controlling individual volition with respect to their response to *specific* laws. The same law can be interpreted by an individual, or different individuals in different circumstances or having different perspectives, as constraining and controlling or liberating and empowering. Any new law encompasses broader social meanings than the specific subject matter of the law might suggest and can create new possibilities that enjoy the

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[108] Silbey 2001 *supra* note 22 at 8627
[109] A. Marshall & S. Barclay, "In Their Own Words: How Ordinary People Construct the Legal World" (2003) 28 Law & Social Inquiry 617
[110] *Ibid* at 623

legitimacy bestowed by the authority of the state. The enactment of law in practical application is influenced by individual beliefs and aspirations and has individual and collective effects.[111]

While Hull, in a study of legal consciousness, legality and same sex marriage[112] notes that recent legal consciousness research applies interpretive methods to individual narratives in an effort to describe how various social actors experience and understand the law, she and other legal consciousness scholars acknowledge that collective awareness of law and legality is embedded in individual perspectives and can be seen as much in resistance to law as in compliance.

> Resistance to law can be collective or individual, can take many forms, and is not always effective. The defining features of resistant consciousness are awareness of one's relative lack of power, a sense of the possibility of turning a situation to one's advantage, and an implicit "justice claim" that the current conditions are unfair and that those with more power are responsible for this unfairness (Ewick and Silbey 1998, 183). From the perspective of "against the law" consciousness, legality is "something to be avoided" because it is arbitrary, capricious, dangerous (Ewick and Silbey 1998, 192).[113]

In studying legal consciousness in a business regulatory environment, Larson[114] observes the interdependency of individual legal perspectives among those within the relevant social field that creates a shared vision or consciousness that could be described, according to Meidinger's defining conditions, as a regulatory culture.

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[111] *Ibid* at 624
[112] K. Hull, "The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage," (2003) 28:3 Law & Social Enquiry 629
[113] *Ibid* at 633
[114] E. Larson, "Institutionalizing Legal Consciousness: Regulation and the Embedding of Market Participants in the Securities Industry in Ghana and Fiji" (2004) 38:4 Law & Society Review 737

> By applying the study of legal consciousness beyond individuals to the emergent consciousness shared among participants in a social field, we can address questions of when law applies, when compliance is necessary, and how relations between competing institutions and firms are conceived. At the same time, the organizational field can be brought to bear on legal consciousness: Norms and practices that enable and constrain action are shaped within fields and consciousness is institutionalized through participants' internalization of the characteristic background assumptions in the field (Campbell 1998).[115]

Of particular relevance to this case study of the attitudes and perceptions of legal actors' in the RHPA regulatory community towards the ADR legislation and how those perceptions affect the implementation of the legislation is Davina Cooper's 1995 study of U.K. local government legal consciousness in response to a process of "juridification," in which local practices were being supplanted by new laws, regulations, policies and procedures imposed and enforced by a central authority.[116] Cooper's legal consciousness research into the politically inflected narratives of local government representatives provides an illuminating parallel to the Ontario healthcare self-regulatory College officials' reactions to the provincial Government's new ADR law. While the regulatory Colleges are not "local government," they are similar in the sense that they govern distinct "local" populations (of health professionals) within the larger public governance system and derive their power to do so directly from statutory authority of the provincial Government. Like municipal governments within the province of Ontario, the RHPA regulatory Colleges are statutory "creatures" of the provincial Government, and therefore not so much "self-

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[115] *Ibid* at 740

[116] D. Cooper, "Local Government Legal Consciousness in the Shadow of Juridification" (1995) 22:4 Journal of Law and Society 506 [Cooper]

regulating" by their members as agents of government policy between the members of the professions and the provincial Government. Indeed, the discrepancy between the self-governing description and the reality of greater provincial Government control may be part of what gives rise to the frustration that leads to resistance to and avoidance of new constraints on administrative discretion. Cooper suggests that the use of law to constrain affects the legal consciousness of the regulatory actors:

> [C]entral government's explicit use of law to limit municipal discretion meant law became the mechanism through which local government power was constrained, and through which its subservience to the centre was reconstituted and reinforced.[117]

Cooper describes a pattern of local government compliance, selective implementation, non-compliance, evasion and resistance to the imposition of law. She draws upon Sarat's research[118] into the legal consciousness of welfare recipients and finds interesting and unexpected parallels between their attitudes of powerlessness and resistance in the face of legal authority and those of the local government officials she studied in their response to the increased juridification of their field of responsibility. She connects the individual response with the collective regulatory culture, replete with collective experience, meaning, values, attitudes, etc., through which lens individual responses are constructed out of legal actors' personal experience and adapted to particular legal circumstances.

> [A]ttention to consciousness emphasizes its collective construction and the constraints operating in any particular setting or community, as well as the

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[117] *Ibid* at 508

[118] A. Sarat, "'... The Law is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor" (1990) 2 Yale Journal of Law and the Humanities 378

> subject's work in making interpretations and affixing meanings. Legal consciousness research challenges the notion that people simply absorb a dominant legal ideology. Instead, law is understood experientially, in ways shaped by class, education, geography, and occupational positioning.[119]

Cooper notes that, like Sarat's welfare recipients whose sole source of power is to engage in tactics that restore some sense of agency while not disrupting the authority of the law,[120] the local government actors may not contest the central authority's right to impose legislation that affects local practices, "what they do contest, however, is the assumption that change occurs in the form law or its 'masters' intends." [121] It is precisely the assertion of personal agency in affecting how the intent of the law is realized that the local government actors and the welfare recipients achieve or restore some sense of discretionary power and control.

> [The Sarat research] emphasizes the creation of [legal] consciousness as a situated *practice* involving agency – collective and individual. While it is important to hold on to wider economic, political, and cultural determinants of [legal] consciousness, the role of agency and the possibilities it opens up for oppositional understandings are equally important. Second, the literature highlights the relationship between legal consciousness and power.[122]

> On the one hand, municipal actors claim that 'the law is the law' - a normatively closed tool of government policy – at the same time, they engage

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[119] Cooper *supra* note 116 at 510

[120] Compare Ewick & Silbey 1991 *supra* note 22 at 748: "Despite being opportunistic and transient, tactical engagements with such institutional powers are a critical, albeit often neglected, element of consciousness. ... It is out of the play of strategy and tactic, of power and resistance, that Millie's legal consciousness emerges....These tactics are a sort of anti-discipline, which, like the disciplinary power they oppose, are dispersed and invisibly distributed throughout everyday life.... The fact that tactical resistances, such as Millie Simpson's, are momentary and impermanent victories of the powerless, contingent upon opportunities presented, rather than created, means that they are often dismissed as trivial, having little, if any, political significance. ... Serious attention to tactics of resistance, the basis of conformity, and the mobilization of contestation affords a fuller description of power."

[121] Cooper *supra* note 116 at 509

[122] *Ibid* at 510

> in law games which highlight the open, albeit skewed, nature of legal possibility.[123]

Cooper concludes on the basis of her research that law used instrumentally to reduce local discretion leads to an exposure of local or domestic practices and holds them up to the scrutiny ("gaze") of the law, thus increasing the sense of powerlessness and loss of control, agency and administrative discretion. Individuals and local collectives were obliged to scrutinize their practices "through the eyes of the law," and adopt "procedures identified as necessary to avoid challenge."[124]

> The image of law as a powerful, external force, increasingly displacing (more domestic) forms of organization and regulation has become almost a truism within local government.[125]

While some local government officials in Cooper's study were clearly dissatisfied with the imposition of new laws curtailing their discretion, they felt they had no choice but to comply. However, several of these chose to focus "their critique on the identity of those making law rather than on law itself."[126]

Individual situations and experiences of legal constraint may give rise to a variety of responses, both positive and negative, and yet the individual experience does not necessarily disrupt the underlying acceptance and even support of the constitutive role of law in society.

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[123] *Ibid* at 522
[124] *Ibid* at 508
[125] *Ibid* at 512
[126] *Ibid* at 513

> Particular legal experiences may affect consciousness of law within a given domain. However, such experiences may not necessarily impact significantly on people's more general or abstract legal understandings which continue to be drawn from dominant, hegemonic ideologies. Thus, while law in particular may be criticized, law in general remains largely protected.[127]

3.5 The Role and Legitimacy of Regulator Administrative Discretion in Adopting, Contesting or Resisting the ADR Legislation

The healthcare professional self-regulatory sphere in Ontario can be seen as a "culture" that has its own norms, values, history and expectations, as the readings in Gilmour, Spoel and James, O'Reilly and others suggest. It is a world populated by, for example, professionals of different status and power, patients and consumers, agencies and organizations, bureaucrats and Government. All these players participated to some extent in the development, drafting and passage of the ADR legislation. Who participates in the implementation phase to influence how the legislation will ultimately be actualized and experienced? On the face of it, much of the responsibility for the implementation appears to rest with the College Registrar, who has been given authority in the legislation to refer specific complaints to the ADR process that is defined by the terms of the legislation.

This section looks more closely at the question of bureaucratic discretion, examining to what extent it is a legitimate policymaking process, and how it is guided and constrained by the culture of the wider society, of the particular regulatory sphere, and of the specific profession and College. There are many "regulatory cultures"

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[127] *Ibid* at 521

according to Meidinger's definition, including the state and its various clients, the legislative drafting community, the regulatory agency community, the professional community, the legal community, and so on. Each of these "cultures" impinges on and interacts with the others in the process of creating and applying legislation. Meidinger's perspective encourages a full and dynamic perspective of the process of legislative development and application.

In both his influential papers regarding the relationships among regulatory culture, rule of law, delegation, indeterminacy and administrative discretion, Meidinger challenges the fallacy (in his view) of greater legislative precision as the antidote to administrative interpretation of law and discretion in its application.

> Whatever the *a priori* situation, legislatures, courts, and agencies have in practice found it impossible to state decision-determining rules. . . . Conventions seem to refer to a much fuller array of behaviors than do rules. Many social actors might follow conventions without feeling legally bound to do so, perhaps without even thinking or fully knowing about them. They might follow them because they are convenient, simple, typical, traditional, or expected. Conventions might even describe shared expectations as well as typical behavior patterns. Because the realm of conventions seems much larger and denser than that of rules, conventions may allow a much more detailed structuring of social choice than do rules. [128]

For Meidinger, the idea of "convention" as a general, and not necessarily explicit, agreement about what constitutes "regular behaviours," and the "blurring of the lines between rule, principle and action," come "tantalizingly close to what many sociologists and anthropologists mean by culture. Therefore, an improved

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[128] Meidinger 1987 *supra* note 7 at 358

understanding of culture might lead to an improved understanding of regulation and its relationship to discretion, indeterminacy, and collective choice."[129]

> The appropriate behaviors in any situation will necessarily vary somewhat because of the conflicting principles available in any given culture, and because of the political nature of culture construction. . . . [A]ny culture will make some solutions more plausible than others. Accordingly, . . . cultural understanding is likely to infuse, structure, and constrain behavior without determining it.[130]

Meidinger addresses the "problem" of discretion – when authoritative acts are not governed by legal rules – and concludes that discretion is always necessary, because no rule can precisely determine the actions to be taken (or avoided) in response, rules always being indeterminate.[131] Indeed, Rubin in his influential paper on administrative discretion[132] comments that "only a legal scholar would need the concept of discretion."[133] He views administrative discretion as a continuation of the policy-making process from government to agency, exercising the power of choice to advance the public good and as instrumental to the social goal.[134] Therefore administrators are making public policy when they interpret and apply legislation.

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[129] *Ibid* at 359
[130] *Ibid* at 362
[131] I*bid* at 357
[132] Rubin *supra* note 20 at 1299
[133] *Ibid* at 1312: "The problem is that only a legal scholar, who began from a normative commitment to democratically enacted rules, would need the concept of discretion to recognize the uncontrolled aspects of a bureaucratic system."
[134] *Ibid* at 1317: "Policymaking is the process by which a government agent, whether legislator, executive, administrator, or judge, uses some articulated method to establish general rules, or standards, for the implementation of governmental efforts. It is a more accurate and useful term because it illuminates both the nature of the process and the relationship between that process and other aspects of governance. ... When a legislature grants rulemaking power to an agency, and when those in charge of the agency exercise that power, they are of course making choices, often choices that are not subject to direct review.[134]

They exercise discretion in selecting the best means to achieve what they perceive to be the legislative goal.[135]

In the same vein, Meidinger observes that, given the impossibility of stating decision-determining rules, appropriate responses to rules are worked out by individual administrators within the context of the regulatory culture.

> The normative presumption that policy-making is to be done by a legislature and executed by its governmental agents has obscured several of the key empirical characteristics of modern administrative regulation. First, "delegations" of policy-making powers are quite widespread and take many forms. Some are to local or regional levels of government. ... This rationale, that administrators were simply executing legislative decisions, was probably never quite believable to anyone who knew or thought about the actual operation of regulatory agencies. The indeterminacy of rules probably means that it is an inherently impossible condition to meet. In any event, it has become increasingly clear with political experience that agencies frequently make policy, sometimes quite controversial policy.[136]

Meidinger cites "professional groups (e.g., lawyers' and doctors' associations)"[137] as among those to whom authority is commonly delegated, given their expertise in the professional domain. Meidinger emphasizes the role of regulatory culture and legal consciousness in determining how a specific statute will be interpreted and applied by individual legal actors in the regulatory community.

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[135] *Ibid* at 1318: "The agency is not given a choice because it has earned the right to have one, or because it is entitled to the legislature's respect, or for any other deontological reason. Rather, the declared purpose of the agency's power of choice is to advance the public good. It is instrumental to a social goal. ... The fact remains that what the legislature asks the agency to do, and what the agency perceives itself as doing, is to make public policy, not exercise discretion. The agency is expected to gather information, review various options, and decide which option best implements the legislature's goal. That is, of course, the classic description of the policymaking process."

[136] Meidinger 1992 *supra* note 7 (unpaginated) pdf version at 4

[137] *Ibid*

> To some extent, . . . statutes can be seen to take on lives of their own. But those lives are significantly limited in two ways. First, statutes only have effects when members of regulatory communities choose to use them. But often no one chooses to do so. In practice, large amounts of regulatory policy are made without reference to statutes. Second, ... statutes are generally indeterminate. They may preclude certain courses of action, but they generally do not require unique solutions. Therefore, the actual effect of any given statute will only be determined in the context of regulatory interactions reflecting the interests and aspirations of the participants in regulatory communities, the social context in which they operate and so on. In sum, statutes can help structure regulatory culture, but to facilitate actual regulatory practice, regulatory culture must go well beyond the dictates of states.[138]

Edelman and Suchman affirm Meidinger's views of the constitutive role of the regulatory community in making law and policy through the exercise of administrative discretion.

> Because the ambiguity of law-on-the-books is not an occasional aberration but rather a political fact of life (Baer et al 1988), the practical meaning of any given law-in-action can only emerge through a highly interactive process of social construction. Perhaps not surprisingly, this sense-making exercise is likely to involve not only the official agents of the legal system (regulators, judges, litigators, and the like), but also the members of the focal organizational field.[139]

> Initially ambiguous laws acquire sufficient specificity for judicial enforcement only after professional and organizational communities have socially constructed a taken-for-granted definition of compliant behavior (Edelman et al 1996, Suchman & Cahill 1996, Suchman & Edelman 1996).[140]

They observe that "organizations (and organized professions) participate actively in the social construction processes that give new laws their meanings,[141] ... with intraorganizational professional constituencies playing a significant part in

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[138] Meidinger 1987 *supra* note 7 at 370
[139] Edelman & Suchman *supra* note 18 at 502
[140] *Ibid* at 498
[141] *Ibid* at 505

determining which institutional norms and scripts get reflected in organizational structures and practices (Scheid-Cook 1992):

> Empirical evidence on the filtering role of the professions suggests that professional activities can either dampen or amplify the impact of law, depending on the circumstances. At times, professional staffs will reframe reform-minded legal ideals so as to minimize the law's impact on established bureaucratic routines.[142]
>
> Professions, of course, are not alone in their ability to filter (and thereby transform) the law. Individual organizations, too, participate in the social construction of the regulatory environment, primarily through their bureaucratic practices and internal legal cultures. Indeed, organizational constructions of law often provide the chief conduits between formal law and everyday legal consciousness. For most people, the legal system is both remote and arcane, and popular understandings of law and legality come largely from day-to-day experiences in concrete bureaucratic settings, not from exposure to abstract doctrine (Macaulay 1987, Sarat 1990, Ewick & Silbey 1992, Fuller et al 1997). In these mundane organizational encounters, formal structures symbolize commitment to legal objectives, while informal norms give content to legal principles. Consequently, organizational responses to law play a key role in reifying legal mandates in daily life. Once again, such filtering agents can act either to amplify or to dampen law's impact.[143]

In the event of a conflict between the regulation and previous organizational practices, "organizations may adopt outwardly compliant structures as a visible demonstration of attentiveness to legal mandates, norms, and schemas – while at the same time preserving traditional managerial prerogatives by decoupling structural symbols from substantive practices."[144] While structures symbolize a commitment to

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[142] *Ibid* at 499
[143] *Ibid* at 500
[144] *Ibid* at 496

legal objectives, it is the informal norms that give actual content to legal principles.[145] In relation to this study, this observation appears to suggest that Colleges could adopt a formal ADR process structure in conformity with new ADR legislation, while continuing to carry on their own informal complaints resolution process (albeit "behind the scenes") as before.

Edelman and Suchman emphasize that law is often complex and contradictory. It may create sanctions on the one hand, while also providing defences and loopholes that may be exploited to escape the sanctions on the other. Regulations are "replete with unintended consequences."[146] The practical meaning of any law has to be socially constructed by the members of the field, as Larson's research on legal consciousness demonstrates.[147]

Black emphasizes the role of culture as the combination of norms and expectations that ultimately determines discretionary administrative decision-making, which she defines as the individual's (or agency's) freedom to choose courses of action in the interpretation of rules.[148] She characterizes such administrative discretion as dealing with the "space within and between rules,"[149] that consists of organizational norms and practices, past experiences, personal relationships, as well as the decision-

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[145] *Ibid* at 500
[146] *Ibid* at 488
[147] Larson *supra* note 114
[148] Black 2001a; Black 2001b *supra* note 19
[149] Black 2001a *supra* note 19 at 2

maker's own perceptions and attitudes, in effect, their legal consciousness. Whether explicit rules are present or absent, the exercise of administrative discretion will always be informed and constrained by bureaucratic and organizational norms, as well as broader political and economic pressures and moral and social norms, i.e., by the very substance of regulatory culture and the five influences Meidinger identified as making it: general cultural assumptions, political pressures, legal requirements, bureaucratic procedures and structural constraints. She concludes that regulators or enforcers must pay attention to the legal framework, the organizational practices and the internal cultures of the regulatory community in order to understand how culture determines the discretionary decision-making process. In this way, Black neatly summarizes Meidinger's and this study's approach to regulatory research.

Ford characterizes the regulatory community as the statutory "interpretive community"[150] in her study of principles-based regulation in the securities industry, asserting that legislation only means what everyone understands that it means, rather than how clearly and precisely it is drafted (*pace* Colin Diver[151]). Ford favours rules over principles when seeking to safeguard rights like participation and procedural fairness, although rules often "exact higher costs" and encourage "loophole

[150] C. Ford, Principles-Based Securities Regulation A Research Study Prepared for the Expert Panel on Securities Regulation (2009) [Ford] at 4

[151] C. Diver, in "The Optimal Precision of Administrative Rules" (1983) 93 Yale Law Journal 65, advocates greater precision (the three elements or dimensions of which he identifies as "transparency, " accessibility," and "congruence") in rule-drafting as a means to minimizing interpretive discretion and "administrative failure," which he attributes to imperfect information and the divergence of social and private preferences.

behaviours" to escape their narrow boundaries, leading to unintended consequences.[152] While rules and legislation generally favour more accountability, are more transparent and better able to protect rights, they can lead to "gaming" behaviours, as Silbey and others have documented and discussed, as well as stifling individual bureaucratic innovation and "cabining" the discretion of individual frontline actors.[153] Morrell, referring to Lipsky's research among professionals and "street-level bureaucrats,"[154] describes how the legislation is interpreted to allow the professional manager in a regulatory agency to accomplish the complex tasks for which they are responsible, to operate within the resource constraints (time, financial and human resources, space, technology, etc.) of the agency or organization (Meidinger's "structural constraints" and "bureaucratic procedures"), to mediate between the agency and its "clients," all the while exercising the power that is conferred upon them by virtue of their expertise in their "complex domain."[155]

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[152] Ford *supra* note 150 at 8

[153] *Ibid* at 43

[154] K. Morrell, "Re-defining professions: Knowledge, organization and power as syntax" 2007 http://www.mngt.waikato.ac.nz/ejrot/cmsconference/2007/proceedings/newperspectives/morrell.pdf (retrieved March 2013) at 17 "The theme of complexity in the organisational context finds expression in Lipsky's (1980) notion of the 'street level bureaucrat'. This offers more insight into what it means to be a professional as part of a wider social arena (Hoggett, 2006). Lipsky's point is that street level bureaucrats have enormous power because they have great scope for applying discretion. This power is not simply a function of legislative or social sanction, nor does it arise solely from the nature of their organizational situs. Instead the scope is a consequence of the discretionary powers necessary to accomplish complex tasks and to mediate between individual client needs and institutional interfaces. It is also a function of resource constraints. Lipsky argues that the scale and extent of this power goes unanalysed. This model is in some ways less critical than other analyses of the system of professions (Abbott, 1988), because Lipsky does not imply that the source of power results from professionals' seeking to further their own interests. Instead, it arises from complexities in the context. Nonetheless, this discretion raises issues about the accountability of street level bureaucrats to organizations, clients, the law, and professional norms."

[155] *Ibid* at 16

Banks[156] also acknowledges the difficulties the bureaucrat faces in dealing with new legislation and regulation, noting the additional burdens it imposes: additional paperwork, distortions in decisions about agency and organizational priorities, limits to choice, additional cost impositions and reduced flexibility, thereby prolonging decision-making and using up scarce resources, thus inviting the temptation to evasion as much as (or more than) compliance.[157] Therefore, he concludes, additional regulation frequently leads to unintended consequences that can undermine the legislator's goals for the regulation/legislation.[158]

An important Canadian case study of bureaucratic discretion in the interpretation and application of immigration law has found that the enforcement officials and bureaucracy, rather than making individual decisions with reference to the legislation, are significantly influenced by internal bureaucratic values as well as by larger, mutating social values in applying their decision-making discretion to particular cases.[159] Pratt describes discretion as a form of constitutive power, the workings of which cannot be adequately understood in the abstract.

> Rather than considering discretion as the absence of governance, discretion is considered here as a powerful form of governance, one which facilitates the translation of certain social concerns into exclusionary immigration law, policy and practices. Discretionary power is inflected by shifting, historically specific discourses.[160]

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[156] G. Banks,"The Good, The Bad and the Ugly: Economic Perspectives on Regulation in Australia." (2004) 23 Economic Papers: A Journal of Applied Economics and Policy 22
[157] *Ibid* at 24
[158] *Ibid* at 26
[159] Pratt *supra* note 21
[160] *Ibid* at 201

> [S]ince the 1960s, legal scholars have increasingly acknowledged that there is in fact no clear distinction between discretion and law. It is today more commonly conceded that laws and their application are suffused with discretion and that administrative discretion is in fact extensively curbed by rules.[161]

Through observation, interviews and analysis of a particular context, she explores the ways in which discretionary power facilitates the translation of shifting social concerns and priorities into what she determines to be exclusionary immigration law and policy. Her study begins with a brief critical review of the academic literature on discretion, paying particular attention to and disputing liberal assumptions about discretion - that law is the primary instrument of social regulation and that discretion is a residual category of law that is exercised by individuals who are essentially autonomous.

Both Black's article and Pratt's investigation of how discretion actually works at the level of the "street level bureaucrat" are important to understanding how the culture – including the wider social culture, the regulatory and professional self-regulatory culture and the culture of the particular profession and College in question - influences the context that produces the range of possibilities within which the individual bureaucrat's power of discretionary choice will be exercised. Like Edelman and Stryker, Pratt refers to the dominance of the legal paradigm in evaluating the role of discretion.

> The debate has thus been polarized: discretion is good, discretion is bad; discretion is arbitrary, discretion is necessary for the advancement of important public policies; discretion needs to be preserved and defended, discretion needs to be curtailed and controlled. The limited framework and circular nature of the debate is the result of the false discretion/law binary on which it rests. This

[161] *Ibid* at 202

> binary imagines that there is a clear distinction between the two and that they are inversely related: 'where law ends, discretion begins'. The dominance of the liberal legal paradigm is further evident in the primary place accorded to 'law' as the most important regulatory instrument in society, leading, in this context, to the taken-for-granted assumption that the problems of discretion can only be effectively addressed through the constraints and checks offered by law. ... Rather than viewing it as the unruly shadow of law which allows for the relatively uncomplicated expression of individual agency operating unchecked within boundaries set by legal constraints, discretion is more fruitfully regarded as a productive regulatory power, the uses of which are inflected by shifting, historically specific discourses and material conditions.[162]

Pratt's study suggests that scholars ought to view discretion as a positive form of power, rather than as the absence of law, and ask different questions about discretion in the application of laws - questions that relate to particular, historically specific contexts.

> Rather than asking how discretion can be eliminated, curtailed or expanded and made fairer and more just, the guiding question becomes how does this power work? What are the channels, processes, organizational and institutional networks and relationships that facilitate the uses of discretion in a particular governmental context? What are the dominant discursive influences on the uses of discretionary power in the governance of liberal subjects?[163]

Pratt sees promise in research about discretionary decision-making using semiotics and ethno-methodological insight, which

> bring to the discussion a serious interest in context and the social construction of realities and subjectivities that begin to challenge liberal assumptions. These studies explore how decisions are 'constructed' as opposed to 'made' by decision-makers. In this, they complicate the taken-for-granted liberal understanding of autonomy and subjectivity. As well, they do not seek to identify new universals to explain decision-making but rather see decision-making as an activity constructed by a myriad of contextualized influences that are shifting, dynamic and historically specific. These influences do not merely

[162] *Ibid* at 217
[163] *Ibid* at 220

shape, guide, constrain or determine individual decisions; they actually constitute them.[164]

3.6 The Influence of the Concept and Characteristics of "Alternativeness" to Law in Determining Ideal ADR Legislation and Regulator Responses to the RHPA ADR Legislation

This section focuses on the work of Lande, Pou, Kleefeld and Howse et al regarding whether and how to create legislation that will govern the conditions and circumstances when ADR can be used and the conduct of the ADR process. The arguments for and against ADR legislation, its potential benefits and costs, the risks and rewards of legislating ADR are examined. With respect to the need for clarity and flexibility in ADR legislation, the theories discussed below both support and challenge the earlier discussion of administrative discretion in the interpretation and application of regulation.

Legislating ADR

Lande is one of the principal advocates for minimal, flexible and permissive ADR legislation.[165] Lande's view is that legislation should be a limited and last resort in developing and promulgating new ADR policies. He believes that legislation should be avoided whenever possible and non-regulatory support mechanisms preferred because many of the benefits of ADR are lost when the process is fixed and prescribed. "Policymakers should generally begin by considering nonregulatory

[164] *Ibid* at 223
[165] Lande 2005 and Lande 2007 *supra* note 5

options and adopt regulatory options only to the extent needed to accomplish desired goals."[166]

In his important paper on ADR legislation, Lande refers to the constitutive hegemony of legalism in society as demonstrated by the choice to legislate in an area (ADR) that could rightly be considered "other than," separate and even completely the opposite of a legalistic approach to dispute resolution. Citing Menkel-Meadow,[167] Lande notes that while ADR is a "field that was developed, in part, to release us from some—if not all—of the limitations and rigidities of law and formal legal institutions, [n]onetheless, many members of the current ADR movement operate implicitly based on 'legal centralist' assumptions that society is and should be ordered primarily by state-created and enforced rules. Law is only one means of social control—and often a relatively ineffective one."[168] However, he acknowledges that, "[o]f course, some legal regulation is appropriate, ... and regulation per se does not necessarily result in legalization."[169] He later observes that, while legal definitions of ADR "might seem innocuous, they can have major impact on the nature of the process being regulated."[170] Lande's comments address the power of constitutive legalism to reinforce or undermine individual and communal agency and relationships within a regulatory community through the apparently innocuous use of legal terms and

[166] Lande 2007a *supra* note 5 at 624
[167] C. Menkel–Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR'" (1991) 19 Florida State University Law Review 1
[168] Lande 2007a *supra* note 5 at 642
[169] *Ibid* at footnote 94
[170] *Ibid* at 650

definitions. Echoing the legal consciousness view of how individuals respond to law, Lande writes:

> [T]he scope of effective regulation is limited by difficulties implementing enforceable rules. Moreover, people—especially lawyers—do not simply respond to rules by behaving as intended by the rulemakers. Professor Stewart Macaulay writes[171] that people: [c]ope with law and cannot be expected to comply passively. Many people are able to ignore most legal commands, or redefine them to serve self interest or "common sense" . . . Sometimes, however, the command of the law rings loud and clear and has direct impact on behavior. In short, the role of law is not something that can be assumed but must be established in every case.[172]

Given the likelihood that some (particularly those in the legal profession) may approach legislation, including ADR legislation, with an adventurous "gaming" spirit, in which law is something to be played with and around, as opposed to something concrete and inflexible, Lande proposes that "would-be ADR regulators should consider how lawyers are likely to react to—and possibly "game"—any new rules as they try to accomplish their clients' goals."[173]

Lande's view is that ADR legislation may not be desirable at all, as it concretizes certain aspects of ADR in law,[174] and thereby undermines some of its key benefits to participants, including flexibility, responsiveness and choice, which make ADR a preferable alternative to the courts.

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[171] S. Macaulay, "Law and the Behavioral Sciences: Is There Any There There?" (1984) 6 Law & Policy 149 at 153

[172] Lande 2007a *supra* note 5 at 645

[173] *Ibid* at 646

[174] *Ibid* at 623 "[I]nvoking government power to establish ADR policy can increase the risk of developing orthodox dispute resolution ideologies by officially favoring certain procedures and disfavoring others."

> While appreciating the valuable benefits of using rules as policy instruments in many situations, this Article argues that we should normally resist the temptation to make policies governing "alternative dispute resolution" (ADR) processes merely or primarily by adopting new rules. Strategies that rely exclusively or primarily on regulation can create significant problems. In the name of promoting uniformity, regulation can restrict or discourage legitimate choices by disputants and dispute resolution professionals. This would undermine a fundamental value of the ADR field in promoting increased choice between dispute resolution alternatives. [175]

In a summary of his article, presented as Recommended ADR Policy Principles, Lande provides a clear statement of what he considers the appropriate goals of ADR legislation:

> Dispute resolution professionals should aspire to a goal of developing a good overall dispute resolution system with a variety of desirable processes and approaches. In other words, the goal should be a pluralistic dispute resolution system rather than one with rigid orthodoxies about what dispute resolution procedures are appropriate or not. Recognizing the evolving nature of the legal system and dispute resolution processes, dispute resolution practitioners should develop flexible and dynamic models and avoid static, brittle models. [176]

Lande's article addresses the concern of other senior scholars in the ADR community (e.g., Fairman,[177] Peppet [178]) that the introduction of collaborative law and other alternative processes to traditional adversarial dispute resolution practices should be accompanied by regulations to define and direct their use. Lande focuses on the risks of over-regulation of ADR processes, while acknowledging the benefits to having rules about certain aspects of ADR design and practice. Lande maintains that, "[i]n

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[175] *Ibid* at 620
[176] Lande 2007b supra note 5 at 1
[177] C. Fairman, "A Proposed Model Rule for Collaborative Law" (2005) 21 Ohio State Journal on Dispute Resolution, 73
[178] S. Peppet, "Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism" (2005) 90 Iowa Law Review, 475

general, policymakers should explicitly identify and prioritize their goals at the outset of an ADR policymaking process."[179] In his view, the appropriate areas for ADR legislation are as follows:

> a. Rules are needed to regulate and restrict the use in litigation of communications in ADR processes.
>
> b. Regulation is appropriate to regulate the relationship between ADR processes and the courts, such as when parties are required to use ADR or when the courts will enforce the results of ADR processes.
>
> c. Some regulation is appropriate to protect ADR consumers, though this is a challenging task and thus regulation should be done cautiously and often in coordination with non-regulatory policies.
>
> d. Default rules for ADR processes are appropriate when a substantial number of people have actually encountered significant problems because their ADR agreements were silent or ambiguous about particular issues.[180]

The ideal, according to Lande, is for the goal-setting phase to precede the actual ADR policymaking process, his views on which are discussed later in this paper in the section on process design. Lande insists on the importance of policymakers being explicit from the outset on what purpose the ADR legislation is intended to serve. However, part of his opposition to ADR legislation is founded on the commonly expressed concern that laws do not always accomplish or even promote the goals for which they were developed and may have unexpected negative results.

> A more pragmatic problem is that legislative drafting is often crude and prone to unintended consequences. ... Although definitions might seem innocuous, they can have a major impact on the nature of the process being regulated.[181] In any event, the very existence of laws where there were none previously has an impact on the way issues are viewed, interpreted and understood.[182]

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[179] Lande 2007a *supra* note 5 at 641
[180] Lande 2007b *supra* note 5 at 3
[181] Lande 2007a *supra* note 5 at 650

Despite describing what he sees as the legitimate goals of ADR legislation, Lande goes on to say that, while "regulation is appropriate to establish ADR process definitions and thus create legitimacy and build a sense of security about particular dispute resolution processes [. . . I]n my view, these can be desirable benefits of appropriate regulation but do not justify regulation by themselves."[183] In other words, while Lande recognizes that defining acceptable ADR processes (e.g., mediation, conciliation, negotiation) creates legitimacy for these processes and gives potential participants in the processes some security about their use, having these spelled out in law – while useful - is not necessary or perhaps worth the potential costs of ADR legislation.

> As a matter of policymaking, this Article argues that we should enact rules only if there is a legitimate instrumental purpose for the rules and that a constitutive purpose by itself is an insufficient justification. Governmental authority is a powerful and precious resource that is easily subject to abuse. Thus it should be used cautiously and only when justified.[184] ... In general, under our common law system for developing legal rules, it is generally better for policymakers to refrain from adopting such ADR rules unless and until there is demonstrated need.[185]

In a section of the paper entitled "Appropriate Regulation of ADR," Lande asserts that rules may be needed because the behaviour involved in the ADR process "cannot often be determined objectively without great difficulty. Although other issues, such as prevention of coercion, may be appropriate for regulation, a strategy relying

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[182] *Ibid* at 622: "In addition to affecting behavior by creating actual or potential consequences, rules can also affect behavior by changing people's cognitive patterns." This observation relates to the cultural and cognitive hegemony of law and legality/legalism described in Edelman and Stryker.
[183] *Ibid* at 647
[184] *Ibid* at 648
[185] *Ibid* at 654

exclusively on regulation may not be effective because of difficulties in detection and enforcement. In such situations, it may be appropriate to develop a strategy that combines regulation and other policy tools."[186] Default and other rules should only be considered when there is sufficient evidence from experience that the process does not work without them.[187]

ADR Statutes – Inherently Ridiculous Irony or a Small Part of the Way to Nirvana

> As ADR advances into the mainstream, a growing number of jurisdictions have passed legislation specifically addressing ADR use by agencies, courts, and other governmental bodies. The trend has resulted in a rich body of legislative approaches and thinking from which helpful insights and guidance can be gleaned. While much of this legislation may prove useful in stimulating beneficial state activities, there is some portion that has been poorly informed and even detrimental. People who draft, comment on, or introduce ADR legislation should be mindful that implementing better dispute handling is a process, not an act.[188]

Pou covers some of the same ground as Lande, focusing on the inherent tension in designing ADR legislation that, on the one hand, provides formality for the sake of public accountability, process consistency and predictability, and on the other, maintains the flexibility and informality that are the supposed (and frequently vaunted) characteristics of ADR, as well as being the realm in which significant administrative discretion can occur. Pou's observations also point to an ideal tension in which the safety of known limitations through clear rules supports, rather than inhibits bureaucratic creativity and administrative discretion.

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[186] *Ibid*
[187] *Ibid*
[188] Pou *supra* note 5 at 6

> There are, though, real limits as to what [ADR] legislation can accomplish. First, there is an obvious tension in the very idea of "ADR laws," all of which are, in a sense, trying to "legislate flexibility." Some see this irony as inherently ridiculous, and believe it best to say nothing by statute -- thus avoiding "slippery slopes" and any need to interpret. But governments operate by rules and procedures that are intended to promote things like accountability and consistency. When this chafes someone, it is called "red tape;" at other times, it is "due process." While numerous scholars have told us that informality is the lifeblood of the administrative process, this informality tends to occur most often within a prescribed framework, and departures from that framework can cause considerable anxiety among those who work within the bureaucracy or who oversee it. We need to, in a sense, make ADR processes an integral part of that framework and make officials comfortable with them. Legislation is one way to move toward this goal.[189]

In the context of governmental use of ADR, Pou describes an ideal ADR world "if governmental use of ADR – at whatever level, federal, state, or local – were to reach its full potential."[190] In his view, such ideal government support for ADR would include:

> • Creativity, energy, and leadership at all levels in promoting appropriate, informed use of ADR methods
>
> • A predictable, accommodating legal framework allowing maximum appropriate ADR use, and personnel or other incentives to match
>
> • Understanding and acceptance of ADR and its potential utility among agency managers, agency political leaders, auditors, enforcers, and other internal components
>
> • Adequate resources to experiment with useful process alternatives and a comfort level regarding such experimentation both inside government organizations and among legislative overseers
>
> • Government organizations within which individual process decisions reflect sound dispute systems design theory and practice, as well as a broad perspective about the pro's and con's of any particular process choice (i.e., not "pass the buck" or "reduce my section's burden", but rather "what's best for the whole agency's mission and for its clientele?")

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[189] *Ibid* at 7
[190] *Ibid*

> • Long-term design and resource decisions that are based upon solid evaluation data as to ADR activities' goals and results.[191]

However, to get close to this state, which Pou describes as ADR "Nirvana," legislation is not, strictly speaking, necessary. Indeed, most government entities can already do – and are doing – many, if not most of these things without legislation ("formal underpinnings").[192] The purpose of ADR legislation, according to Pou, is to ensure that agencies using ADR "have authority to engage in binding arbitration, to acquire neutrals' services expeditiously, or to provide parties with meaningful assurances of confidentiality."[193] Pou sees ADR legislation as "giving ADR a legislative imprimatur by explicitly telling agencies and those who deal with them that these entities have many arrows in their DR quivers, and setting a basic governmental policy encouraging experimentation and fostering use of flexible, consensual alternatives by allowing parties to reshape processes to meet their real needs."[194] Legislation provides ADR with state-sanctioned legitimacy and authorizes more than the traditional dispute resolution processes. It also supports ADR as "a basic governmental policy."

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[191] *Ibid* at 8
[192] *Ibid*
[193] *Ibid*
[194] *Ibid*

Pou takes up the issue of generalized ADR legislation ("one size fits all"[195]) as opposed to various, agency-specific, somewhat fragmented and possibly inconsistent versions of ADR legislation. Rather than seeing the first as ignoring individual needs or the second as only leading to confusion, Pou values both approaches, though preferring the "potential value of cross-cutting laws that provide general authorization, rather than on specific laws building ADR into a particular agency program or decisional process. While a broad-brush approach has inherent disadvantages when compared with tailored laws that mesh ADR processes with existing procedural schemes, it can avert the fragmentation and confusion that may result if legislatures balkanize ADR by defining terms, setting standards for neutrals, or crafting confidentiality rules or judicial review tests afresh with each program."[196]

Pou summarizes the purpose of generalized ADR legislation as follows:

> Broad-based ADR legislation, rather than a patchwork approach spread across a number of statutes, can effectively address a number of important issues in governmental ADR. Specifically, it can:
>
> - Create a statutory framework that promotes thoughtful, consistent policy toward agencies' use of ADR;

[195] R. Jones,"Florida's Experience with Dispute Resolution Legislation: Too Much of a Good Thing?" (2000) http://consensus.fsu.edu/ADR/PDFS/FloridaADR.pdf at 2. Jones enquires whether the proliferation of ADR statutes and the underlying policy support for ADR in the state of Florida has helped to legitimize and increase the use of these problem solving and dispute resolution procedures or whether ADR laws have led to confusion regarding under what conditions parties should consider the use of ADR procedures. He believes the experience overall has been positive, although the proliferation of such laws has also led to some confusion regarding what procedures parties should choose from. He urges that greater attention be paid in legislative drafting to barriers that inhibit the use of the procedures as well as increased involvement of the dispute resolution community with legislatures and legislative staff in system design questions. He observes that "legislative drafters often take a meat cleaver vs. a scalpel approach in designing ADR procedures" and concludes that a "one-size fits-all" approach to ADR legislation produces more problems than it resolves.

[196] Pou *supra* note 5 at 8

- Raise agencies' (and especially agency lawyers') awareness of and comfort with innovative dispute resolution methods;
- Reflect an appropriate general balance between prescription and flexibility in employing these processes, protecting sensitive communications, acquiring neutrals' services, and assuring judicial oversight;
- Address issues for which specific safeguards or enhanced certainty can promote fairness, prevent abuse, or encourage appropriate ADR use (e.g., an ADR Act's prohibition against requiring an agreement to use arbitration as a condition of awarding any contract or benefit; or meshing ADR procedures, such as confidentiality protections, with those prescribed under other laws);
- Assign responsibility – both within agencies and more broadly – for ADR implementation;
- Afford a basis for regular legislative oversight of agency dispute resolution initiatives;
- Require agency personnel to focus on use of ADR case-by-case in selected settings.[197]

Pou highlights certain aspects of the ADR environment that may be critical to the successful implementation of ADR in terms of agency and consumer use and that cannot be determined by statute. These aspects deal with the dimensions and dynamics of the regulatory culture where ADR is being introduced or developed. "Wholly apart from their unintended side effects, there exist any number of obstacles that passing new laws cannot really address."[198] Laws cannot assure adequate resources, affect the agencies' other priorities (which may compete with ADR requirements), ensure leadership of the ADR initiative within the agency, or create an infrastructure for education, training and sharing of best practices within and among agencies. Laws cannot ensure inclusive, high-quality design of the program,

[197] *Ibid* at 9
[198] *Ibid*

acceptable and ethical programs, a supply of adequate neutrals, rigorous evaluation of programs, general education of the public and consumers, or insulate ADR initiatives from the contingencies of bureaucratic structures and attitudes or from unforeseen interactions with other laws with different goals or inconsistent and conflicting processes.

Pou sees ADR legislation as "only a starting point," frequently creating its own obstacles, particularly "in light of many legislators' tendency to see their decisions largely in political or personal terms, which often leads to compromises that lawmakers deem necessary to get a bill enacted but that can introduce new ambiguities or gloss over necessary policy choices in ways that inhibit the legislation's goals or even make things worse."[199] The goals of the legislation can often be short-circuited by the powerful underlying priorities of the authorities that draft and impose the legislation. Legislation often serves more than one agenda and the effects of the combination of (stated and unstated) agendas can sometimes undermine the stated purpose of the legislation.

Pou warns that legislating ADR processes and procedures cannot change the attitudes of those who will pay only lip service to the legislation – observing only the letter and not the spirit or intention of the ADR law, assuming they are in possession of sufficient information to be aware of what the "spirit" or intention of the law may be

[199] *Ibid*

or are capable of imagining how the spirit of the law might relate to how they see and understand the prerogatives or constraints of their own situation.

> Far more . . . will be needed, to reorient many individuals and institutions so that they take these statutory mandates seriously and so that their compliance is genuine and thoughtful and not just minimal or, worse, self-serving.[200]

It may be a false dichotomy that Pou draws between "self-serving" and "genuine" compliance with ADR legislation, given the ideal flexibility that allows scope for discretion in the application of the law. Self-serving compliance may in fact be a legitimate and even desirable feature of ADR laws' flexibility that allows the interests of the bureaucrats to be accommodated within the overall ADR mandated process and procedures.

ADR Legislation for Professional Self-Regulatory Bodies (Canada)

In his study of ADR and professional self-regulatory colleges (not only healthcare professions) that compares the Ontario and B.C. experience, John Kleefeld[201]

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[200] *Ibid* at 8

[201] Kleefeld *supra* note 23; See also L. Feld & P. Simm, *Complaint Mediation in Ontario's Self-Governing Professions* (Waterloo: Fund for Dispute Resolution, 1995); L. Feld & P. Simm, *Mediating Professional Misconduct Complaints* (Waterloo: The Network Interaction for Conflict Resolution, 1998) who study the use of ADR in the health professions self-regulatory system. The authors examine the potential strengths, weaknesses, opportunities, and limitations of a mediation program. They explore a number of key issues in the operation of a complaint-mediation program in the context of the College of Physicians and Surgeons program, including neutrality and the public interest, satisfaction of the parties, the nature of the complainants, motivations and expectations of the parties, the issues of coercion and power imbalances, the form of the hearings, and the roles of lawyers. They evaluate each of these in terms of its consequences for the effectiveness of the process. Feld and Simm, as well as P. Marshall & R. Robson, "Conflict Resolution in Health Care" (2006) 7 Law and Governance 74 and G. Siskind & P. Marshall, *In Search of Elegant Outcomes in Complaint Resolutions: The Participative Resolution Program at the College of Nurses of Ontario* (Toronto: College of Nurses of Ontario, 2001) study and report on the "how to" and the real and potential benefits and costs of designing and using ADR in the College complaints and discipline process, but only indirectly refer to the aspects of regulatory culture, legal consciousness or administrative discretion addressed in this paper.

examines the motivations for incorporating ADR into the complaints resolution process and addresses the need for authority and the jurisdiction for use of ADR at different points in the complaints process. Kleefeld notes that in some jurisdictions (e.g., Ontario), ADR has been an available option to the parties once the dispute enters the judicial (i.e., discipline hearing before a duly constituted tribunal) phase of the complaints resolution process (as contemplated and sanctioned by the governing administrative law).

> Jurisdiction to Engage in ADR: A Threshold Question
> Before discussing what those alternative processes look like, or what they might look like, a threshold question needs addressing: for any given process, does the regulator have jurisdiction to use it and if so, where is the jurisdiction to be found? B.C. has nothing quite like Ontario's Statutory Powers Procedure Act, whose s. 4 gives regulators a general power to use alternative processes to resolve complaints. Rather, jurisdiction must be found in the regulator's own statute or in subordinate legislation, such as regulations or bylaws, validly passed pursuant to that statute. That is important because statutory authority to deal with a matter cannot be delegated or conferred on another person or body except as allowed by the statute, even if all parties consent. Generally, through a liberal and remedial reading of the legislation, jurisdiction to engage in some form of ADR can often be found or implied in the legislation. But settlements reached under such processes will usually have to be approved by the appropriate person or committee, as set out in the statute. In some cases, legislative amendments or bylaws may be needed to clarify jurisdictional uncertainty about the use of ADR. [202]

Despite Kleefeld's observations regarding the Ontario experience, no clear authority existed prior to the new legislation for use of ADR at an earlier phase of the complaints resolution process, since the SPPA required that the reference to ADR be made by a tribunal, and many concluded that, unlike the Discipline Committee, the previous Complaints Committees were not, strictly speaking, tribunals, hence no

[202] Kleefeld *supra* note 23 at 7

specific authority existed, although a general authority in the RHPA to act in ways "not inconsistent" with the Act provided sufficient assurance for some Colleges to engage in informal resolutions of complaints. The new legislation gives authority directly to the Registrar, at any point following the filing of a complaint, to try to resolve the matter by referring the parties, with their consent, to an ADR process, and possibly before the ICR Committee has even begun to investigate the complaint.

ADR Legislation for Healthcare Professional Self-Regulatory Bodies (Australia and New Zealand)

A recent empirical study addresses the question directly of whether and to what extent it is necessary or desirable to codify ADR principles and procedures in legislation governing healthcare professional self-regulation.[203] The authors of the study define ADR as not "a specific process, but rather [...] a shared set of methods, goals, assumptions or values."[204] Their study, which was carried out in Australia and New Zealand in 2003, is based on interviews with members of the Councils and staff of healthcare profession self-regulatory Boards in those jurisdictions.[205] The study exposes two opposing perspectives among those directly involved on whether to legislate ADR in healthcare professional self-regulation. The two views may be summarized as follows: 1) legislation is useful because it provides authority,

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[203] Howse *supra* note 24

[204] *Ibid* at 3

[205] The Howse study addresses one aspect of the ADR process in one jurisdiction. While it may be tempting to try to analyze the "legal consciousness" of the participants in this study from the quotations provided, without full texts of their responses to the researchers' questions and without a more direct experience of the social, political, cultural and legal contexts in which their views were situated, that would be a perilous and perhaps foolhardy exercise.

credibility and assurance to the consumers of the process; and 2) legislation may render the process too inflexible, thus diminishing its responsiveness and limiting the necessary discretion to select and apply appropriate processes to address the requirements of a particular situation.

> Views on the need for legislative reform to adopt ADR are divided. On one side, participants felt that the Boards already had many ADR techniques available for use, and that such techniques were used at the Board's discretion. According to this view, legislative change was unnecessary because the Board's essential duty is to protect the public. Concern was expressed that to formalize ADR would reduce the existing flexibility, and lead to inappropriate use. On the other side, participants felt that ADR use by Boards should be legislatively recognised so as to give Boards compliance powers, and to provide transparent and consistent guidelines for ADR use by all Boards. [206]

Some study participants asserted that specific ADR legislation is unnecessary because of the Boards' essential duty to protect the public interest (requiring all processes to meet that minimum standard). However, ADR legislation could affirm ADR's role in fulfilling the public interest mandate.

> The debate about whether Boards should adopt ADR centres around their integrity. On one hand, legislative change to embody ADR is not relevant because public safety, not an individual's satisfaction, is their immediate concern. On the other hand, Boards would be less able to function in the public interest without the power to use ADR to help manage complaints in a timely and cost effective manner. [207]

Legislating ADR is also seen to be undesirable because formalizing ADR would reduce its flexibility and could lead to inappropriate use.

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[206] Howse *supra* note 24 at 6
[207] *Ibid* at 100

> Several participants said legislative change was not necessary, because the present system allows enough flexibility for Boards to manage complaints effectively[208]
>
> The ability to be flexible while satisfying legislative requirements is the key to Boards managing complaints more effectively without legislative reform. There are prominent concerns that such flexibility would be lost if ADR is formalized in the Act because legislation could become over prescriptive, standardised and difficult to change.[209]

Other respondents supporting ADR legislation focused on the coercive power of the legislation through giving Boards compliance powers to direct the use of ADR in certain situations, as well as on legislation's ability to enforce uniformity and consistency by providing transparent and consistent guidelines for ADR use by all Boards.

The state can confer legitimacy on a process that may appear to some stakeholders to operate outside the usual judicial framework. Recognition in statute provides a measure of confidence that the process is sanctioned by the state as appropriate to be used in the complaints resolution process. In the Howse study, Board members of smaller professional self-regulatory Boards in particular found the legitimizing effect of ADR legislation beneficial and reassuring to their members and to the public.

> [P]articipants expressed mixed views on the need for legislative change to formalize ADR use in resolving complaints about professional misconduct. Participants from smaller Boards, or Boards which have not practiced many ADR techniques, are more likely to support the legislative change than those from larger Boards, or from Boards which have used ADR techniques frequently. ...

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[208] *Ibid* at 86
[209] *Ibid* at 101

> Although some Boards exercise discretion and use ADR techniques in resolving complaints, some participants felt that this capacity to use ADR should be better recognized so that people are compelled to adopt it. The Board's legal position will be clear and parties involved in a complaint will comply with the process. To make the most effective use of ADR, one participant suggested that it should be formalized in their individual health registration Act. "*Just to formalize our ADR process a little bit more, that would be best done legislatively.*"[210]

In the Howse study and elsewhere, consistency is identified as a desirable outcome that justifies codifying ADR processes in legislation. Predictability of process and equitable treatment of professionals and members of the public across various Boards are two goals that may be met in some measure by enacting legislation.

> The participants who thought that change should be made to current legislation to allow Boards to utilize ADR based their views on the following reasons:
> *Providing appropriate mechanism and guidelines to Board's practice*
> If Boards are going to use ADR techniques, there needs to be an appropriate mechanism provided in the legislation. ... [W]ithout clear guidelines, Boards may operate ADR differently; this could be dangerous.[211]

A high degree of prescriptiveness, on the other hand, could limit the flexibility ADR can offer to tailor the process to the circumstances.

> *If mandated, it is too rigid, difficult to change and might be used inappropriately.*
> If Boards want to utilize ADR, they should do so voluntarily, based on the flexibility in the existing system. Some participants cautioned that if ADR was formalized in the law, it would have disadvantages. ... [I]t could be difficult to draft a meaningful legislation with ADR approach. ... [L]egislative change might dictate the Board's processes and remove flexibility. Concern was expressed that the legislation might be used inappropriately, might be overused, or might become another layer of bureaucratic process. If mandatory, and part of, rather than an alternative to the formal system, concern was expressed that ADR legislation might not be used as effectively

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[210] *Ibid* at 84 (italics in the original)
[211] *Ibid* at 85 (italics in the original)

> as it is now. One participant with a legal background stated that the use of ADR could be encouraged by Boards being made more aware of their options, which could become standard practice for all Boards before a matter goes to hearing. Legislative change is not only unnecessary, but also difficult to alter later on.[212]

Some respondents to the Howse et al. study noted complainant empowerment as an important beneficial outcome of ADR legislation by making it a requirement through the use of ADR to involve complainants more directly in the complaints resolution process than is generally permitted under the judicial decision-making process that is the core of the complaints-handling system.

> ADR brings a sense of closure for consumers because it expands the focus of complaint management to include them. Boards' pursuit of power to carry out ADR satisfies these goals of the consumer movement. [213]

Legitimacy, formality, clarity and consistency regarding the appropriate use of ADR by professional self-regulatory bodies were cited by the participants in the Howse et al. study as the main goals of and reasons for advocating legislation. These values are embedded in the political, social and cultural contexts in which the study was undertaken. While including the Howse et al. study as a very useful and relevant reference for research into the Ontario experience, it is important to state that the jurisdiction it reports on has a different history of professional self-regulation and has made different decisions about other aspects of the complaints resolution process, including a centralized, rather than a profession- and Board/College-specific complaint intake process.

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[212] *Ibid* at 87 (italics in the original)
[213] *Ibid* at 101

3.7 The Influence of the Regulatory Community's Experience of the Legislative Design and Development Process on Regulator Legal Consciousness and Responses to the ADR Legislation

The Legislative Design Process

One hypothesis about how regulator legal consciousness and administrative discretion might be influenced to comply, contest or resist the ADR legislation concerns the extent to which the regulator perceives the way the community and the individual regulator was consulted or was involved in the legislative development process. As Meidinger argues, the legislature that delegates authority can and does step in to remedy some perceived problem in a regulatory community, often without having adequate information about the problem as it is experienced by the actors in the community. He suggests that the legislature involve the regulatory community in the negotiation and development of solutions that are practical and appropriate, based on administrative experience, knowledge of client needs, feasible procedures and available structural resources (time, money, human resources, skills, technology, etc.).[214] Meidinger's approach is supported by public policy scholars commenting on the process of regulatory design through a regulatory negotiation ("reg neg") process.[215] This

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[214] Meidinger 1992 *supra* note 7 at 9

[215] See, for example, Freeman *supra* note 25; J. Aronson, "Giving Consumers a Say in Policy Development: Influencing Policy or Just Being Heard?" (1993) 19 Canadian Public Policy 367; P. Aucoin & R. Heinztman, " New Forms of Accountability," in B. G. Peters and D. J. Savoie, (eds) *Revitalizing the Public Service* (Montreal: McGill/Queens University Press, 2000); R. Goldfiend, "Negotiated Rulemaking and the Public Interest" http://www.abanet.org/dispute/essay/goldfiend.doc; P.J. Harter, "Negotiated Regulations: A Cure for the Malaise" (1982) 71 Georgetown Law Review 151; D. Spence, "Agency Policy Making and Political Control: Modeling Away the Delegation Problem" (1997) 7 Journal of Public Administration Research and Theory 199. Spence focuses on the shift in some of the literature on political control of administrative agencies away from an emphasis on agency autonomy and toward the view that politicians can and do exert significant amounts of control over agency decisions. He notes that much of the new theory of political control comes from positive

approach is also supported, as reported above, by scholars commenting on the development of ADR legislation. Freeman describes the goals and desired outcomes of the regulatory negotiation process and its relationship to administrative decision-making thus:

> Also known as regulatory negotiation (reg-neg), it is a consensus-based approach to developing rules[.] ... [S]ome accounts portray regulatory negotiation as a deliberative process that facilitates creative solutions. ... By giving all parties a stake in the rule, regulatory negotiation is thought to foster commitment to the resulting agreement, which, presumably, might facilitate implementation.[216]

> [E]very aspect of policy making, implementation, and enforcement depends on the combined efforts of public and private actors. They must work out how to deliver a service, design a standard, and implement a rule. My contractual metaphor envisions that working out as negotiation. Similarly, there is no moment of decision to which one can point and say, "Aha, there policy was made!" or "There policy was implemented." The process of design, implementation, and enforcement is fluid. Administrative law scholars tend to take "snapshots" of specific moments in the decision-making process (such as the moment of rule promulgation) and analyze them in isolation. Rules develop meaning, however, only through the fluid processes of design, implementation, enforcement, and negotiation. This is not to deny the significance of rule promulgation as a separate process, or the rule itself as a product, but to situate both in a larger dynamic.[217]

Meidinger addresses the question of who participates or is allowed to participate in the regulatory debate, who is included and has "standing" within the "regulatory

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theorists who emphasize the ability of politicians to shape agencies' decision-making environments in ways that steer agencies' subsequent decisions toward the politicians' policy goals. Spence concludes that it is flawed design and methodology that support such a view and that agencies do continue to act with a great deal of autonomy when exercising most delegated policy-making authority. This research supports the impact of the RHPA and ADR legislative changes and their policy and political bases as adjusting the power balance within the healthcare system and in the regulation of professionals.

[216] Freeman *supra* note 25 at 653

[217] *Ibid* at 572

community," and who can then influence outcomes regarding the form and substance of the legislation.

> To talk about regulatory culture as a real phenomenon it is helpful to delineate a group in which it might be seen to operate. After all, cultures are shared by groups as a matter of definition. Just as importantly, defining the group participating in regulatory culture is also a political act; for it speaks to who can legitimately participate in the formation and enforcement of regulatory policies. Thus the age-old legal debate about standing, and the struggle for and against expanded participation in regulation, can be understood in part as efforts to define the bounds of the social group that will create and enact regulatory relationships.[218]

Meidinger's observations about the participation by members of the regulatory community in the development of rules and relationships parallel Lande's view of how ADR legislation should be developed and applied – a key feature of DR design best practices being the involvement of the key stakeholders in its development, articulation and application. Indeed, Meidinger suggests that the legislature as part of the regulatory community may not be in the best position to develop rules for subsidiary agencies enacting delegated authority.

> Because the legislature faces a plenitude of issues, it might not decide an issue hotly contested within a partial community with great care. Second, and more importantly, that community might have a much stronger relationship to and greater knowledge of the issue (valuable local culture) than the legislature. Rather than distrusting that relationship, and seeking refuge in pure democratic decisional procedures, we might be better off allowing it to continue and to grow. Third, when issues involve substantial uncertainty, it may make sense, rather than resolving them in one fell swoop, to let the interested regulatory community work out tentative accommodations, then follow the development of the problem, and make adjustments when necessary. ... Although the formal distribution of authority is important, expertise -- detailed knowledge of the regulatory domain and the likely

[218] Meidinger 1987 *supra* note 7 at 363

> operation of alternative policies -- is also a major source of regulatory influence.[219]

The dispute resolution system design process itself and whether or how it is followed may be one important reason why the ADR legislation is ultimately adopted/complied with, contested/"gamed," avoided or resisted. If ADR legislation is to be developed at all, and for the reasons he suggests make it worthwhile, Lande strongly favours a Dispute System Design (DSD)[220] approach to the process of ADR policymaking. "Policymakers should use a dispute system design framework in analyzing policy options, which includes assessment of disputants' needs and interests."[221]

Furthermore, he suggests that, while "[i]t is unrealistic to expect that every proposal for ADR policy will include a systemic analysis of how the proposed policy would fit into or affect the relevant dispute resolution system[, n]onetheless, it is an ideal worth striving to achieve when feasible. As a corollary to the principle that the DR field should provide a variety of desirable options, it should also engage representatives of

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[219] Meidinger 1992 *supra* note 7 at pdf 9

[220] Lande 2005 *supra* note 5 at 630: "The ADR field has developed a subfield for policymaking about disputing, called "dispute system design" (DSD). . . . A full-fledged DSD effort may not be feasible in many situations because it would require more time, effort, and other resources than available or appropriate. ADR policymakers should consider using DSD procedures and principles as much as feasible given their circumstances." See also, *inter alia*, S. Carter, "The importance of party buy-in in designing organizational conflict management systems" (1999) 17 Mediation Quarterly 61; C. Costantino & C. Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass, 1996); K. Slaikeu & R. Hasson, *Controlling the Costs of Conflict* (San Francisco: Jossey-Bass, 1998); W. Ury, J. Brett & S. Goldberg, *Getting Disputes Resolved* (San Francisco: Jossey-Bass, 1988)

[221] *Ibid* at 624

parties and other stakeholders"[222] in decisions about dispute resolution processes as much as possible and appropriate.

Lande describes some of the features of the DSD process that he believes should be followed to develop appropriate ADR legislation:

> When developing policies about dispute resolution processes, policymakers should use DSD procedures and principles as much as feasible given their circumstances. DSD focuses on systematically managing a series of disputes rather than handling individual disputes on an ad hoc basis. In general, it involves assessing the needs of disputants and other stakeholders in the system, planning to address those needs, providing necessary training and education for disputants and relevant dispute resolution professionals, implementing the system, evaluating it, and making periodic modifications as needed. When developing dispute resolution processes, designers should engage representatives of parties and other stakeholders as much as appropriate and consider offering a variety of processes to satisfy parties' various interests and preferences.[223]
>
> In designing ADR processes, policymakers should normally solicit input from key stakeholder groups. The process of eliciting input may take various forms and depend on the resources available. In some cases, it may involve formation of a committee that includes representatives of the various stakeholder groups. It is valuable to convene a group of stakeholders, including practitioners, as well as independent analysts. Being human, all of us have blind spots and biases. Convening a representative group with diverse perspectives can help identify such biases and lead to a better policy than what like-minded experts or a single stakeholder group might devise. Collecting data from stakeholders can be especially helpful. ... After assessing stakeholders' interests, policymakers should develop policies to satisfy those interests, engaging stakeholder representatives in the policymaking process as much as feasible.[224]

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[222] *Ibid* note 52 at 630: "Stakeholders are those whose interests would be affected by a decision or action. In the context of dispute resolution, stakeholders might include, but are not necessarily limited to, disputants, dispute resolution professionals, public or private organizations, and communities. Dispute resolution professionals might include lawyers, neutrals, judges, and other court personnel, among others."
[223] *Ibid* at 630
[224] *Ibid* at 639

In his overview of ADR legislation, Pou views the legislation as one point on a continuum of ADR process design, development, measurement, evaluation and remediation. "[I]mplementing improved dispute handling is a process, not an act. Legislation authorizing and encouraging ADR must explicitly recognize this and create a framework for setting that process in motion."[225]

The Howse research does not address the question of the ADR legislation policy development process. Conducted in the absence of ADR legislation, it is concerned mainly with the attitudes of key stakeholders toward the potential risks and advantages, the perceived benefits and costs if ADR legislation were to be applied to the health profession regulatory bodies in Australia.

ADR Legislative Design: Power, Participation and Procedural Fairness

As Freeman observes in her studies of regulatory negotiation, whether and how legislation is adopted depends to a very great extent on the participation of key stakeholders in the rule development process.

> Social psychology teaches us that parties are more likely to view outcomes as legitimate when they play a meaningful role in the process. Parties may derive satisfaction not solely from getting what they want in a bargaining process, but from being included in the enterprise, taken seriously, and offered explanations for decisions. Evidence from the most recent study of regulatory negotiation supports such claims.[226]

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[225] Pou *supra* note 5 at 7
[226] Freeman *supra* note 25 at 656

> Only recently has empirical research turned to the question of how people think about the law. One important strand of this work develops theories about procedural fairness and substantive justice (see Tyler 1990; Lind & Tyler 1988).[227]

Ewick and Silbey's research suggests there exists within legal consciousness a kind of "procedural consciousness."[228] In their interviews they observed a "deep, broad-based normative consensus. While citizens expressed persistent skepticism about the fairness of legal institutions, they appeared to be committed to both the desirability and possibility of realizing legal ideals of equal and fair treatment."[229]

> Citizens value procedure more than substance. The stratified structure of the legal system is thus sustained by a "procedural consciousness."[230] People care about having neutral, honest authorities who allow them to state their views and who treat them with dignity and respect.[231]

In their studies of risk management initiatives that depend on rule-making to support public safety, Tharaldsen and Haukelid identify the importance of participation in the rule-making design process by those who will be responsible for implementing the rules. This involvement is necessary and even critical given the frequently tacit power dynamics operating in the regulatory culture. They note that any larger regulatory culture engenders varying power differences that give rise to sub-cultures

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[227] L. Neilsen, "Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment" (2000) 34:4 Law & Society Review 1055 at 1059 note 6

[228] Ewick & Silbey *supra* note 22 at 739

[229] *Ibid*

[230] *Ibid*

[231] *Ibid.* See also J. Conley & W. O'Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (Chicago: University of Chicago Press, 1990) for an examination of the contrast between legal discourse and the narratives those engaging the legal system expect the system needs to hear, and their disappointment when they are not heard. The valuing of narrative is at the heart of legal consciousness research and the basis for the case study presented in this dissertation.

and counter-cultures within the larger culture.[232] For example, their research uncovered a link between workers' perception of management's good faith in establishing new safety rules and the workers' willingness to follow them. Worker involvement in the development of the rules was seen to be an important factor in achieving the adoption of the rules. "Important success criteria in a cultural approach would also be related to the involvement of management and employees in the intervention to come."[233] These findings contribute empirical evidence to suggest that participation in the design and development of legislation may be a significant factor influencing how and whether members of the RHPA regulatory community adopt, contest, "game" or resist the new ADR legislation, if, for "management," we substitute Government, and, for "workers," we identify the officials of the regulatory Colleges.

The issues of trust that arise in the study of rule-making in a regulatory culture, based on the regulated's perceptions of the rule-maker's/legislator's motives and the rule-maker/legislator's understanding, appreciation of and willingness to take into account the expressed interests, concerns and experiences of those to be regulated, as evidenced in a participatory process that is perceived to be "fair," are cited by both regulatory and ADR scholars as relevant and important to ADR system design and to the field of rule-making in general. Evidence-based theory in particular suggests that

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[232] Tharaldsen & Haukelid *supra* note 17 at 379
[233] *Ibid* at 382

grounds for cynicism or suspicion include perceptions of negative, manipulative, controlling or punitive legislator/rule-maker motives for the legislation, these perceptions being among the principal reasons observed for why legislation and rules are not followed, or are subverted in some way to compensate for the perceived injustice and unfairness to the parties being regulated. Judging from the scholarly research reviewed, this could be as true for ADR legislation as for other types of regulation.

3.8 Theory-Based Conclusions About Regulatory Culture, Administrative Discretion and Legislating ADR

As stated in the Introduction, the basic focus of this dissertation is not the design or practice of ADR itself, but rather the reasons for and effects of *legislating* ADR. Hence, the theoretical frame of the dissertation is the study of regulation, of which ADR legislation is one of myriad subsets, however one with very particular characteristics that reflect on the nature of regulation itself. Because there is a way in which ADR can be considered a concept, practice or process that stands apart from, is complementary/supplementary or alternative to law, or is, in some sense, a non-law-based complaints or dispute resolution process, the tensions within the process of regulation itself are highlighted or heightened when ADR is the lens through which the regulatory field is studied.

This chapter has laid out the arguments commonly cited for and against legislating ADR, with empirical evidence provided in the Howse study regarding how regulators in the actual field chosen for the case study, but in another jurisdiction, view the potential costs and benefits, risks and rewards of legislation governing the use of ADR in complaints resolution. Theoretical arguments have been presented that legislating ADR processes confers the benefit of the authority and legitimacy that law's social standing can provide to those who are reassured by law's imprimatur. Moreover, some in the field argue that ADR legislation governing the form and use of the ADR process may also provide the benefit of greater consistency and predictability across a field of ADR-using organizations where such consistency appears desirable.

Lande, Menkel-Meadow and other advocates for the alternativeness and non-law character of ADR argue that ADR legislation can (whether consciously or unconsciously, intended or unintended), however, result in ADR's alternativeness being diminished or curtailed. Attributing to law the power to contain, "cabin", capture (or recapture) a mode of dispute or complaint resolution that these ADR scholars see as operating usefully outside law's constraints and limitations, they argue that ADR's attributes must be preserved from over-legislation.

However, this chapter has also presented theoretical and empirical research that challenges the view that law's constraining power is inescapable, arguing instead that

legislation when it is drafted is inevitably porous and indefinite and subject to interpretation in myriad ways that make ample use of its ambiguity, as well as its clarity (adherence to the "letter," as opposed to the "spirit" of the law). Lande and Pou describe what they believe ADR legislation can and cannot provide to support the ADR process and those responsible for or participating in it. They also draw attention to the general nature and tendency of rules to produce unintended as well as intended consequences, thus challenging the idea that ADR (or any) legislation will necessarily ensure consistency in its application. Several regulatory scholars cited in this chapter make the point that legislation governing any activity or behaviour cannot be drafted in a way that is sufficiently precise as to determine specific actions.

The theory of the indeterminacy of rules is linked to the theory that there is a process of often complex, creative interpretation, grounded in individual and collective experience, that takes place as the regulated determine, by conscious and unconscious criteria, how they will respond to the legislation. This process of interpretation that informs administrative choices is described and supported by the extensive literature on administrative discretion. Meidinger's scholarship emphasizes the connection between the concepts of the indeterminacy of rules and administrative discretion. He views administrative discretion as the customary, often reflexive decision- (and policy-) making process that the regulator follows to determine appropriate responses to legislation. As for the factors that enter into that individual regulator's decision-making process, Meidinger identifies the powerful influence of regulatory culture,

which, he asserts, comprises five significant considerations: general cultural assumptions, political pressures, legal requirements, bureaucratic procedures and structural constraints.

Other scholars have been cited in this chapter as supporting Meidinger's view of the regulator's conscious and unconscious deliberative process that weighs costs and benefits, risks and rewards of any given legislation to the individual regulator and to the regulatory community as a whole. Pratt and Black in particular support Meidinger's view that, in addition to personal, managerial and professional considerations, the regulator's perceptions of the general social, economic and political environment, and the norms and conventions of the regulatory community itself are influential in determining types of responses to legislation/regulation. Black and Pratt each make the case for these bureaucratic discretionary choices being both complex, personal, local and significantly influenced by community considerations, thus reinforcing Meidinger's view of the important role of the regulatory community in administrative discretion.

Regulatory scholars' insistence on the importance of understanding the particular regulatory community's issues in a specific place at a certain point in time (regulatory culture as "what is going on here") as influences on individual and collective decision-making led to identification and reporting on developments in health professional self-regulation at the time of the legislation and at the time the research

was carried out. Thus the chapter included several examples of recent theoretical and empirical research into current issues in the professional self-regulatory field.

Among the various and important, often competing influences on the regulator's decision-making process about whether or how to respond to legislation is the regulator's and the collective regulatory community's perceptions of, beliefs about and relationship to law, the power of legislation and the legislative development process. This chapter has therefore examined and reported on the work of several recent scholars who address the phenomenon of legal consciousness: how individuals and communities perceive, think and feel about law and how those beliefs and perceptions influence their behaviour – what strategies and tactics individuals and communities engage in to comply with law, contest law and/or avoid, resist or escape law's coercive power. Ewick and Silbey provide extensive theoretical and empirical evidence for the existence of individual and collective legal consciousness. This chapter has also invoked the work of subsequent legal consciousness scholars whose work provides further empirical evidence of the phenomenon, as well as extending and, in some instances, challenging and offering alternative interpretations of the evidence Ewick and Silbey have presented regarding the existence and influence of legal consciousness on strategies and tactics in relation and response to law.

Finally, scholarship was presented that identifies the potential influence of the regulator's perceptions of the power dynamics between the legislator and the

regulator who is subject to the legislation in that regulator's legal consciousness, particularly how the actual process of developing the legislation/regulation can influence whether and how legislation or regulation is adopted. This chapter has reviewed scholarly studies on the aspects and influence of party participation in regulatory development – openness, inclusiveness, respect, fairness – as affecting legal consciousness and the likelihood and mode of adoption, as well as the influence of regulatory community role models on regulatory community members. As Lande has argued, participation in the dispute system design and development by concerned stakeholders whose input is valued and respected is an important element of good dispute system design theory. This observation is corroborated, as the chapter shows, by other empirical research into legal consciousness and regulatory negotiation.

A Concluding Note on the Theoretical Research Methodology

This chapter has followed a thread of theoretical debate along several logically related paths of enquiry into legalism, regulation, legal consciousness, administrative discretion and ADR legislation, while contemplating the particular theoretical dilemmas ADR legislation might present in the regulatory culture of the Ontario health profession self-regulatory domain. This chapter has explored relationships between the selected theories and concepts in the fields of regulatory and ADR scholarship: law and alternative-to-law ("non law"); the pros and cons of regulating an alternative-to-law; the influence of the way law-makers and the subjects of law think about the power of law in social life (hegemony of law or constitutive legalism)

on decisions to legislate and whether and how to respond to the legislation; the reality that almost no legislation can be completely precise, but leaves ample room for interpretation (indeterminacy of rules); the process of deciding what to do about legislation (administrative discretion); and the influence of regulatory culture and community on considerations about what to do about legislation.

In pursuing an understanding of what makes legislating ADR and the subsequent exercise of administrative discretion in relation to how the legislation is interpreted and applied contentious enough to give rise to passionate debates in the academic literature, the theoretical trail of discovery reflects a series of choices and decisions determined by one scholar's particular interests and intuition. Hence the theoretical research narrative or framework presented in this chapter, and in this dissertation generally (including the choice of including a case study and the particular case subject to be studied), reflects a scholarly "administrative discretion" that selects, extracts, uses and organizes – from a vast field of available regulatory and ADR scholarship – a particular cluster of theories that appear to be the most relevant to the study at hand. Another scholar studying the impact of ADR legislation might follow a different trail and decide on an entirely different case study (or none at all) as determined by their own interests, beliefs, training, values, as well as by current scholarly philosophies and approaches.

In relation to his landmark studies of regulatory culture, indeterminacy of rules and administrative discretion, Meidinger states that the regulatory scholar's crucial tasks at present are to observe and understand logical regulatory practices; map ongoing relationships and describe forms of power in actual regulatory communities; give weight to the particular problems faced and the role of concrete experiences in structuring regulatory outlook; and capture key differences and similarities of work practice that enable the development of typologies of regulation.

The case study that follows seeks to respond to Meidinger's exhortation by seeking, observing and recording concrete empirical evidence of the experiences, relationships and practices in a specific regulatory community; the particular forms of power and the problems the regulatory community and its stakeholders experience and how these structure their regulatory outlook and produce differences and similarities in their behaviour. The goal is to compare the theories discussed above, and the theoretical framework outlined in this paper, and to discover whether and to what extent the empirical evidence supports or challenges the theory in ways that enable a better understanding of the regulatory process, especially in relation to whether and how to legislate ADR.

Chapter Four

CASE STUDY RESEARCH AND FINDINGS

4.1 Case Study Introduction and Outline of Methodology

The primary object of this case study, including primary document research and qualitative in-depth interviews, was to respond to Meidinger's challenge to develop empirical evidence that would reveal the various elements of regulatory culture and account for regulator choices in applying administrative discretion. Since Meidinger does not suggest a preferred methodology for discovering the legal consciousness foundations for regulatory culture and administrative discretion, the first challenge for the scholar developing such a case study was to select or develop the best methodological approach that would permit a full exploration and discovery of how, in this case, the members of the RHPA regulatory community perceived the ADR legislation related to the College complaints resolution process.

A number of possible approaches were considered, including survey questionnaires; structured interviews with a series of questions relating to the ADR legislation and regulator practices; in-depth, unstructured interviews with key informants; and in-depth, semi-structured interviews with key informants. Issues of representative sampling, how to frame the research to potential informants (how much to suggest to them without unduly influencing their responses) and how to record the data were among the key issues identified and considered. A full discussion of the

methodological approach and related considerations is presented in Appendix A: Comprehensive Methodology.

After considerable deliberation, it was decided that this study of regulatory culture, its influence on regulator legal consciousness and the impact of legal consciousness on the regulator's administrative discretion regarding responses to ADR legislation would rely on a combination of investigative methods that have been proven to yield best results when examining cultural phenomena in the regulatory field. The advantages and possible shortcomings of taking an in-depth qualitative survey approach, on a particular issue, using a representative sample of informants, are discussed more fully in Appendix A. However, a summary review of the reasons for selecting this approach may be helpful here.

Research by organizational culture, legal consciousness and regulatory culture theorists has strongly influenced this study's methodological approach. Investigations by Reiman and Oedewald,[234] Sackmann,[235] Sommer and Sommer,[236] and Ewick and Silbey[237] have addressed the challenges of exploring phenomenological elements of the subjects' inner cultural landscape or legal

[234] Reiman & Oedewald *supra* note 17
[235] S. Sackmann, "Uncovering Culture in Organizations" (1991) 27:3 Journal of Applied Behavioral Science 295
[236] B. Sommer & R. Sommer, *A Practical Guide to Behavioral Research Tools and Techniques* 4th Ed. (New York: Oxford University Press, 1997)
[237] See particularly the discussion of legal consciousness methodology in Ewick & Silbe 1998 *supra* note 22

consciousness and have established criteria and specific methodologies for empirical regulatory culture research.

In-depth, issue-focused, phenomenologically oriented interviews

The key informant narratives that follow in this chapter are the result of a deliberate methodology selected so as to produce the most robust and suggestive accounts of legal consciousness operating in the RHPA regulatory culture to influence administrative discretionary decision-making. Careful review of methodological literature in relation to cultural studies offered various combinations of approaches. Reiman and Oedevald's studies of safety cultures cited earlier recommend a combination of quantitative and qualitative surveys to reveal both the overt and tacit elements of regulatory culture in an approach they call "contextual assessment of organizational culture (CAOC)."[238] For organizational culture, this case study refers both to the RHPA regulatory culture and the culture of the particular regulatory College.

> Cultural perspective is interested in the meanings and generation of these meanings in a given organisation. Of special interest are the meanings that relate to the demands of the particular work. These meanings are also constructed in interaction with other members of the organisation. Cultural perspective thus emphasises collective and shared issues (and those issues that should be shared) over e.g. individual decision making. An individual always makes his/her decisions in a social context. The effect of this context can be so strong that the individual is not even aware of making a decision – choosing between alternative ways of acting. It is this context, which sets the possibilities and boundaries of action that is our main focus of interest.[239]

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[238] Reiman & Oedewald supra note 17 at 10

[239] *Ibid* (reference omitted)

Reiman and Oedewald assert that the phenomenon under study, such as ADR legislation, can only be understood in the context of the culture from "which it is difficult or impossible to separate the phenomenon itself."[240] Their research into regulatory culture confirms other cultural researchers' findings that questionnaires are inadequate means to uncover embedded cultural understandings.

> Organisational culture questionnaire methods have been criticised for the fact that it is not possible for them to map out a culture's underlying assumptions, because they are unconscious and often only poorly explainable. ... With interviews it is possible to bring out subjective opinions and views on the significance of issues, which is not always possible with a structured form. Moreover, the uncovering of entirely new, surprising issues and ideas is more probable in interviews than in questionnaire studies. In interviews one can enquire about the *justifications* for actions and different measures. These justifications reveal the kind of picture that interviewees have of their work and its requirements as well as the kind of *meanings* that individuals assign to their actions. ... During in-depth interviews, as open and as broad questions as possible are used, giving interviewees the opportunity to deal with them from the perspective of their own culture.[241]

Reiman and Oedewald's work on regulatory culture research methodology validates and extends the cultural research methodology outcomes earlier reported by Sackmann, on which this research study is based. Sackmann's research into various types of culture studies suggests that the most fruitful investigations of culture rely on inductive qualitative research, principally in-depth semi-structured or unstructured interviews with key informants that are issue-focused.

> In-depth interviews are used to uncover culturally based values, cultural beliefs, or knowledge structures. ... [S]uch an in-depth interview may be called *ethnographic,* clinical or *phenomenological.* The common denominator

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[240] *Ibid* at 8

[241] Reiman & Oedewald 2002 *supra* note 17 at 19 and 20

> is that researchers do not introduce cultural issues from the outside or from their own cultural reference groups. Instead, by using broad and open-ended questions, by trying to use the insider's language, and bracketing their own assumptions, the interviewers entice the interviewees to unravel aspects of their everyday life in their particular cultural setting.[242]

A semi-structured in-depth interview intended to uncover unconscious cultural beliefs, values, understandings or assumptions can sometimes frustrate or fail its research purpose by its lack of direction or focus. Therefore, Sackmann goes on to argue that

> "[a]n issue focus enables both the surfacing of the tacit components of culture, and comparisons across individuals and research settings. ... The [issue] should have the quality of a projective device – that is, provide a specific context but leave enough latitude for interpretation. ... The tacit components of culture become apparent in the specific interpretations attributed by respondents. ... [A]n issue focus enables comparisons, because it introduces a specific context that forces respondents to draw on the same stock of knowledge. It channels the attention of respondents to the same cultural aspects within a given organization and reveals their framework about this issue. ... The issue serves as a projective device, leaving latitude for different interpretations." [243]

Sackmann favours combining the issue focus, that surfaces cultural understandings in relation to a specific circumstance, with a phenomenological orientation that focuses "on insiders' perspectives, their everyday theories of organizational life, and what they consider relevant in that particular setting."[244] The combination of an issue focus and phenomenological orientation invites and promotes open and in-depth exploration of the informants' awareness and understanding through the lens of a

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[242] Sackmann *supra* note 235 at 301 (italics in original; references omitted)
[243] *Ibid* at 304
[244] *Ibid* at 305

specific issue with which they have reasonable familiarity. In discussing the issue, Sackmann asserts, the phenomenology of the culture is revealed and any researcher bias is significantly reduced. The issue, as "projective device" (in this case, the ADR legislation), allows "respondents to reflect on taken-for-granted aspects of their work life. It [is] sufficiently ambiguous and thought-provoking to surface subconscious beliefs and at the same time non-threatening, because respondents ... answer freely and openly."[245]

This case study is based on face-to-face interviews with relevant stakeholders, all of whom were directly associated with the policy development and practical implementation of the ADR legislation. It describes perceptions of the ADR legislation from three perspectives: where it came from (the background or what conditions gave rise to it), perceptions of the development process and the actual provisions, and the perceived impact of the ADR legislation on complaint resolution practices within the Colleges. The key informants were selected so as to obtain a diverse array of College and other key stakeholder perspectives. This "thickly described" case study seeks to create greater understanding of how ADR legislation is understood in the regulatory community. More specifically, this case study is intended to facilitate the identification of values and understandings that make up the "culture" that influences the individual and collective exercise of administrative

[245] *Ibid* at 310

discretion in this regulatory field and the factors that may determine adoption, avoidance of, or adaptation or resistance to the ADR legislation.

Appendix A describes in detail how the RHPA" regulatory community" was determined for the purposes of the research. It is perhaps sufficient here to state that the principal representatives of the community were construed to be the Government (elected officials), the Ministry of Health and Long-Term Care (appointed administrative officials); the Health Professions Regulatory Advisory Council (appointed consultative officials); the Health Professions Appeal and Review Board (appointed judicial officials); and representatives of the professional regulatory bodies (Colleges), including large (LC), medium (MC) and smaller (SC) Colleges, Colleges where the professions provide services funded by the provincial public health insurance program (OHIP) and those whose services are funded privately, by individual clients or by their private insurers.

From the Colleges, input was sought from the Registrars (chief administrative/ executive officers with overall regulatory as well as management responsibility, as well as statutory responsibility under the new legislation for determining complaints cases suitable for ADR); senior College staff responsible for the administration of the complaints resolution process; elected College Council members responsible for judicial decisions regarding complaints resolution; consultants to the College complaints resolution processes, including ADR experts and legal counsel. This

selection was made to ensure broad input to the study as well as to explore and validate, as far as possible, Meidinger's concept of a regulatory community whose interactions on the five influences[246] constitute a regulatory culture that influences individual responses to regulatory change.

The interviews focused on three core areas: What do you think gave rise to the ADR legislation? In your opinion, how appropriate is the actual ADR legislation? What impact has the ADR legislation had on College practices? This basic interview protocol, designed principally for College key informants and their consultants/ advisors, was modified slightly to reflect the different perspectives of the officials of the Ministry of Health and Long-Term Care and the Health Professions Appeal and Review Board. Interviews lasted approximately one hour. Only a few were briefer and most were longer. The discussions that followed each question and stage of the interview were lively and intense, and included many probing, follow-up questions for further information. At times the sequence of core questions would be varied when the informant(s) included information addressing a subsequent area of enquiry in their initial responses. The interview then flowed in the direction the informants led, thus providing precious insight into their perceptions and the inner logic of their responses. An opportunity was found later in the interview to return to any interview area that had been "skipped" as a result of the informant's free flow of ideas. All the

[246] General cultural assumptions, political pressures, legal requirements, structural constraints and bureaucratic procedures

key informant interviews were voice-recorded and the recordings were professionally transcribed.

Some twenty-four hours of remarkably candid reflections have been condensed here into some fifty pages describing the constellation of issues that, taken together, embody and represent the informants' perceptions of the various regulatory culture dimensions within their legal consciousness that govern their administrative discretionary decision-making, as revealed in their attitudes toward the ADR legislation. Through attention to these narratives, it is possible to gain a sense of the community and the individuals that comprise it and to hear the tensions and the challenges expressed in their own words.

The interview results (the verbal and conceptual content of the respective interview transcripts) from meetings with College officials, consultants and HPARB in this chapter were analyzed, clustered and coded according to similarity (patterns) of concepts and themes mentioned with respect to perceptions of how the ADR legislation came about, how appropriate the ADR provisions appear to be and what impact the ADR legislation has or will have had on College practices prior to the legislation. In reporting these results, the source is indicated by a code that reflects the College size (SC, MC, LC) and a number that has been assigned to that College within that size grouping.

Ewick and Silbey's reports on the legal consciousness of their subjects is the model for reporting the views expressed by the key informants in this study. By providing significantly more than the most condensed snippets from their interviews, this report allows the reader to enter more fully into the culture the informants inhabit and glimpse the values, understandings, beliefs and meanings that inform the informants' thinking and behaviour about their work, their responsibilities, the power dynamic and socio-legal framework they perceive as governing their work and the impact of the ADR legislation within that cultural context. I believe that the chosen methodology has produced robust results that offer unparalleled insights into the administrative discretion process within the RHPA regulatory culture, thus promoting a more grounded and nuanced understanding of the consequences of legislative initiatives in the regulatory sphere, particularly with regard to ADR.

Key Informant Interview Summary Results

4.2 FIRST QUESTION SET/CLUSTER: What do you think gave rise to the ADR legislation?

4.2 A Ministry of Health and Long-Term Care (2 Senior Officials)

Ministry senior policy officials of the branch responsible for the health regulatory Colleges agreed to an interview to discuss the ADR legislation. The legal counsel in the Ministry's Legal Services Branch responsible for drafting the legislation declined to meet, commenting (in a brief telephone exchange), however, that the Ministry policy staff had been fully involved in the legislative drafting "more than most."

In answer to the question regarding the background that gave rise to the legislation, the conversation with the Ministry policy officials began with the key informants referring to the HPRAC reviews and the recommendations in the 2001 and 2006 HPRAC reports regarding the need to improve public and member understanding of and access to the College complaints and discipline system and to "heighten public awareness of the ADR process as part of the system." They referred to how "the Colleges, in their many and various ways, deal with different sorts of complaints." Bill 171, they said, was "intended to sort out and achieve efficiency and transparency of the complaints and discipline system." Colleges had reported to HPRAC and to the Ministry that "ADR had been remarkably efficient and useful in resolving complaints – complaints which had skyrocketed because of public awareness. And obviously, if you start raising public awareness of complaints and the system, it may lead to more complaints." ADR "gave the Colleges the opportunity to increase their outreach and increase public awareness of what they were trying to do, and increase the public's understanding of health professional regulation." Colleges, they pointed out, were "required to investigate complaints, but ADR allowed Colleges to prioritize complaints, focus [their] energies on -- quote/unquote -- more serious complaints, or complaints which touch on more serious issues. . . . They had found a way to bring ADR into the system whilst maintaining and providing resolutions which were in the public interest."

The MHLTC key informants suggested that the reason for formalizing ADR in legislation was because "the use of ADR was undeniable and because it met so many objectives of Bill 171 in making the complaints and discipline process more efficient." Because ADR had become the "watchword" in the last few years, and "such an important component of the scheme and supports it, probably some structure and, for lack of a better word, rules around it are appropriate." "At the end of the day, if you were increasing the public access, it's also important to have those types of parameters in the legislation to make sure that it was being consistently applied by various Colleges and various committees." They acknowledged that "without it being written down there," while "very few Colleges" would use ADR to deal with cases of sexual abuse, "there was also the need to ensure public safety, which was the other important aspect of Bill 171. ... You have to be very, very careful about the types of complaints that you put through an ADR system, and so that is what the legislation now says, as we know. Clearly as a result of that, Colleges will have to think a bit more carefully about the types of cases that go through ADR."

The Ministry officials referred to the way the ADR was being used in the civil justice system and the parameters and guidelines around its use there, indicating that the same was simply being done "here, in this micro system." When asked to what extent those external developments in ADR affected the decision to legislate, the Ministry informants responded that while ADR was "popular in the labour and civil contexts," those were "on the periphery." "We were very firmly focused on what was

going on in the health regulatory system." They summed up by commenting that, overall, Bill 171 was intended to increase public awareness of and access to the regulatory system, acknowledge the effectiveness of ADR, and ensure public safety, bearing in mind what ADR processes were already there within the health profession regulatory system. They cited the Colleges of Nurses, Physicians and Surgeons, and Dental Surgeons ADR processes as examples of ADR systems already in place.

When asked whether it was part of the Government's intention to give the ADR process legitimacy, they responded that they had not thought of the legislation in that way, but "maybe, to a certain extent, it does legitimize it a bit, at least in the minds of perhaps complainants and others, insofar as it's dealt with in the Act, and some rules and structure are put around it and so therefore a complainant or a member of the public who's participating in this process feels that it is genuine as opposed to 'Am I being railroaded by this profession protecting itself?' and 'What am I being asked to be a party to here?' when this actually gives it some structure and some legitimacy.... That's a very important point, the notion of it saying this is not just something that a College has cooked up to railroad them, and 'We don't really know what the Government or anybody else thinks about this.' We might know if we had been in some kind of civil action that it exists, but even in those circumstances, there's always that feeling of the out-of-court settlement, and, of course, that's something that the Colleges have been very, very keen not to press. I think that that's very much embodied by the idea that one of the key elements of this – something which all

Colleges did – was to ensure that the committee that was in charge – the statutory committee, be it the complaints committee or the ICR Committee – ratify the decision, so that there was the idea of it being in the public interest and maintaining the public interest rationale."

"When looking at an ADR system," they said it had been important "to consider not only what was necessary and what was happening with Colleges, but also what was considered to be compatible with the law." "Clearly, whenever legislation is developed, there's advice sought and obviously legal direction is also sought. ... [The ADR legislation] has to be constitutionally compliant. It has to be compliant within the civil law doctrines of the day, so that kind of consideration absolutely." "The provisions that you see there in respect of ADR are consistent with matters of confidentiality and fairness and due process and all those things which are throughout the RHPA, which are the very common themes in respect of these kinds of matters and compliant within the constitutional law and various other principles in terms of process matters and legal matters." However, unlike ADR in other settings, where the settlement can be anything that meets the needs and interests of the parties involved, "whatever is resolved, unlike normal ADR where it could be pretty much anything you wanted, it has to be something that comes back [for the approval of the College statutory committee] and has to be compatible with the public interest. In other words, it has to be consistent with the RHPA from that perspective."

They commented that "framework" is a good word to describe the legislation since the RHPA itself is "a regulatory framework which contemplates a number of different micro processes or systems, whereby Colleges have the flexibility, by making regulations, to create a system which aligns and is compatible with their members, but within the legislative framework." The ADR legislation has "three or four central tenets, but is otherwise a framework." They emphasized that since the legislation deals with "23[247] different communities who not only would have a different vision of what ADR is, but would also possibly be dealing with a different notion of what a complaint is, and the subject matter of a complaint can vary so dramatically within one College, never mind across the spectrum, ... reflecting that it is a very, very broad church. There's no getting away from that. As a result of that, you still have to try and find some consistencies for the reasons we've just mentioned. In something that impacts so directly on the public's participation in those processes, they should not be influenced by professional culture. I think arguably you could say that, without the legislation, there would be 28[248] different [ADR processes] potentially, or not, as the case may be. So you have that situation where you're going into one shop to get the answers as opposed to going to 28. But certainly it's really only intended to be a framework. It's not prescriptive. It's intended to be a framework, and so the flexibility arguably is there. ... There's not an extensive structured process in terms of how this works. There are some very simple and common notions of fairness, and

[247] Two Colleges regulate two different professions.
[248] Reference to 23 existing and 5 new self-regulating professions.

consistency with other legislation, but beyond that, there's lots of opportunities for Colleges to be creative."

In response to a final question about the clarity of the legislation, they concluded the interview as follows:

> You could argue that there are several places in the RHPA where there may be, shall we say, procedural holes. It's not necessarily intended, but at the same time, the Colleges have a responsibility to ensure that they're conducting a process with all due fairness and with necessary consent. What I find so interesting is that this has raised a number of debates, which, in my opinion, have been raging all the way since ADR has begun, and the very fact that it was being used at all within the system. So, yes, it's in the legislation now, but it was always being used, so these things were always a possibility. I think it's interesting that people are thinking about these now, but I think with respect to what actually happens, we probably will have to wait and see and cross that bridge when we come to it. There's nothing in terms of a requirement for a formal review [of the legislation], but the health minister seems to be fond of writing letters to HPRAC, so something may turn up at some point in that respect, so you never know. But is anything planned currently, formally? No, not at this time, but that's not to say that as things play out, which they certainly will, and the various consequences – intended or otherwise –come into view, then who knows? We'll see.

4.2 B Colleges, Consultants & HPARB

In reviewing and sorting the College key informants' answers to the first question area, "How did the ADR legislation come about? What gave rise to the ADR legislation?" the response analysis produced some common themes, with individual variations and emphases.

When asked about the background and what gave rise to the ADR legislation, the three most frequent responses were the perceived need to:

1. improve public protection;
2. authorize/legitimize ADR as a valid form of complaint resolution; and
3. limit professional self-regulation.

Other responses, in descending order of frequency, were the perceived need to:

4. bring consistency to the ADR processes among Colleges;
5. bring the regulatory College complaints resolution process into alignment with the use of ADR in other areas; and
6. respond to media and political pressures from the wider community.

The Perceived Need to Improve Public Protection

The RHPA stipulates that the Duty of a health regulatory College in carrying out its Objects is "to serve and protect the public interest."[249] A majority of individuals interviewed, across the spectrum of College size and experience with ADR, asserted that the primary reason for the ADR legislation was to improve public protection within the complaints resolution process. This would be accomplished through clear direction, structures and expectations, leading to greater accountability. Increased accountability leading to greater focus on the public, as opposed to professional interests, was cited by several of the respondents. "I suspect it was a legitimate concern about whether ADR processes are in the public interest or whether they're in

[249] RHPA, 1991, c 18, Schedule. 2, s 3 (2)

the interest of the profession." Putting it in legislation was seen to "ensure that the loop was closed in terms of accountability" (SC6). The legislation was perceived to be necessary to address "lingering concerns about what's going on in this ADR alternative resolution realm" (MC3), because ADR "was seen as something that regulators did behind the scenes and had the potential to give the impression of professional self interest. 'We'll take care of our own, thank you very much,' in a process that isn't public" (LC3).

> There is a sense at the Ministry (and they're quite blunt about it) that Colleges need to be more accountable and transparent. I think that this was one of those: to be more accountable and transparent. There's no transparency behind closed-doors ADR. And there's no accountability that stays out of the public process and realm. (MC3)

These concerns were perceived to be held by "politicians" and "maybe an unease even among consumers, that, because it wasn't in statute, it might be used differently by different Colleges, and that it might allow a little sweeping under the rug of some things and allow some things to go below the radar" (SC6). "The public says, 'Self-regulation is a crock. They're just protecting their own" (SC7). The media, too, were seen to have influenced the legislation. "There was a perception out there that ADR was a fast way to sweep things under the rug, and there was no accountability, and 'Let's get rid of it.' I think the media drove a lot of that: 'backroom dealings,' and all that kind of stuff. Because there were no rules around it, it was easy for those who weren't familiar with the process to perceive how it was being abused or a way to cover things up" (MC2). "Sadly the media reports some things, and I think that that

can give self-regulation a bad name, I think unfairly. But that might be the motivating factor behind a lot of the regulatory changes that we see coming our way" (SC1).

Several College informants commented that, prior to the legislation, the majority of College ADR processes were being conducted with respect for accountability and public protection, and that policymakers and decision-makers were responding, "as they should," to "the minority of cases where there was serious concern", but "losing sight of all the good stuff that was happening without public interest issues" (SC5). Colleges with "well-founded ADR programs" were perceived to be using them "successfully to deal with patient concerns" and to effect systemic changes within healthcare institutions (MC2). However, there was also a perception among College informants, referred to indirectly by several, and directly by a few, that, indeed, "some Colleges had ADR that was cooked, so the public did not have confidence in that process", leading the "the Minister and the Government and the public" to conclude that those Colleges were "not doing their job" in disposing of misconduct through "a quiet, confidential meeting and burying it" (MC4).

One informant commented that some Colleges, in an attempt to manage their high volume of complaints, had started to become more "aggressive" in "channeling some complaints away from the complaints committee investigation process" (C1). They were not being "unscrupulous" in doing so: it being a "survival mode" and an "understandable way" to cope with the overwhelming volume of complaints they

were receiving. In some of these cases, the perception was that complainants may have been encouraged to accept the member's apology, as arranged by the College, and, assuming they were satisfied with this outcome, to withdraw their complaint, without further investigation. This summary, informal resolution without an investigation may have led, in some instances, to systemic misconduct by the member being missed, along with the opportunity to remediate or sanction the conduct. It was also suggested that, prior to the legislation, a College might have the same person attempt to mediate a complaint between the complainant and the member, and, if the complaint could not be resolved, and with the information learned in the attempted mediation, take on the investigation of the complaint, thus potentially compromising the integrity of the College investigation process.

Perceived Need to Legitimize the Use of ADR

Some informants believed that the primary reason for the ADR legislation was to ensure it was seen as a legitimate, Government-authorized form of complaints resolution and part of the complaints resolution process. A few informants identified public protection and legitimation of the ADR process for complaints resolution as equal principal reasons for the ADR process to be enshrined in the RHPA. "I think there were two pressures – one to create safeguards and one from the Colleges saying we're not sure we're allowed to do this unless the legislation tells us we're allowed to do it. So it would empower those folks, I think" (MC3). "I have no proof, but I got the sense that it was legitimizing what a lot of the Colleges were already doing. A lot

of the bigger Colleges had a robust type of ADR program. It was going on and we need to put some framework around it and give that option to other Colleges to follow if they want" (SC4).

Several informants suggested that discussions about the legitimacy of ADR for complaints resolution had been going on for some time among the Colleges. "There was divergence among the Colleges as to whether ADR was permitted or not. There were many who felt that they would have comfort if it was put in as an option related to the activity" (MC2). Two of the College informants stated that they thought any discomfort about legitimacy was exacerbated by legal opinion some Colleges received from nervous College lawyers concerned about insufficient legal authorization for the use of the process. "There are lawyers who said, 'To protect yourself, you [the College] need to get ADR in the legislation.' That isn't the advice we got, but it's possible that there have been some who were reticent to use it and this was seen as a way to support that. What we didn't want to see was that every complaint had to be investigated and this was a way to ensure it was seen as a legitimate regulatory response to a complaint" (LC3).

The view that the ADR legislation was not required to legitimize its use was supported by several informants from Colleges that had developed ADR programs. One informant commented that he had been informed by "several lawyers and authorities in this area" that the basis for implementing ADR programs before this

legislation was a clause in the RHPA, with specific reference to the complaints process, that sanctioned "'other actions not inconsistent with the Act.' That was what everybody hung their hat on and said that means they could approve an ADR because that's not inconsistent with the Act. The Act is about public protection and managing these complaints" (C1). Another key informant viewed the whole of the previous version of the RHPA as unrestrictive and open to a fairly wide interpretation of means to accomplish the legislation's goals. "We've never looked at the legislation as restrictive. You can opt to do that in a lot of ways and not just the ADR. We've looked at it generally as an opportunity to be innovative and creative as long as we are meeting and enhancing our mandate. All of the objects can be interpreted as either, 'It's the road and here it is,' or 'There are many paths.' But with that previous legislation, you had the diversity of where people would say, 'Well, it's not in there, so we can't do it,' which is about looking at it from a half-empty, rather than a half-full perspective. So I think it's intended to be an enabler" (MC2).

Some informants were frustrated by the concerns of those who worried about ADR's legitimacy, which caused them to resist using it.

> When RHPA came into place there was a reluctance to harness this kind of vehicle unless it was clearly provided for in the legislation. There was talk about that, so you'd get questions at meetings like, "Are we allowed?" Of course, for the Colleges that had been doing this for a long time, it's like the nine-headed question, "What do you mean, 'Are you allowed?' It's called *Alternative* Dispute Resolution! By its very nature it's meant to be an alternative to the formal stream." But I think that's why it [*the legislation*] came about. (MC3)

Perceived Need to Standardize ADR Processes

Several informants believed that the legislation was needed in order to standardize the ADR processes in use or contemplated in the various Colleges. Various informal and more formal complaints resolution procedures were being followed and there was significant inconsistency among them.

> ADR processes were all over the map. Some Colleges already have this process in place to a "T". Some don't have anything, and some are like us – they were in the process of coming up with something. Most big Colleges have some kind of formalized ADR process, like the College of Nurses – because, with that number of complaints, you would expect them to have something very, very streamlined. And they do. (SC3)

The legislation as an effort to standardize already existing and new processes was also linked to the growing use of ADR in other dispute resolution contexts. "If you walk outside the regulatory community, certainly mediation is done in a lot of other venues, as not only a case management tool, but as a value to the individuals, and so there's no reason why we shouldn't have it here, and it should be supported" (MC2). As another informant pointed out, "The ADR movement had come in with quite a force in other areas of law and naturally Colleges chose to use ADR – some formally, in the true sense, with facilitators, parties, agreements, and so on; but informal resolution was also taking place" (SC5). However, a few informants saw the "trend" to ADR as part of a Government strategy, perceived, somewhat cynically, as an attempt to win public support by appearing to empower greater collaboration between the public and the Colleges.

> I don't know where the genesis of that came from, to be perfectly honest, whether the Government thought it would be trendy to throw it in there and

> make it look like it was empowering people to be more collaborative. I don't know. At the time that the legislation was drafted, was there anything going on in terms of society or anything that was happening that would have let the drafters or the policy makers think, "Maybe this is a prudent piece to put in"? I don't know.
> I mean, the family law courts make it mandatory now, and I can understand that that's because they don't want to clog up the system potentially. I mean, I think that was driven by "Let's try and take a stream there that maybe can function in another stream; take a bunch in one stream and put them in another stream." LC1

The Perceived Need for Increased Efficiency

Only a few informants suggested that the purpose of the ADR legislation was to achieve greater efficiency or public cost savings. One College official saw it as a way of reducing the number of appeals that would go to the publicly funded Health Professions Appeal and Review Board. In this way, the perceived backlog ("a whole whack of appeals") at the Board would be reduced along with direct costs to the public purse. Imagining themselves as the Government officials, they reasoned:

> We'll reduce the backlog at the Complaints Committee level, so that they don't have to reach as many arbitrated decisions and the way to do that is let the parties, between themselves, reach an agreement. We'll put in some safeguards. One safeguard is that it has to be approved by the ICRC, but at least then you're guaranteed that it's not going to be appealed and we don't have to pay the folks down at the Appeal Board on this backlog. I think that's the motivation [behind the ADR legislation]. (SC2)

All the Colleges, except the College of Midwives,[250] are funded entirely by their membership, mainly through the payment of annual fees. The whole complaints (mainly investigative) and discipline (tribunal) system, apart from the Appeal and

[250] And the 5 Transitional Councils preparing for proclamation in 2013 or later (Kinesiology, Naturopathy, Psychotherapy, Tradtional Chinese Medicine, and Homeopathy)

Review Board and the Divisional Court to which College decisions can be referred, is funded by the individual members of each profession. One interviewee had formed the impression that the Government tended to pay particular attention to those Colleges where the public health insurance scheme pays for the services of its members. This would be a reason for the Government to try to achieve greater efficiency in the complaints resolution between those health professionals and the public they serve, including resolving complaints quickly and to the client's satisfaction.

> When Government thinks of self-regulated professions, there's a divide between publicly funded and privately funded, and their concern has been more towards publicly funded. That's where the public money goes in the system, so it almost does create a two-tier system where you've got publicly funded and you get privately funded, and publicly funded is where their focus is. (SC1)

A Perceived Trend toward Power Shifting

A few informants appeared genuinely baffled by the Government's decision to legislate ADR, while a significant minority interpreted the ADR legislation as another example of Government acting principally to serve political, rather than public interest purposes. One common theme that emerged was the ADR legislation as another example of the Government's move to curtail professional regulatory autonomy. "In the last couple of years, it seems that the federal government, the provincial government, and different branches within the provincial government are looking at regulation and self-regulation, and there's greater demands being placed on regulatory Colleges" (SC1).

At the time of the interviews, the Government had introduced draft legislation giving it authority to appoint a supervisor to take over the affairs of a College that was deemed by the Minister to be failing in carrying out important aspects of its duties and objects. During the interviews, a majority of informants spontaneously expressed frustration with this initiative and with the manner of its introduction. Several College key informants described this as an excessive and unnecessary step, given that the existing legislation provided the authority for the Minister of Health and Long-Term Care to require a College to do anything she or he requested it to do. They reported that they had not received clear answers to their questions about why the power to appoint a supervisor to take over a College was necessary, nor had they had a response to their offer to sit down with Government officials to discuss how the problem the Government perceived might be remedied.[251]

While the legislated authority to appoint a supervisor was not seen to be directly related to the ADR legislation, the ADR legislation became linked in the interview to a perceived trend to diminish the level of autonomy in professional self-regulation.

> I think there's a movement -- there's a belief that there's a movement for more regulatory control by the Government on self-regulating bodies. So certainly the appointment of a supervisor sort of speaks to that. ADR does not necessarily speak to that, I don't think. I don't know why they did it. ... There

[251] Since these interviews were completed, and following a Government-appointed independent consulting firm review of one College's practices (one interviewed for this case study), the Minister appointed a supervisor to oversee the College's affairs. See Appendix A for more on the possible impact of the timing of the interviews.

> is talk about, well, look what happened in England. I mean, we may end up not having – the government may take it all back. I can't imagine why they would do that. (LC1)
>
> It's just raising a lot of concern right now that the movement is moving away from self-regulation, and that can only stem from trust issues. So what are we getting wrong, and how do we get it back on track? I think that rather than reacting negatively to these things, there has been a lot of leadership [in the regulatory community] and a lot of maturity to try to understand what is the problem, what is the issue, and show them [Government] we will work with you to solve the issue or the problem. And that to me shows such a level of commitment and maturity, and a commitment to make self-regulation work. (SC1)

One informant viewed the intention behind the ADR legislation as Government wishing to appear more open and collaborative with the public on the one hand, while at the same time moving to curtail the autonomy of the self-regulatory Colleges.

> We asked ourselves why they put this ADR in the legislation and we couldn't understand why, other than this particular government is into interprofessional collaboration and alternative processes. They're trying to be more open, and that is probably the motivation – "Look what we've done, we've established a whole new process for ADR," rather than letting the Colleges themselves identify when that process could work for them and work for their members. It's quite interesting to try to understand the motivation behind it, but it seems to me that it's kind of the flavour of this particular government. They're passing a lot of legislation and there's been this whole emphasis on collaboration, more open processes, and certainly they're putting their oar a lot more in the water with regulatory colleges – treating us more like agencies rather than self-regulatory bodies. So the level of accountability and monitoring is at a level we've never seen before. (MC1)

For at least two informants, the ADR legislation reflected a purely political agenda. One saw the Government as "interfering," and with "no concept of the political effect they are having on the regulatory Colleges." Specifically, the Minister of the time was

perceived as taking a heavy hand with the regulatory Colleges to demonstrate his ability to "shake things up" as a way of furthering his own political career. "A lot of changes were driven by that particular Minister of Health ... and what has happened is a huge burden on the Colleges. And at the end of it, do I think public protection has been enhanced? I don't think it has. If you can see the public protection enhancement, it would have been worth doing. But I don't see that it has" (MC1).

For the other interviewee with a strong political perspective on what gave rise to the ADR legislation, the Government's actions were motivated by scandals that reflected on the Government's own accountability and transparency. The Government's response was to clamp down very publicly on bodies within their control, adding further accountability and transparency requirements on them. In this way, this somewhat cynical, though not unique view held, the Government could be seen by the public to be taking firm action to increase accountability and transparency, while deflecting attention away from its own problems with public accountability. A number of recent scandals were mentioned in connection with this perception of how the ADR legislation came about.

> Every time they have a scandal in their own system that shows how woefully bad they are at accountability and transparency, they're going to crank it up for us because they control the legislation. So how you respond to criticism that you aren't accountable and transparent is to say, "Well, all of our regulatory bodies are going to be made *more* accountable and transparent. Or agencies." And that response works. The media laps it up and it's front-page news, and everybody goes, "Whew! That's taken care of." ... So it's sort of a political answer to scandal. But I believe it's also a reflection of what politicians believe their constituents are interested in. ... There's always a

> reason why things come to what they come to. And if you can address the interests that pushed the agenda, then you have a chance of controlling the way it plays out. (MC3)

4.3 SECOND QUESTION SET/CLUSTER: In your opinion, how appropriate is the ADR legislation?

General View of the Legislation

Several of the College officials interviewed believed that the ADR legislation managed to strike a balance between flexibility and the principles of transparency and accountability. They commented on the need to accommodate difference, while ensuring public protection, principally through having the ICRC approve the agreement, if any, that results from an ADR process.

> What's in the RHPA now is good because it recognizes ADR and keeps ADR within the complaints process and clearly keeps the panel or the committee involved and clearly states that they have to make that final disposition and that means that all of the transparency provisions apply. They have found a way to keep the flexibility of the informal resolutions or informal ADR, but keeping the control of the ICRC, as I think they should. The combination of the new transparency provisions and what goes on the public Register, with the ADR provisions, I think is very much in the public interest, and very good. (SC5)

Several Colleges, mostly those who thought they had participated in some way in the process that preceded the finalization of the legislation, viewed the legislation fairly positively, as the best that could have been expected or hoped for, under the circumstances. One stated that, while they "like[d] the legislation," the legislation was not really needed. However, "there is nothing in there that is particularly offensive" (MC4). Another commented that the legislation was "not a big change

from what we were already doing," and "the way they wrote it in the legislation was better than we thought it would be" (SC6). Another informant offered a more qualified evaluation of the legislation, focusing on the legislation's perceived inflexibility: "I don't know that any harm has been done [with this legislation], but know that not as much potential good was done with this legislation as could have been done. The College's flexibility has been reduced significantly" (SC2). Similarly, the legislation was viewed somewhat negatively as "a very formal process with formal outcomes" (SC4). As one informant stated, "I haven't heard any of my colleagues saying that this is an improvement now, just because it's alternate dispute resolution. I think it should have been left" (SC3).

The following three statements reflect the sentiments of several key College informants in emphasizing the loss of flexibility that they perceived to be a core value of the ADR approach:

> We lost that flexibility by putting it in legislation, and some things would work for us. For other Colleges, they may work differently. This way, it's quite rigid. Then you still have to ratify it. And there's a lot of little details involved that some people may say, "Oh well, why bother?" Of course, you have to have a policy and some kind of rules, but it should have left it for the Colleges to do, specific to their needs. If it's an *alternate* dispute resolution, it should not be formal: papers and signing and consents. It should just be spontaneous and informal. That's what we had before. The public may not understand how it all then plays together: "This is the list of rules and this is how it's going to happen." I would say, "Whoa, what is this now?" And this is *before* even going through the "formal" process. (SC3)

> We questioned why is it still called an *alternative* dispute resolution process when it's now ingrained in the legislation. It no longer seems to be alternative. It seems to be a concept that needed not to be ingrained in

> legislation. That was our first question – Is this now really ADR, now that it's ingrained? There's nothing "alternative" about legislation! (MC1)
>
> Once you talk about ADR in your legislation, and you say what the "alternative" is, that's the end to the alternatives, isn't it? Whereas in the old system, when it was silent, people could go and, on consent, create whatever they felt was appropriate, given their mandate and their objectives, and the needs of the people involved. But now you can't do that. Because now, if you've got an alternative, the legislation's pretty clear about how that's got to run and the way it has to look. I just think that now that creativity is gone, and that's really sad, because if you're a fan of ADR, it's the creativity and the ability to create appropriate resolutions for the parties involved, and for the circumstances involved – the best possible solution. You will never be able to legislate that type of program because it's too individualized. So I think that's a sad tradeoff for I'm not sure that much more in terms of public protection or oversight. I think it made sense to let people know they could do it, because clearly some folks didn't. It's the restrictive pieces that are just too restrictive. (MC3)

The view that the process had been made so restrictive and so structured that it was unusable (and no longer the effective, informal "alternative" that encouraged its use previously) was expressed by several of the College informants. The College of Physicians and Surgeons had made the point to HPRAC in its submission on the recommended changes to the Act regarding ADR. CPSO supported a definition of alternative dispute resolution in the legislation as "an important step forward," and supported the goals of having such legislation. "Used properly, [ADR] is more efficient and expeditious, cheaper, and generates more positive outcomes than the traditional model," including "broad system outcomes." However, CPSO viewed the "elaborate system" proposed by HPRAC as "unworkable." "The College's concern is that these goals will not be achieved by the system envisioned, which is complex and cumbersome. We would support a truly informal process and certainly agree that

in order to invoke that process, all involved should agree to participate in it ' (LC2)."[252] Another informant echoed this view, saying that the new legislated process was "laborious" and "complicated," and impossible to carry out without legal counsel's advice. "What if you make a mistake? What if something serious happened and it really shouldn't have gone to ADR?"

> There's going to have to be all kinds of policies around what's ADR and what isn't, and when can we do it. For the people who have been using it and using it well, it is most unfortunate. If I were them, I would be using it less. Now you've made it so complicated, it doesn't have the same spirit. And if you destroy the spirit, it's not going to work, or not as well. (C2)

> If we were to embrace this, it would require significant resources. It was never embraced. We told [the Government] that it wasn't going to be usable in its current form and they elected to do it. It's not usable. There's no consequence, either intended or unintended. It's simply like it doesn't exist for us. (LC2)

Interestingly, however, one of the Colleges, considered by other members of the regulatory community as a leader in the use of ADR, stated that the right balance had been achieved in the legislation between formality and flexibility, which they had advocated for in consultations with HPRAC and the Ministry.

> We were successful in getting it left broad. There were some Colleges that wanted to define what the ADR process would look like and we really resisted that. First of all, there's a cultural element. Different professions have different cultures. Ours is based on standards, and not every College has standards. Yes, they have something you and I would recognize as a standard, but they may call it something else. They may call it a policy. They may call it a professional statement - a position. But the more you legislate, the trickier it gets, and the less leeway you have. There are different approaches to [ADR],

[252] *Supra* note 6

not what's "right" or "wrong." But we did not want to be stuck in a box. (LC3)

ADR Provisions in the Act

During the interviews, informants offered their views of different provisions of the ADR legislation in response to the questions regarding the appropriateness of this particular ADR legislation. Their comments were largely spontaneous, although follow-up questions were asked to probe for clarification in order to ensure understanding. Informants' comments on the provisions are included below, in the order the provisions appear in the legislation. Ranked in order of frequency and importance to the respondents, there is no question that the provisions giving rise to the greatest concern were *Timely Disposal* (28. (1)) *Not affected by ADR* (28.2); *Confidentiality* (25.1(2)); and *Facilitator not to participate* (25.1(3)). These aspects of the legislation elicited strong comments from the full range of College, Consultant and HPARB informants, as will be seen below.

Definitions

One of the relevant definitions in the Act is the definition of ADR, which was added to the Act, as follows:

> "alternative dispute resolution process" means mediation, conciliation, negotiation, or any other means of facilitating the resolution of issues in dispute; ("processus derèglement extrajudiciaire des différends") RHPA Schedule 2, 1(1)

None of the respondents offered any comment on the range of possible ADR mechanisms that could be employed in the ADR process. Most informants who discussed the process as they saw it unfolding appeared to imagine a mediation process, with two parties assisted in conducting a dialogue by a neutral third party whom they referred to as the "mediator" or "facilitator." Since they were not asked how they would describe each of the processes during the interview, it is outside the scope of this enquiry to establish what alternatives to mediation they might envisage occurring. The overall concern regarding the ADR process itself was with when the formal process would begin to apply. This led to significant discussion of the other area of definition in the legislation.

The other relevant "definition" is not technically a definition within the legislation, but does suggest how a "complaint" comes to be qualified as a "complaint," to which the ADR legislation would apply. Some informants appeared to be relying on the potential for these provisions to narrow the definition of a complaint and widen the scope of how they might handle a matter addressed to the College by a member of the public regarding a member of the College.

Panel for investigation or consideration
25. (1) A panel shall be selected by the chair of the Inquiries, Complaints and Reports Committee from among the members of the Committee to investigate a complaint filed with the Registrar regarding the conduct or actions of a member or to consider a report that is made by the Registrar under clause 79 (a).
Complaint must be recorded
(4) A panel shall not be selected to investigate a complaint unless the complaint is in writing or is recorded on a tape, film, disk or other medium.

It became clear during the interviews that these legal provisions both restricted the nature of a complaint, in terms of whether it was subject to the ADR legislation, and offered openings to evade the formal process by allowing non-written, initial, informal communications and approaches to the College by members of the public to be classified as contacts, communications, enquiries, educational opportunities, but not necessarily as "complaints" as the new legislation appeared to be defining a complaint. First, the Act determines that a "complaint" will be something "filed with the Registrar," leaving open the interpretation of a) what action constitutes *filing* and limiting the said "filing" to a communication with the Registrar (and leaving the status less clear of a communication made to another College staff member), and hence b) whether the approach is a complaint or has not yet become a complaint. Second, the formal complaints investigation process is not triggered until and unless the complaint is received in a written or recorded format. This provision, according to many of those interviewed, left open the possibility that the ADR process as prescribed is not legally required to be followed until such time as the complaint is received in written or recorded form by the Registrar.

> We don't consider [phone enquiries] complaints. You know, a complaint has to be in a written or recorded format. So it's not a complaint when we get a phone call. It's not a complaint unless it says, "This is a complaint against so-and-so," or if it comes in in another format. Because what I see is an enquiry. "I have an issue. I have a question. I don't know what to do with this. I don't know if it's a complaint or a concern." I perceive the difference in approach that lawyers take to the law. For some lawyers, it's the absolute letter of the law, with a rigidity and a fear that is very restrictive. Whereas I have worked with other lawyers who respect the law absolutely, and especially the spirit of the law, but appreciate that where the law is not clear, as long as you respect the principles behind the law, you should be able to use some of the

> ambiguity. And sometimes that's where they actually intersect. A complaint is defined. And it's in recorded form, so why are you worried about a telephone conversation? That is not a recorded form. You're not even exploiting the ambiguity, you are exploiting the clarity that's there, so you have some flexibility. If your basic fundamental personality wants to define everything similar to be ADR, then you get all tied up, and that's the personality of some of the lawyers in this system and some of the people in the system and I respect that. They're not wrong, but I tend to go down to fundamentals. It's about service and protection to the public. If I say, "I can't talk to you, it's not in writing. It's not a complaint unless it's in writing. Give it to me in writing," it's not a good service. Where there's ambiguity, ultimately you challenge it and a court of law decides it. That can be expensive and I think that's why some people get tied up – they don't like to be challenged. (SC5)

Consent and Matters That May Be Referred to ADR

Alternative dispute resolution with respect to a complaint
25.1 (1) The Registrar may, with the consent of both the complainant and the member, refer the complainant and the member to an alternative dispute resolution process,
(a) if the matter has not yet been referred to the Discipline Committee under section 26; and (b) if the matter does not involve an allegation of sexual abuse.

Consent

Several informants referred to the provision with respect to the complainant and the member each having to consent to participate in the ADR process. One informant believed that it was not required to put this in the legislation, because "in ADR, you have to have both parties who agree, otherwise you're not going anywhere" (LC3). Another informant also questioned the consent provision and read into its inclusion a discouraging and even insulting further example of the lack of trust between the Government and the regulatory Colleges, if such an obvious aspect of ADR had to be legislated.

> If you read this [the ADR legislation] and you knew nothing about ADR, you would get the impression that ADR was somehow non-consensual. Because why would you have to regulate it if the people involved are fully consenting to what it is that is going on? When you read it you think, "Weren't the people consenting to have it taken out of the formal process and didn't they always have the right to take it back to the formal process?" You get the sense that that wasn't happening and that *was* happening. So even the optics of the way it is written is distrustful. We as Colleges have become quite used to that – that it's a distrustful approach to say we need to specify this, and, what is unsaid, because Colleges have not been taking steps to safeguard these processes up till now. And I think that that's an unfair impression to leave with the public. (MC3)

Another informant, however, saw the situation regarding consent quite differently.

> In the past, I think nobody ever got consent from anybody to participate in this process. They were getting some level of informed consent about what they were participating in, but it was probably very inconsistent, because it was all verbal, and different people would say different things, and, frankly, I suspect people would say whatever they felt they had to say to convince the person to participate. So, I think it's a good thing that the legislation has said, yes, you need to get consent, because I think that that results in the Colleges taking a more appropriate approach to ensuring that people are properly informed, and they understand they can back out of it, and that if they do back out of it, it's not going to be held against them, and anything they say is going to be without prejudice, and not going to be an issue for them at some point down the road. (C1)

Some informants who commented on the consent requirement in the legislation also addressed the protocols of the consent process, as they understood it, though it is not actually covered in the legislation. One concern was the order of seeking consent. A College informant emphasized the importance of seeking the consent of the member complained about first, and only after obtaining their agreement, seeking the consent of the complainant to participate in the ADR process.

> We made a conscious decision to go that route, in part because it takes a lot of effort for a complainant to file a complaint at a College, and we recognize

> that. Often they do so because they felt victimized somehow by the registrant or by something that happened in relation to their care, and so we didn't want to victimize them twice. We didn't want to offer them ADR first, get them all excited about it, and then go to the registrant and the registrant says, "Uh-uh, I'm not touching that. I'm going to make my written submissions." Then we would have to go back to the complainant and say, "Sorry, technically you may feel victimized twice now because the registrant doesn't want to engage in this process with you." (MC2)

However, the difficulties of getting consent from the complainant was delaying and even undermining the process in at least one College. This College had sent a "Consent to the ADR process" letter to an elderly complainant, and, even following several telephone conversations to explain the process and the need for consent, had not yet received the signed form. Without the signed form, this College Registrar believed they could not proceed with the ADR process.

> I think because it's very formalized (the letter that goes out), maybe people are intimidated by that. Maybe they don't understand it clearly. They might be skeptical or they have a fear that if they consent to this, that they're bound to this, and that's when I spoke to the complainant. I said, "Well, this is strictly voluntary and you can pull out at any time. Our letter states that, so really from that perspective, you don't have to see the practitioner. You don't have to talk to the practitioner. You can let the facilitator know that you're looking for a refund. If you don't like the way that it's working out, you can step away from the process." And she had said, "Oh, well, okay, then I'll consent to doing it." And I said, "Well, then you need to complete the form and send it in to us." I was led to believe that she understood the process, but for whatever reason, we still haven't received her Consent, and because this is a new process, we're trying to figure out how we should administer this. (SC1)

Matters That May Be Referred to ADR

The Ministry key informants to this study pointed out that, under the new ADR legislation, Colleges would have to be "very, very careful about the types of

complaints that you put through an ADR system. So that is what the legislation now says. Clearly, as a result of that, Colleges will have to think a bit more carefully about the types of cases that go through ADR." Several informants referred to the provision that prohibits using ADR in a case of sexual abuse, as it is defined in the legislation.[253] There don't appear to be other prohibitions in the legislation against the use of ADR to resolve a complaint, though nearly all the College informants believed that it would be wise to exclude certain types of "serious" complaints from ADR, although each College official interviewed had a slightly different perception of what, other than sexual abuse, should be excluded, and what process should be followed for determining whether a particular type of complaint would be deemed eligible for ADR.

> The law is clear: nothing related to sexual abuse. In the past we have not looked at competency as for ADR. I am seeing some files where that might be a possibility. Not a public complaint. We're exploring the options as the complaints and reports come in. (SC5)

> So there's no billing fraud in our stuff. There's certainly no sexual abuse, no criminal behaviour. We're having a conversation right now about whether people that have multiple prior history can go through mediation or whether they can't. If it's similar fact or it's not similar fact, does that make a difference? Is there a recency of prior history that matters? So, all of those kinds of questions, we're still sorting those through as we work through eligibility criteria. (MC2)

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[253] Sexual abuse of a patient (3) In this Code, "sexual abuse" of a patient by a member means, (a) sexual intercourse or other forms of physical sexual relations between the member and the patient, (b) touching, of a sexual nature, of the patient by the member, or (c) behaviour or remarks of a sexual nature by the member towards the patient. 1993, c. 37, s. 4. Exception (4) For the purposes of subsection (3), "sexual nature" does not include touching, behaviour or remarks of a clinical nature appropriate to the service provided. 1993, c. 37, s. 4. Health Professions Procedural Code 1.(1) The Code is deemed by section 4 of the *Regulated Health Professions Act, 1991* to be part of each health profession Act.

> There are some criteria that are used to separate – So, for example, sexual abuse, a previous ADR would take that out as well, and there are a couple of others and I can look them up, but basically the first screen at intake of a complaint is, would the parties consider resolution? (LC3)

Several of the key informants wondered out loud during the interviews about what might be appropriate matters for ADR, given the lack of more precise direction in the legislation. One area that arose consistently with different Colleges is that of refunds and restitution for unsatisfactory products or services. These matters are not within the jurisdiction of the ICRC, but informants were uncertain whether they might be "ADRable," and a convenient way to address these very common complaints in some professions. Some made the point, however, that, since the ICRC would have to approve the agreement,[254] and since the ICRC has no jurisdiction over such matters, the agreement could not be approved by the Committee. Moreover, if the agreement were to fail in the execution, the ICRC would have no legitimate jurisdiction to enforce the agreement in matters outside its jurisdiction. Some informants viewed the open-endedness of possibilities apart from sexual abuse as an opportunity to take on issues that were common to their College, while other informants expressed concern about the ADR process opening the College to the role of a Civil or Small Claims Court and the attendant problems that would bring.

[254] See interview data on this provision on page 170 of this dissertation.

One aspect of the decision-making regarding eligibility that was addressed by key informants in this study was who establishes the criteria for referring a complaint to the ADR process and who makes the decision to refer to ADR. Some informants mentioned that the College ICRC members, assisted by College staff, and sometimes also by the College legal counsel, would determine appropriate criteria and then delegate the actual referrals to College staff – either the Registrar or Director/ Manager responsible for the complaints and discipline process. Other College senior staff noted that staff alone would make the decisions, that the Committee was "right out of it." Another approach reported was to have the committee briefly review a complaint and then approve its referral to ADR, if they deemed that appropriate.

> I also think that the very serious complaints – the legislation speaks to sex abuse and other very serious complaints – I may be in violation of the statute, but I won't put to ADR. It's a staff committee that decides what goes to ADR, and, in my head, those matters are those that need to be fast-tracked or those matters that are not as serious – not sex abuse, supervised neglect or fraud – should really be dealt with in an alternate kind of process where the patient and the member, with an experienced mediator, can sit around and come up with a reasonable solution that both parties can participate in. (MC4)

> I think the legislation states that certain cases are exempt, which we would never do anyway. The committee would come up with criteria, then the discretion is mine as to which cases to send to ADR and then I would select a mediator and go from there. (SC7)

Confidentiality

(2) Despite this or any other Act, all communications at an alternative dispute resolution process and the facilitator's notes and records shall remain confidential and be deemed to have been made without prejudice to the parties in any proceeding.

This provision was described as the "black box," the "what goes on in ADR stays in ADR" provision by several informants, and was clearly the source of very serious questions and concerns. As one informant noted, there were Colleges that spoke to that concern during the legislative development process, citing public interest issues with learning of systemic or egregious conduct in the course of an ADR process, and not being able to use that information to take action to stop the behaviour and hold the member accountable.

> One of the provisions that fussed CPSO and CNO that didn't fuss me was the notion that what goes on in ADR stays in ADR. It's one of the reasons why the safety net is not to take the real serious ones, because, in the hands of a wily lawyer, I don't know what a member might say to keep things contained and excluded from other investigation. So for me the answer was to keep it confidential – absolutely. If it goes nowhere, we seal it. The Committee just gets the resolution. They don't get the whole ball of wax. But for [CPSO and CNO] it was an issue of, "It can't be confidential because we have a greater good and greater responsibility." The legislation does say that it is confidential. (MC4)

One informant wondered whether there might not be "a creative way around it. I don't know if it is so serious as to pose a risk of harm or threat to the public, whether there could be an additional process so as to use the information if it is so deleterious. I know that in our ADR process we would get a better outcome if it were without prejudice" (SC5).

Despite public interest concerns, one College accepted legal advice that "the black box is the black box," noting that " a lot of this is probably standard mediation protocol that they've just implemented, and, certainly, in some environments that

would make sense. But in the business of the public interest, public safety and healthcare, it seems probably a little too restrictive, so I'm sure there's a halfway balance in terms of meeting that mean and still being able to report on excessive things" (MC2b).

The Committee chair of a College ICRC recalled a session held among regulatory Colleges to discuss the provisions, where it was suggested that ADR could be used to acknowledge certain conduct, and, having it come out in ADR, would protect the member from subsequent prosecution for that conduct.

> There could be someone who had a lawyer who said, "You know what? Do ADR. This is your way to get off the hook on a lot of things that are potentially a risk to you." Then it could be abused and we wouldn't know the content of it either, because we don't see the black box. I just remember it from our training session with all the Colleges. People's heads were spinning around that and the potential for misuse, where we're facilitating people getting off, when that's not really the spirit of ADR. But I think everyone kind of came to the conclusion that if you're going to offer a process, you need a safeguard, and the black box is the ultimate safeguard. There's probably a percentage of people that would abuse that, but overall, that layer of protection is essential to the success of ADR. (MC2c)

For more than one College, the risk in adopting a process with such potential for harm was the "deal-breaker" that had led them to avoid the ADR process altogether. The fact that the "black box' meant that College Committees had to take the agreement on faith, without supporting information was simply unacceptable.

> An agreement will be hammered out, and the Committee will rely on the fact that they believe a robust process has taken place. I think that's a big risk to the organization, and Committees will understand that risk. Certain Committee members will be very leery. They're going to start to ask all kinds of questions, and what's somebody going to say: "I'm sorry, we can't

> disclose that?" The Committee is going to say, "Well, then, we're not prepared to accept this." Who knows? I think all of those things could happen. It's without prejudice and the member says, "Well, I was really hung over that day, and that's why I was rude." Now you've got suspected possible incapacity and you can't do anything with it. So we just decided we don't want to go there right now. Let some other College figure out how they're going to deal with that. (LC1)

The HPARB informant in addressing this issue reflected on the way the ADR legislation might be interpreted according to other aspects of the Act having to do with the powers and responsibilities of the ICRC and those of the HPARB.

> The ADR process is supposed to be private and the material is not supposed to be producible, at least the way the legislation is currently written, but something must be given to the ICRC in order for them to exercise their discretion, and there's no guidance as to what that discretion could entail. ... ADR is closed, but so is the complaints process closed at the College level. It's only when it comes to HPARB that it's open. So all the material that is filed is actually confidential and, setting aside the ADR process, that's why to me it would seem that for the ICRC to make a decision, they need to look at the material that the ADR process revealed in order to exercise their discretion, very similar to the complaint review process. (HPARB)

Facilitator not to participate

(3) The person who acts as the alternative dispute resolution facilitator shall not participate in any proceeding concerning the same matter.

> The legislation is not that clear. It's pretty clear that who's involved in mediation can't be involved in investigation. That's a pretty clear message. (SC7)

This provision, along with the Confidentiality and the Timely Disposal provisions elicited the strongest expressions of concern among the College key informants, whether from a large or small College. Many viewed this requirement as so costly and impractical that it would affect their ability to proceed with ADR at all.

> In the smaller Colleges, the Director would be involved from intake to scheduling the discipline hearing. Since we are financially not able to hire anyone else and not able to use the Director, we would need to go outside to an external mediator. Costs arise from having to send it out. Larger Colleges have larger departments and resources. The problem is the unknown cost. (SC4)
>
> In terms of its impact on the College, the costs involved for this process increase substantially, because it was done internally by the College before. (SC1)

Several informants questioned the point of the provision as it relates to the role of College staff, because, in their view, College staff members do not make the decision to accept or reject an agreement or to determine the outcome of a complaints process. That is the sole responsibility of the members of the College Inquiries, Complaints and Reports Committee (ICRC), comprising elected and Government-appointed College Council members and often other, non-elected, College-appointed professional members of the College. From the point of view of the principle of avoiding conflict of interest, these informants could not reconcile the legislated means with what they viewed as the purpose or ends of the provision.

> If you could have some overlap at the staff level, not at the decision-making level, but at the staff level (staff don't make decisions on complaints), if our staff resource to the ICRC could be the facilitator to the ADR, that would free up manpower and allow us to proceed. We wouldn't have to contract out with the higher expenses. (SC2)
>
> [The Government] must have had some reason for restricting it the way that they did. Maybe so that the issues would not be confused, so that whoever was mediating it was not involved in the investigation. For me, if I did the ADR, I simply facilitate the investigation, I don't make the major decisions about what happens, that's the Committee. I make the investigative decisions.

> Maybe they thought that's too close. Our legal counsel advised us against it. (SC7)

For most Colleges concerned about the provision, the challenge it presented was financial and logistical, in terms of access to human resources. Over and over, both larger and smaller Colleges perceived this provision as prohibitively costly.

For many Colleges with a current complaints resolution process, this requirement was seen to necessitate a radical change in the way complaints resolution was handled. Once a staff or Committee member was involved in the ADR process, they could not be involved in the investigation.

> The big problem for us is, who will do the ADR process? If I do it, once it becomes a complaint, I cannot be involved in anything. I can't do any investigation. We would have to get an outside person to do the ADR and that's a problem for us. It's costly. It's who do we get? It complicates things. It's only me in the department and the coordinator. ... Every College now has to comply with this regardless of how big, how small, how many staff. This would be easier to implement if you had a ten-people department and then you say, "The two of you will be in charge of this, and the eight of us will ..." But here it's only me and the coordinator. That's it. And the receptionist, who could maybe get the beginning of somebody's story, but for the rest, we can't get any other help. (SC3)

One informant noted that the difficulties this provision presented had been raised before the legislation was passed, but, in their view, the concerns expressed had been overlooked or ignored.

> Believe me, we really tried to get them to listen to us and said, "This is going to really penalize the smaller Colleges. If you're trying to encourage this formally, because it's now ensconced in the legislation, you're certainly not facilitating it for the smaller Colleges." They didn't listen. I don't know why. I guess they thought there might be some sort of a conflict. HPRAC provided

> advice to the Minister. It was presented to the Standing Committee. Nothing changed. We lost interest when nothing happened. (SC7)

Other issues with this provision included how to find a qualified mediator and how to ensure the work was being carried out in a timely fashion, bearing in mind that the whole process, from intake to disposition, including any ADR and an adequate investigation, if required, must be accomplished within the legislated timeframe of 150 days.[255] There was a concern that if the ADR process preceded an investigation, the ADR process might take significant time, and unless the mediator could tell early on in the process that an agreement was unlikely, it might mean having very limited time left within the timeframe to conduct an investigation.

> These are huge costs. Having an external mediator would be a bit of writing a blank cheque, because you don't know how long the complainant will drag this out. You need trust in the mediator that they will know when to stop, will know when it isn't going to work and refer it back. Any good mediator will know this early on – that this isn't going to reach an agreement and you cut your losses. (SC4)

The alternative – to initiate the ADR process and have it run concurrently with an investigation – was seen to potentially prejudice the effectiveness of the ADR process. Informants commented on the "chilling" effect of a member's practice being investigated at the same time as they were expected to engage in good faith ADR negotiations with the assistance of a mediator/facilitator.

[255] See Timely Disposal findings at 174 of this dissertation

Two of the Colleges, with processes already in place and with adequate staff and financial resources, confirmed that the principle of separation to avoid conflicts of interest was valid and appropriate to be in the legislation. The second informant made it very clear that, despite the expense and practical challenges of what was being required, they viewed the benefit as justifying the cost of this provision to the College and its membership.

> The principle that anyone who participates in a resolution will not be involved in any process that will follow as a result of the same complaint is an important one and we will certainly follow that. (LC3)

> We're smaller and we're very streamlined in terms of function, so we consult with an external mediator. They are not involved in any way in any discussions at the College tables. Certainly the information they get is the initial complaint and the contact information for the parties. They facilitate. They do one-to-one discussions or teleconferencing. We haven't had an in-person session yet, although there will be a case, I'm sure, that will warrant that at some point. They prepare a report, after which it goes to the Committee with any resolution agreements, if they were obtained. We have a budget line for it right now, and our average cost is about $250 to $300 per case. So it's not excessive in terms of cost, and we were framing it in the sense of the public interest and what's beneficial for that patient at the time they filed the complaint. They may at the end of the [investigation] process get a written decision by the Committee that's written often in legalese and that might not address their needs for going through the process. If we can spend a little bit of money to assist them in walking away from their interaction with the member in a more positive way, and help them with their perception of the College and how we assisted them in coming to some closure, then that's probably money well spent. (MC2)

Ratification of resolution

(4) If the complainant and the member reach a resolution of the complaint through alternative dispute resolution, they shall advise the panel of the resolution, and the panel may, (a) cease its investigation of the complaint and adopt the proposed resolution; or
(b) continue with its investigation of the complaint.

> One of the key elements of this – something which all Colleges did – was to ensure that the Committee that was in charge – the statutory committee, be it the Complaints Committee or the ICR Committee – ratify the decision, so that there was the idea of it being in the public interest and maintaining the public interest rationale. (MHLTC)
>
> Actually, the whole of our self-regulatory system is all about the public interest. And I'm not certain where I'm seeing the overlay of the public interest throughout this process, other than in that discretion that has been accorded to the ICRC by the legislation. (HPARB)

The role of the statutory committee in approving an ADR agreement raised some issues from College key informants, as well as from the Consultants and from HPARB. Many viewed it as a necessary and desirable way to ensure the public interest would be the criterion for the approval of any facilitated agreement, and that there would be a measure of oversight for the ADR process and the outcomes achieved.

> Our ICRC has to approve the agreement. They can reject it. They do issue a decision as well. It's appealable to HPARB, which is the Review Board. Obviously if people have worked together they're usually not going to back out of the decision that they've signed on to, but certainly that's available to them. (SC2)
>
> Now while the legislation says the [ICRC] panel can accept or reject [the ADR agreement], another principle we have here is that you want to do a bare minimum of investigation, because once you're into the investigation, the sides get entrenched pretty quickly. And so for us, we have taken many of the less serious kinds of complaints and have had some very successful ADRs. Another principle for me is that the panel has got to make a decision. The legislation is not that clear about that. For me it's simple. The Committee is given the resolution and the Committee makes a decision on the resolution, and invariably there's no further action. And that is a final decision. Parties have 30 days to seek review from HPARB and it's a final matter. I don't want the Committee to deviate from its statutory responsibilities. At the CPSO there have been several issues with complaints being withdrawn as part of the ADR resolution, and what does that do to the conduct? You don't want to leave the regulator out of the mix. (MC4)

One key informant who chaired the statutory committee at one College described the difference between the Committee's review of cases that had been investigated and those that had been sent to ADR with a resolution being presented to the Committee for its approval in terms of the quality of Committee member experience and the cost-benefit equation for the College.

> We looked at the cost of a mediator and thought this doesn't make any sense, because we can process this internally very quickly, and the majority of our complaints are dismissed with advice or no action. So the change that happened is now we get this package with tons and tons and tons of information [complaints investigation results], and then there's three at the end that are wafer-thin, and it says, "This is the outcome. Do you agree – approve of it?" "We need your approval of it." And those are great. It's amazing. We still have leads. I'll take the lead and say, "This is a case about so and so and this and that," and usually it's sifting through all this [investigative reports]. Now we just say, "You know what? They sorted it out on their own. An apology has been issued," or whatever they've decided to go ahead and do. And we close those cases with smiles. We're very happy with it, and I don't ask how much it cost us to get to that resolution or anything like that, because we're not a College that is in financial hardship, but we are also strapped, looking at the workload that the staff has. We're strapped from that sense, so anything that actually takes off from that is worth the money. If we can manage our cases, especially the ones that seem pretty straightforward, through another stream that doesn't involve our committee until the end, then I'm a convert. I'm converted. I'm all for it now. (MC2c)

Another College staff informant told a different story of a Committee that was very reluctant to give up its management of cases and knowledge of the details of each case. In that connection, they suggested that, since the Committees comprise members of the particular profession, as well as appointed public members, the attitude of the Committee towards accepting or supporting ADR processes might be

reflective of their professional culture and its tendency (as those informants perceived it) to be more or less controlling or *laissez-faire.*

However, some informants drew attention to the potential for conflict between the confidentiality provision and the Committee approval provision. How could the Committee satisfy itself that the agreement was in the public interest if they could not access the information on which the agreement was reached? Would a Committee simply approve an agreement on trust? What if the agreement were to be taken to HPARB for review, either because the terms of the agreement were not followed, or one or other of the parties to the agreement later claimed there had been coercion in the process? The fact of the agreement having been approved by the Committee appeared to make it automatically a decision of the Committee – and all decisions of the Committee are appealable to HPARB, with HPARB having the right to review all the files and information which led to the decision, under the terms of HPARB's governing legislation regarding its jurisdiction and the grounds on which its review can take place as well as the areas it can consider. The potential in this situation was described as follows:

> Certainly, we have jurisdiction for decisions of the ICRC, and I think it's arguable that this would be a decision, because it is discretionary in the legislation for the ICRC. They have the discretion to approve or not. On the other hand, the ADR process is supposed to be private and the material is not supposed to be producible, at least the way the legislation is currently written, but something must be given to the ICRC in order for them to exercise their discretion, and there's no guidance as to what that discretion could entail. ... So it all starts with a complaint and now you have two streams, but they all flow through the ICRC to make a decision and render their discretion, as they

> do now. And the legislation indicates that when they are making a decision, HPARB gets everything, the documents and materials. I'm not certain anyone thought of that. (HPARB)

Timely disposal

28. (1) A panel shall dispose of a complaint within 150 days after the filing of the complaint.

Not affected by ADR
(2) A referral to an alternative dispute resolution process under section 25.1 does not affect the time requirements under this section.

The provisions regarding the timely disposal of a complaint gave rise to lengthy and vehement comments about the proposed ADR process from College informants. Several thought the timelines were unrealistic and unmanageable and would preclude them using the ADR process altogether.

> If you're tying [ADR] into the 150-day timeline, people are going to look at that and say, "You're going to do a crappy job at your ADR because you're going against the clock." That speaks to why we have not chosen as a College to engage in an ADR process at this point in time, because the 150-day clock is still ticking. (LC1)

Several College informants found the requirement onerous, but viewed the consequences of not meeting the timeframe as relatively manageable and certainly not threatening. Still other informants were convinced that if the College could show it was moving as expeditiously as possible under the circumstances of the case, there would be little to fear from HPARB, the review body with powers to take over a complaint.[256]

[256] RHPA 1991 Schedule 1 ss 28(1) to 35

> The time concern is a real issue. Sometimes ADR can be a faster process. In the end, having a timeframe is good. In the end the sky doesn't fall in if you don't hit the 150 days, you just get pulled into a more administrative procedure. So I'm not going to turn the College and the investigative system into knots beyond normal continuous quality improvement processes, because the investigations have their own culture and they have to be done well and if you're not being fair and if you're not doing a good job, that's a greater sin than not meeting your time frame. You just have to accept the way it is and look for ways to streamline the processes. My Committee's more concerned about the timelines. They see that 150 days standing out there in law and their view of what the law says is that you *must* complete your file in that time. It's not what the laws says, but they are trying to meet the standard, because that is the gold standard right now. (SC5)

Some College informants reported that they had experienced considerable difficulty meeting the previous 120-day timeframe to complete the investigation and could not imagine how adding another process would be manageable with only another 30 days added. Other Colleges had not had difficulty meeting the previous deadline and expressed some hope and confidence that their administrative processes could be further streamlined to accommodate the two "streams" within the expanded timeframe.

For some, the "ticking clock" undermined what they considered to be one of the values of ADR, that the process is intended to find the best solution, not overly influenced by a pressing deadline.

> We're quite willing to throw the 150 [days] by the wayside if we need to. If there are accountabilities, we'll write the letters to say why we're delayed. We always make decisions for the case rather than the timeline, and I think ADR is the same. We wouldn't cut corners on an investigation or purposely speed up our agenda so that we could meet those timelines. In the legislation, it's cast in stone, and we recognize that. The reality is it's important to have benchmarks, because if we don't, then the whole system falls apart. So it's

> helpful for people to know what we strive to achieve. We're quite diligent about trying to get there, but where we can't, there's very good reasons, and we always tell both registrants and complainants, "You know, it's in the best interests of you as an individual that we go through this due process, and where we need to investigate, we fully investigate." Otherwise we're making decisions on half information, which is not right and not fair to the parties. ... I certainly wouldn't cancel our ADR program out of the fear that we're going to miss the 150-day timeline. (MC2b)

Several College informants were concerned with having to complete both the ADR and investigation of the complaint within the 150-day period, commenting on the problems of organizing and sequencing the two elements of complaint resolution. In a few Colleges, this difficulty proved an insurmountable obstacle to adopting the ADR process at all.

> The other piece that we didn't like was the timely disposal and the fact that the ADR has to work within the 150 days to process a complaint. So that was another reason why we decided at this point in time not to pursue it. We just said, forget it, because we don't have the capacity to set it up between the complainant and the member and get someone to mediate or facilitate the process – it eats up the time. It's a pretty loud clock ticking! (MC1)

A common concern was about how long to give to the ADR process before initiating an investigation. One informant cautioned about having a cut-off date for the ADR, because, in their view, there was always a possibility that the dynamics of the ADR process might have changed within days of the decision to terminate the ADR. The comment was made, as mentioned above, that the two processes may have to proceed simultaneously in order to complete the case within the timeframe. This scenario, as noted above, was seen as potentially creating a chilling effect on the ADR

negotiation, as the member being investigated would be subjected to a full formal enquiry into his or her practice, while being expected to maintain an open attitude toward a potential informal resolution.

> Under the new legislation, you're supposed to be conducting both an investigation and ADR at the same time, and the fact that you're conducting an investigation undermines the ADR process. There was a lot of concern raised about that. It's a show of good faith where you kind of put the investigation on hold while you're working to achieve a settlement. The fact that we have to continue to investigate irks the member and undermines ADR, and we're kind of struggling with that. (SC1)

The limited timeframe that might require both the ADR and investigation to be conducted simultaneously was seen not only to be an ineffective way of conducting ADR, but also a waste of precious College resources, especially by the larger Colleges with significant investments in investigation systems as well as alternative resolution processes.

> Doing both ADR and investigation at the same time would be a terrible use of resources. Because our philosophy is that investigative resources are very expensive, specialized and rare resources, and we want to make sure we are applying them where there is the highest risk. So by dealing with things that can be dealt with in a remedial process, we are preserving these resources to deal with those high risks in a very timely manner. (LC3)

Addressing the value and purpose of ADR as a complaints resolution approach, one key informant challenged the presumption that ADR is a faster process that will achieve streamlining of the complaints resolution system.

> I don't think you would meet anyone who has done ADR or is familiar with ADR who says it's quicker, because it's not quicker. It's high touch. It's high

> resource. The goal is that it's a great outcome and everyone is happy with it and that's why you strive through the high-touch, high-resource. But it's not a quick process, and I think that that clock ticking – it's always been there, but now it's more formalized – will also have folks sitting there thinking, is it even worth going there? We'd have to engage an external resource. We'd have to manage that external resource. And we don't get a "by" in terms of the timing. So I don't see the system that's currently in there as particularly permissive and helpful to solve the problems that ADR is used to solve. (MC3)

College informants' views of HPARB's role as a judicial monitor of College performance within the timeframes varied considerably. A few commented that HPARB had difficulty dealing with its own caseload, so was in a weak position to take a stand against Colleges that did not meet their complaints resolution deadline. Others commented that HPARB patently didn't have the resources to take over a complaint from a College that had not met its deadline.

> I always think of that 150-day deadline looming. In my mind it's all very gray. They say that at the end of 150 days you send a letter, and you keep sending letters until at some point HPARB can take over. Well, HPARB readily admits they haven't got the resources to do that. So, in a sense, these arbitrary timelines are not binding, other than the fact we have to send the letter saying we're making efforts. (SC4)

One informant commented, "Some Colleges think of HPARB as the enemy, but I don't think they are. I think they simply have a job to do, and they're an oversight body. Their hands are as tied as much as anyone else's. I think HPARB understands, and as far as HPARB is concerned – I would have to go back and look – I'm not sure whether they recommended 150 days, or if they recommended more and that wasn't acceptable"(C1).

One informant commented that, since both parties consent to the ADR process, they would be unlikely to complain to HPARB about the length of the process they were participating in if it were unfolding in a reasonably productive manner. On the other hand, if there were a complaint by one of the parties about the length of the process, an adverse response by HPARB was seen by one informant as a determinant of whether any of the Colleges would continue to provide ADR in response to complaints.

> It would take just one case of HPARB jumping in and taking over an investigation for timeliness, and that will be the end of ADR everywhere. And that's how quickly – our world is like that. One court case and "We're not doing that any more," because nobody wants to spend their members' money defending something that's already been challenged in court and been found to be inappropriate. You'd be crazy to stick your neck out there once that's been done. So HPARB will, I think, set the tone a bit around this clock ticking. (MC3)

During the interview with HPARB, it was a matter of some reflection and uncertainty as to why the Government had decided to impose the 150-day limit on the two processes. This reflection was linked to the Colleges' and HPARB's legislated duty to protect the public interest.

> It's also interesting that the Legislature didn't see fit to stop the investigative process or allow some time limits to accommodate the ADR process. The other thing I see is that it's very much dependent on where the complainant resides. So, in a smaller community with limited access to health care resources, both staff and facilities, perhaps that might be an element in determining whether or not the ADR process met the public interest, because HPARB's jurisdiction is very much about the public interest and so is the self-regulatory system, which is why it was put in place. (HPARB)

Perceptions of How the Legislation was Developed

In the interviews, informants were asked directly, as part of the conversation about what gave rise to the ADR legislation, about what, if any, consultation had taken place in relation to drafting the legislation. There was great disparity among the responses. Some informants clearly recalled being part of an ongoing consultation process with the Ministry, with the Health Professions Regulatory Advisory Council (HPRAC) through its report and submissions process, through discussions with the other regulatory Colleges in which they had participated under the auspices of the Federation of Health Regulatory Colleges – both before and after the legislation was proposed – and/or as one of those who made, or were aware of others having made, submissions to the Standing Committee on Social Policy hearings prior to the passage of the Bill in the Legislature. One informant recalled that a College colleague with expertise in ADR had been seconded to a Ministry team in the period between the first HPRAC report (*Adjusting the Balance*, 2001) that discussed ADR use in the complaints process and the second HPRAC report (*New Directions,* 2006), with revised recommendations regarding the use of ADR. Another informant recalled that HPRAC had solicited their input early on in the report and recommendation process: "HPRAC did consult, and we were very pleased, particularly in the very early days. They not only consulted formally, they consulted informally. They brought together people who had experience in using different regulatory mechanisms, in using legislation, and asked, 'What are the problems?' So we did have that opportunity"

(LC3). Another informant recalled pre-drafting consultations, characterizing them as "interesting discussions – CPSO, CNO and the dentists had quiet conversations with the Ministry people" (MC4), rather than as formal consultations involving the whole RHPA community. This informant felt satisfied that the final legislation reflected the concerns they had raised in these "quiet conversations."

One informant commented that the original HPRAC recommendations for ADR legislation had proposed a "clumsy" process that raised alarms among Colleges with ADR systems in place and that, if implemented by Government, would "interfere with some of the processes we had developed that we felt were in the public interest" (SC6). They were relieved that their suggested revisions had been captured in the legislation. They observed that, while "the climate is such that consumers and regulators and professionals all want to have an open discussion, even when there is disagreement, that puts the Minister in an awkward spot if the Minister disagrees [with HPRAC]. And in the last [HPRAC report], the Minister and just about everybody else disagreed with HPRAC's recommendations" (SC6). However, this informant could not recall any consultations taking place other than the formal submissions made to HPRAC and the Standing Committee, "though that's not to say that there have been [some]. I don't know if there were consultations with someone from a regulatory body, but certainly we weren't aware of it" (SC6).

At the other end of the spectrum, a substantial number of informants, particularly those from the smaller Colleges, recounted that the first time they had become aware of the ADR legislation was when the Bill was presented in the Legislature for first reading: "The first we got wind of it was when we opened the Bill" (SC2). They could not recall any consultation in which they had taken part, and, interestingly, some concluded that if they had not been consulted, then none of the other Colleges had been either. Those informants expressed regret that the Colleges had not been consulted, especially those Colleges with a long experience of using ADR in their complaints resolution process. In their view, had those Colleges been consulted, the legislation would have been much better, specifically better reflective of the Colleges' real situation and capacity to accomplish what was required in the legislation.

> If the government had been serious about facilitating ADR and reaching better resolutions, what they could have done is gone to the Colleges and said, "We're thinking of formalizing an ADR process within the Code. What do *you* see as the most important elements and processes that would make this thing work?" Instead of – don't get me wrong – some egghead down on College Street or Wellesley, or wherever, that doesn't know ADR at the College level from a hole in the ground, sitting there, saying, "Oh yeah, this is what we need, yadda yadda yadda," on a very theoretical basis. So if they'd come to us, and said, up front, "What do you guys see as being in the public interest?" we would have told them and we would have given them a process that would have worked better for the Colleges and for the public. There was no consultation with the Colleges. They may have had consultation with other parties, but we certainly weren't involved. (SC2)

One informant suggested that there was political pressure to get through the larger Health Services Improvements Act that comprised a wide number of safeguards and initiatives, and ADR was not of sufficient urgency or importance to warrant a response to the concerns raised by the regulatory community.

> It's unfortunate that type of consultation didn't happen. And then it's time – because there was a real push to get that omnibus legislation through quickly. I'm sure lots of submissions were made to Standing Committee that said, "Hold off on this," or "We're concerned about that," but they [the Government] have a majority. So at the end of the day there's only so much you can push, and the ADR stuff is never going to be the hill to die on. (MC3)

However, other informants believed that what they perceived to be a lack of adequate consultation was not a function of the urgency of passing the omnibus legislation, but a typical pattern of the Government, especially in relation to the health regulatory Colleges.

> There has been a sense of frustration that the regulatory health professions haven't been equal stakeholders in a lot of the regulatory changes. Basically, something comes along, an issue, a situation. It prompts the need for legislation or amendments to legislation. There isn't a great deal of discussion until they're getting ready to pass it, and then that's when it comes to the regulator. And, quite frankly, Government – like, "Here it is and you've got 30 days to respond." You already have a workload here, and now it's up to here. (SC1)

One informant opined that a perceived lack of consultation was the result of a combination of Government style and lack of time to consult on a very complex piece of legislation.

> Consultation from people who draft the legislation? That's not how this Government operates. It may not be how any government operates. But it's certainly not how this Government operates. Their consultation is HPRAC. And when they get HPRAC's report, and the Colleges' responses to HPRAC's report, because we commented on HPRAC's report, I think that's it. Full stop. And whether it's because they don't have the resources to conduct the kind of consultation on each of these individual things – you know these bills are – like Bill 171 was about 17 chapters – and 8 million inches high – and for Colleges, that was not the hill to die on. There were a lot of other hills included in that legislation and that was not the hill to die on, and so you will not have Colleges down there with pitchforks saying "You have not consulted with the people and our best practices." . . . There is so much more at stake in other areas. (MC3)

HPRAC was seen in this case as an arm's length agency that protects the Government from direct consultations with stakeholders, including the regulatory Colleges.

> Then Government can say, "We referred it and we got advice," and that advice is supposed to be fulsome, and to take into account everybody's input. I'm sure if you went in and read the submissions that Colleges made, ADR's mentioned, and those Colleges that have ADR probably said we're concerned about how this will affect our program. But did that lead anyone in the Government to say, "Before we draft any of this marvelous legislation, let's go talk to these people?" No. And at the end of the day, whatever the political will is to do whatever they will do, is what ends up happening. (MC3)

The College of Physicians and Surgeons, the College of Nurses, the Royal College of Dental Surgeons and the College of Psychologists were cited by several key informants as having valuable information and ADR experience that the Government should or could have used in developing the legislation. While several College informants commented on the importance of the Government consulting with the community leaders in ADR, others focused almost entirely on the difference between what might work for those leaders and the problems the lack of consultation and consideration they perceived impacted the smaller Colleges, who are in the majority, but whose aggregate annual complaints are significantly fewer than any one of the larger Colleges.

> It would have been great for them to have gone to a College of Nurses and say, because they have evaluated that program they have fabulous information about that program, what pieces that program works best in. They've really refined it over the years and I'm sure CPSO has the same kind of information. So it would make sense to me to be going to those places and saying, "You've been doing this for 25 years, what works? What doesn't work?" But I've never watched legislation be drafted in that consultative way. ... I think it's a shame that the folks at Nurses and CPSO weren't consulted. I guess I always

> hoped in the back of my mind that someone was consulting them. But obviously not, or they would have got something more reflective of what their systems are and how they work. Because I think they do work and I think they have evidence to support that. (MC3)

> When this Bill was in the consultative stages, a lot of Colleges, and through the Federation, put forward our positions on how this would impact us. It was made clear to HPRAC that this was going to affect the smaller Colleges and we would not be able to engage in this because of the resource issue. And believe me, we really tried to get them to listen to us and said, "This is going to really penalize the smaller Colleges. If you're trying to encourage this formally, because it's now ensconced in the legislation, you're certainly not facilitating it for the smaller Colleges. Smaller Colleges don't have the resources." They didn't listen. I don't know why. I guess they thought there might be some sort of a conflict. HPRAC provided advice to the Minister. We presented to the Standing Committee. But nothing changed. We lost interest when nothing happened. (SC7)

Mandatory or Optional

The question was not specifically asked, but several informants pointed out that the legislation made the adoption of the ADR process optional for the College. "It's permissive. It's not mandatory" (MC1). "You can have an ADR process, but you don't *have* to have an ADR process" (SC4). "There's nice to do and need to do, and ADR wasn't a requirement. It wasn't a need to do" (LC1). One informant commented that the new legislation was "explicit." "You *have* to have ADR. Now you *have* to have it" (C2). It may be that this reading of the law was based on an understanding that the provisions of the ADR legislation were obligatory if anything resembling ADR was being undertaken. Whether informants viewed the provisions for the ADR process laid out in the legislation as something the College was

henceforth obliged to do could be a factor when the impact of the legislation is examined. At this point, it would appear that most Colleges indicated either directly, as noted above, or more indirectly, that the ADR process is an optional part of the complaints resolution process.

One Size Fits All – Legislation versus Regulation

One significant point emerged in the interviews regarding the Government's choice to embed the ADR provisions in the legislation, rather than to require the Colleges to develop a Regulation to cover the use of ADR. Having the ADR provisions in the Act, these informants observed, meant that each of the provisions would apply to each of the Colleges that chose to have an ADR process, assuming it is optional and not mandatory to have an ADR process. Each College has its own Act, in addition to being governed by the collective Regulated Health Professions Act. One College Registrar opined that the original spirit of the RHPA – its "richness" – was poorly understood at the Government policy level, and that the RHPA was becoming a blunt instrument, whereas the richness of the original reflected its ability to "accommodate different professions and different professional cultures" (LC3). One informant pointed out that delegation from one healthcare provider to another is governed by Regulation, rather than by the Act, because the situation regarding delegation varies among Colleges. Informants from the smaller Colleges, in particular, expressed concern about being "lumped in with" larger Colleges, with regard to compliance with the Act. The main concern was the perceived disparity in resources. Another

important concern was seen to be the practice differences among professions, which lead to different types of complaints. And just as significant for some is the perceived difference in professional cultures affecting how complaints would be perceived and handled.

> The reason for the ICRC legislation was because the large Colleges needed efficiencies, but this legislation affects us all. Our members have a more technical profession and less patient contact. As a smaller College (we're actually medium-sized), we don't have as many resources as the CNO, but we must meet all the same statutory obligations. The size and capacity of the College affects what processes we can do. (MC1)

> Every College now has to comply with this regardless of how big, how small, how many staff. And it's just so much more work for us, and especially the small Colleges suffer, because you have to do exactly the same thing as everybody else, but with the same number of people and with the same budget, so it gets a little overwhelming. It should have been left for us to work out our own process suited to our own members' practices. Our cases are mostly exchanges or refunds. (SC3)

Several advantages were identified to having ADR processes in College regulation, including having the ADR process reflect the culture of the profession, having the regulation vetted and passed by Government, and having a fully public and transparent regulation development and publication process. These points were made in the context of the perceived ripple effect or contagion to all the Colleges whenever a prominent College is the subject of media, public and/or Government attention.

> We suffer from this under the RHPA, because whenever the CPSO is on the front page – it's not our members who are on the front page – but we're all under the same system, and we all have the same issues. It may be one of those things that gives you pause about this kind of blanket legislation; I know other jurisdictions are looking at this as well as kind of a model. You have one process and piece of legislation rather than individual ones. Maybe we're not similar enough after all. Maybe small and large are different. Maybe there

are areas where you would say this should be prescribed under the individual profession Act, instead of more globally if there are particular problems.

Other jurisdictions struggle with this: Is this blanket legislation thing working? Isn't there a better way to group people? BC and Alberta are going with this model and they're struggling with it. The UK has this model – all under one Act. It used to be silos – medicine, dentistry, but I think this is one of those problems where you might say, isn't this specific process thing better handled in regulation? Wouldn't it be better to say in RHPA that ADR is permitted but must be done in accordance with any regulation that exists, so then the nurses could put together a responsible piece of regulation that sets out their program with checks and balances.

Regulations have the check and balance that they're vetted by Government. They're public. I see this blanket thing as problematic when we try to blanket all of our processes. There's some stuff we might want to hive off in a different way, allowing each group to be more creative and address their own particular needs, provided there's enough transparency, and regulations are published.

We're still regulating fairly mainstream professions right now. We're about to dip our toe into regulating non-mainstream professions – TCM, acupuncture, homeopathy, naturopathy. What are those communities like in terms of the way they resolve conflict? Is this kind of structure going to work for them? I don't know. I would think that those communities would be more – here I'm making assumptions – would be more invested in alternatives – creative alternatives, because they tend to operate outside the main box anyway. Does that then make regulation less attractive to groups whose values don't reflect this kind of rigidity? Then do groups say, "Better not to be regulated because look at all the little things that you can't do any more because you're regulated." So does it have a chilling effect on that bit as well? (MC3)

Addressing the issue of having the ADR process in the legislation, one informant asserted that, because the provisions were already in the legislation, they couldn't "re-invent the wheel," but they could develop policies tailored to their own College needs, based on the "skeleton" of the legislation. Their perspective was that while

their legal counsel would need to review their policies for compliance with the legislation, and while legal counsel might try to ensure these were compliant, there would be areas where legal counsel might be "100 per cent legally correct, but they are not able to understand – not 'understand' – but to capture some little things and nuances we do here" (SC3).

In a slightly different vein, another College informant commented on the way that different legal interpretations of the Act and the ADR legislation would ultimately undermine any standardization that Government may have hoped to achieve by enshrining the ADR provisions in legislation, rather than some alternative that could reflect health professionals' practices, cultures and types of complaints.

> I think that there may be a little bit of naiveté there in terms of just how standardized this is going to make it, because you can talk to people from any College and even the legal advice that they get varies from law firm to law firm, from lawyer to lawyer. Where some Colleges are being advised you have to do X, Y and Z, other Colleges are being told, "No, no, no, you can cut Y right out of that. Just do X and Z, forget Y. It's not necessary." I think whenever you're dealing with legislation, you'll always be dealing with different interpretations. That's why we have lawyers. That's why we have courts, and so, over the course of the next year, two, three, I think there's going to have to be some tests that are going to take place and the courts are going to have to rule on certain things and certain processes and say, "Yes, this is right" or "This isn't right," and hopefully eventually we'll get it right, and everybody will be doing the same thing, but that's probably going to take some time. (C1)

A Complaint is Not a Dispute

The informant from HPARB raised a concern that ADR was included at all in the College complaints resolution process. The principal issue is that, within the framework of the RHPA, a complaint is not a dispute between a healthcare professional and his or her client. It is not a private dispute to be adjudicated by a court or arbitrator. The complaints process, in this view, is to allege that a breach of College standards has taken place. The "case," if grounds for prosecution are found by the ICRC through a process of investigation, is between the College and the member. The complainant does not have a role, other than being called, at the College's or member's discretion, as a witness to the breach of standards. The question that this informant raised had to do with the focus of the ADR process on the interaction between the member and the complainant and whether characterizing the complaints resolution process as "dispute resolution" was even appropriate.

> I think the other aspect of this process is that it's very much looked upon as a dispute between – or issues between the complainant and the professional member, the regulated member. But actually the whole system of our self-regulatory system is all about the public interest. And I'm not certain where I'm seeing the overlay of the public interest throughout this process, other than in that discretion that has been accorded to the ICRC by the legislation. So I'm uncertain about how that's going to unfold. It's almost an uneasy relationship between the current process and then an overlay of ADR. (HPARB)

4.4 THIRD QUESTION SET/CLUSTER: What impact has the ADR legislation had on College practices?

> Overall I think the changes around the ADR are positive. I think they were necessary and they've given us a framework to work by. Now we know we need to get consent. Now we know there's certain things we have to tell the parties, that they can back out of it and all that. I think that the fact that we have that sort of roadmap now makes it easier for the Colleges to proceed and makes it more consistent and everybody's approach will be more consistent and I think that's an important thing. I think the legislation for the most part is a valiant attempt to put those checks and balances in place, to create standardization, ... but that's probably going to take some time. (LC1)

> Are you really going to be able to regulate all these folks under the one piece of blanket legislation? Interesting to see. You can understand all the interests at the table and there are ways you can address all those interests and still preserve what's important for the system to work. Each profession's culture is so distinct. What do they respect? How do they deal with conflict? Complaints? Challenges? So what we have to do going forward is to try and find a way to work creatively with the language that exists in the statute as much as possible to maximize its benefit. (MC3)

> The legislation is on the books now, so if doesn't pan out the way the Government wanted it to pan out – as I said, I have no idea what their motivations were – what they're going to do is blame the Colleges. They're going to say, "We gave them the authority and they screwed up." That's what I see happening. The Government will say, "We gave you the authority and we thought that this authority would have achieved this particular end, and look at this College over here, they don't even have a program!" But why would I have a program that's doomed to failure? (SC2)

The three key informant statements above illustrate the three general responses to the legislation among the Colleges. The first statement represents a perception of the ADR legislation that it is useful and workable. It is, overall, a reasonable framework and it will be possible, over time, to make it work in the way that individual believes it was intended to, to achieve consistency and clarity about general values and expectations – a "road map" and a "framework."

The second statement reflects a more skeptical view of the legislation and a concern that, while it may be very difficult for such diverse cultures to adapt to the framework, the language of the legislation offers opportunities to be creative in interpreting the legislation for the purpose of achieving the legislation's intended benefits.

The third statement appears to represent the view that the intentions behind the legislation are not to be trusted and the role of the College is to defend itself against the perceived dangers lurking within the legislation and the potentially negative consequences of attempting to engage with the legislation.

Several of the interview results recorded in the previous sections of Findings have reflected these attitudes, and provided some nuance, as well as some of the reasoning the informants provided, beyond what is expressed in these three statements. This section documents in greater depth specifically how the informants saw the ADR legislation affecting their previous practices.

A typical pre-ADR legislation informal complaints resolution was described by several of the College key informants as follows: A member of the public telephones the College with a concern about an interaction with a member of that College. The College staff member answering the telephone call either refers the person to a colleague or continues with the call. The College staff member seeks more

information from the person about their concern. There is an exchange between the caller and the staff member, and at some point the College staff person makes an initial assessment of the *seriousness* of the concern. Informants emphasized that any hint of abuse, particularly sexual abuse, as defined in the Act, would lead the staff person to encourage the caller to make a complaint in written form and submit it to the College. Other "serious" complaints included a breach of the College's professional standards (or their equivalent), fraud, incompetence or the possibility of incapacity. The staff member would offer assistance to the caller in completing a written or otherwise "recorded" complaint. The complaint would then be submitted by College staff to the members of the College Inquiries, Complaints and Reports Committee for a decision regarding further action, usually commencing an investigation, the results of which would later be presented to the Committee to determine next steps, as provided for in the Act.

Key informants described a more common situation where the concern presented by the caller had to do with a "miscommunication or misunderstanding." Following a conversation with the caller in which the caller provided some detail of the issue or concern, the staff person typically would suggest to the caller that, if the caller agreed, the College would contact the member informally and draw the caller's concern to their attention, suggesting either a) that the member contact the caller to resolve the concern informally; b) that a College staff member would act as a facilitator between the member and the caller to try to reach a resolution. Some

informants noted that, if the caller agreed to this suggestion, the College staff member making the call to the member would often encourage the member to seek an informal resolution by outlining the formal investigation process as the alternative to an informal agreement. This suggestion, the informants noted, was often a strong incentive for the member to agree to seek an informal resolution. Typical cases included a caller's hope for an apology and an explanation of the event in question, leading to their better understanding of what had occurred and what they had experienced, acknowledgement of their concern or grievance, an apology and/or, in some cases involving products or services, an offer by the member to refund money paid, exchange a product, or redo the service in a manner that addressed the caller's concerns.

This approach was seen by many key informants to be highly effective in achieving an efficient and equitable service to the caller and the member, meeting the caller's needs in ways that a formal process did not have the jurisdiction to address, as well as saving the College valuable time and expense of resources. These informants emphasized their reliance on the definition of a complaint as a concern provided in a written format as giving them the scope and the authority, prior to the complaint being written or recorded (and filed with the Registrar), to try to reach an informal resolution of the caller's concern. They saw these initial calls as requests for *information*, opportunities for public *education*, or *enquiries* about options, but certainly not, at that initial stage, "complaints." In their view, once the options in the

informal process were exhausted, the concern could be converted to a "complaint," and would be dealt with through an investigation. The whole informal process was characterized by several informants as a "pre-intake" process.

As noted above, if no agreement or resolution was reached, the concern could and most frequently did come to the Inquiries, Complaints and Reports Committee for disposition. Several Colleges with informal processes emphasized that any agreement or resolution resulting from the informal process conducted by College staff would be referred to the Committee for their information or even for their formal approval. Other informants either did not say they referred the resolution to the Committee or said they did not follow that practice, there being no legal requirement previously to do so.

Several College informants expressed their willingness to comply with and work with the legislation as it stands. Most of those Colleges had had well-developed formal or informal complaints resolution processes prior to the legislation. Some had anticipated the actual provisions of the legislation and had taken steps prior to its proclamation to adapt their existing processes and protocols to be able to comply. For some Colleges with an informal process, the legislation did not represent a major change.

> I like the legislation. I didn't need it because we had a pretty good program. There's nothing in there that is particularly offensive. ... We have an internal protocol that triggers ADR. We've beefed it up a little bit to say that if there's

a case that my staff doesn't think is eligible for ADR but the parties want to have it, we'll trigger it - we assume there's consent by the parties. So I don't think that the legislation does any harm. Does it do any good? I think that the principles are okay. (MC4)

Before this legislation came into effect, we looked for opportunities to resolve things at various steps along the way. If things could be resolved in a way that addressed concerns of the consumer, of the patient or client, and were consistent with our public interest mandate, then we were quite happy to support and encourage those kinds of resolutions. ... [We would] really encourage the two of them to sort it out, especially if it's something related to a misunderstanding or poor communication, But if there's a formal complaint or, of course, if it were an allegation of sexual abuse, ... a threat or intimidation or power imbalance, or if there were safety issues, ... that goes through the formal process, and that has been a given for a long time. But if it seemed to be two individuals who were willing to try to work something out and do that in a reasonably open and forthright manner, then one of our staff members might well try and mediate something. There have been a number of cases where that has occurred and it has been successful. Our process wasn't a lot different from what's in place now, except that there was negotiation around remediation. Now, of course, the Committee can order [remediation], but the major difference now is that the focus of the ADR – as it is in the legislation – is between the two parties - the complainant and the member, but still with the vetting of the outcome by the Complaints Committee. So in some ways, it's not that different from what we did. It's not a big change. SC6

The new legislation is in line with what we have been doing. We had not formalized an ADR program or policies, but there were some reports or complaints that came in where our first attempt was to get for the member of the public what they felt they needed to resolve or emotionally deal with whatever was going on. And that was very limited. I expect that won't change. . . . I think it's just better public service to respond to the needs of the complainant and try to get out of the process what they need. Interestingly, I think without the ADR, there has been one view of the College complaints process that goes more like, "Thank you very much for your complaint. We will handle it from here." That's to respond, make sure the information is correct, but the complainant does not have standing unless they want to appeal. That's not very satisfying. Our process actually involves them in their complaint, and that can be better public service, depending on the issue and the public's desire to be involved. SC5

One College informant provided a typical scenario for how complaints were resolved before the legislation and how the legislation changed their previous practices. This description of the "before and after" scenarios was echoed with minor variations by a number of College informants:

> In the past, what we would have done is picked up the phone, and said [to the member], "Hi, I'm calling from the College. I want you to know we got a call from so-and-so [patient]. They're really concerned. They were at your clinic. They want a copy of your patient record. Are you aware of your obligations to help with that and give them a copy of the record?" And usually the member doesn't know, and so, "Yeah, okay, no problem. I will make sure they get a copy of that." So we would do that before. But now that it comes in on a piece of paper, it fits the four corners of a complaint. It is a complaint and then we have to officially go through this whole mediation process, and for us at this College, because we don't have a large staff that has mediators on site, it's certainly the extra contracting out for somebody to do something that we would have done in a phone call before. Whereas now a complaint has come in the door, we have to either mediate it or take it to ICRC. In many of those cases, it's a lot of education that we find that staff could easily do to assist the parties right up front. And we would still do that up until the paper comes in the door. ... You would hate for people to go through a written process that takes 150 days for them to find out something you could have picked up the phone on day one and said "Did you know?" or "Would it have been helpful for you to know?" or "Can you return the record?" or whatever. (MC2b)

> We don't consider [phone enquiries] complaints. You know, a complaint has to be in a written or recorded format. So it's not a complaint when they get a phone call. It's not a complaint unless it says, "This is a complaint against so-and-so," or if it comes in in another format. Because what I see is an enquiry. "I have an issue. I have a question. I don't know what to do with this. I don't know if it's a complaint or a concern." They might say that they want to complain and I say, "Well, these are your options, this is what you can do." I will ask, "What type of outcome, what is it you want to happen as a result of raising this issue?" and often what they want is not something we can give them, so it's still their choice whether they are then going to make a formal complaint or not. They haven't made a complaint. It's not in a recorded form. And I think that is like *pre*-intake, at the enquiry level. When we get a complaint from the public, which we don't get a lot of, actually, there are times when I will do more formal intake to discuss the complaint with the member of the public. And if I hear things like, "I just want acknowledgement

> and an apology," you don't get that through a complaints process. Or, "I just want the opportunity to discuss it." So I have convened the "discussion" with the facilitator present. That can result in, "This has been great. This is really all I wanted. I'm done." So then their choices are – "Do you want this to proceed? Or do you want to withdraw it?" Sometimes they want to withdraw. If I had a concern about the withdrawal, that's discussed at the ICRC. There's still, "It's the complainant's decision to withdraw this, you have to consider such-and-such." So there's still an opportunity for the College to take that issue further where the complainant has said, "Fine I'm out of here." So it doesn't close anything for the College in its ability to act. (SC5)

Several informants commented on the unwillingness of some callers to become involved in an informal process, despite being offered the opportunity to do so. They commented that some callers are simply so angry at what they perceive has occurred that they do not want to engage at all with the College member they are calling about and will only be satisfied with the member's punishment. Other callers take the position that it is not their role to engage with the member. In their view this is the role and duty of the College.

> It's a culture piece, because for a member of the public, where they've complained to a College, they're saying "Don't put this back on me. I sent you a letter." They don't say it this way, but basically the bottom line is "Look, I've given this matter over to you. You do what you're supposed to do and solve it." So this concept of empowering people to be involved in a process to come to a resolution is one of those things that sounds really nice, but is a lot of effort. (MC2a)

In addition to clarifying the caller's expectations regarding the desired outcome, one College noted that the caller is also informed about the criteria by which the behaviour giving rise to the concern will ultimately be judged under the College's complaints and discipline process.

> Our approach is standards-based, so a complainant has to be comfortable with having the member address the standards that were at issue in the complaint, and not everyone is amenable to that. I think we do a much better job at helping the public to understand what the ADR process can offer them and what it can't offer. So this is not an opportunity for restitution. There are certain things that the College processes cannot address. And once those are whittled down, our experience is that more and more members of the public are interested in mediation. LC3

Some College informants explained that they had had an informal process in the past, but, rather than creating a formal ADR process that conformed with the legislation, which they perceived as expensive, rigid and time-consuming, they would look for creative ways to avoid having a legislatively compliant formal process, mainly by relying on the definition of a complaint as being in written or recorded form. In other words, they would continue to provide their own version of an ADR process while being careful not to be caught by the legislative triggers requiring the legislated process.

A third type of response to the legislation among those with informal processes in the past was to discontinue that process and adopt the formal ADR process, with its attendant costs, problems and perceived diminished efficacy. These comments are cited at length because they provide a detailed, yet succinct description of what turned out to be a fairly common pre- and post-legislation approach among the regulatory Colleges.

> In the past, we would explain, first of all, we do have a formal complaints process and what it entails, and then I would clarify it, "Well, your call is not

> a complaint, because we have to receive it in a recorded medium. You can tape record it. You can videotape it. You can write it and send it in to the College by fax, e-mail or by mail." So we clarified - one, the nature of their inquiry, second, that this wasn't a complaint, and that they had this option, which would be, with their consent, we would speak to the practitioner to see if the practitioner would welcome them back to try and work out their differences. If they were comfortable with that, they would give me a verbal authorization for me to contact the practitioner. We're just facilitating the two parties getting back together to work out their own resolution, and, when we had that in place, for every ten complaints, we would get maybe two formal complaints out of those inquiries. So it seemed to be highly effective.
>
> We discontinued providing that service, with concerns that we would be interfering with ADR, with formal complaints. We recognized that what was now expected was a more formalized approach, one that was arm's-length to the College. So we've contracted an ADR officer, someone with an investigation background, with a mediation background, who has the skills to provide those services. And what happens is the complaint is reviewed by the ICRC, which then determines, based on criteria, whether it would be appropriate for this complaint to be resolved by ADR, as long as there's no sexual abuse, only minor conduct or no conduct issues. ... It's one thing speaking to someone on the phone. It's a different thing when you get a letter. So there's issues with regards to costs. There's issues with regards to getting the consent to the process. There's issues around the time involved, and having a sense of where things are at within the ADR process at a particular time for the committee to know whether they need to investigate. I think to some degree the process before was working, and right now it's not as effective, and I think partly because it's been formalized. (SC1)

Another College was prepared to adopt the formal ADR process, albeit somewhat reluctantly, viewing it as significantly less flexible than the previous informal process.

> Because it was so informal and so easy to do, sometimes it worked. Now, with the new provisions, it has become more formal obviously. I think we lost that flexibility by putting it in legislation. In my view, it's quite rigid, and then still you have to ratify it and there's a lot of little details involved that some people may say, "oh, well, why bother?" I just think it doesn't have to be so formalized, and especially the ratification and consent and forms. ...

> Because there are provisions already in the legislation, we can't re-invent the wheel. We can only develop a policy for our own ADR process, what would be tailored for our needs, but of course based on this [legislation]. We do understand how important ADR is because we obviously want to decrease the number of our complaints. Every College wants that. If we can avoid a complaint, it's in everybody's best interest. (SC3)

However, towards the end of their comments on the new process, it occurred to the same informant that there could be ways round a perceived legal requirement to adopt the formal ADR process, using the legislation itself. "I guess you can probably still do it informally because it's not a complaint yet. ... I guess there's a window there for an informal – so that would be a *pre* -ADR. Yes, it's funny how people can always find a way."

Another category of outcome is represented by the Colleges that had a busy informal process, "trying to facilitate a resolution to the problem, concern, complaint, usually by picking up the phone and talking to the member."

> There wouldn't have been the due process that has to be followed. Now we're not as ready, willing and able to make that phone call to the member to try and sort things out. So from that perspective the legislation has in fact slowed our processes down and complicated them quite significantly. The legislation has changed our processes here in the context that we're less eager to try to facilitate an early resolution, than we were previously. ... Given the uncertainty that we have currently, we don't want to be the test case on that and for somebody to say, "You had no right to do that and I didn't like it." We don't want to be the test case. We have been much more cautious and that's with the advice from legal counsel, "You probably shouldn't be doing that." So from that perspective, it's had a negative impact. ... The Committee reached the conclusion that, at this stage, we're not going to have an ADR process, because of the constraints put on the process. Had there been fewer constraints, or different constraints, they may have reached a different conclusion. (SC2)

There were several comments about the "chilling" effect of the legislation on various College complaints processes. "I have heard some Colleges say that they're just not even going to go there. Yes, it's in the RHPA, but it's more work than it's worth. Let's just follow the normal complaints process" (SC4). A College informant described their previous discretionary decisions, "with some assistance from the Complaints Committee," to try to resolve issues and concerns informally whenever possible, through "basically telephone shuttle mediation."

> I am a strong proponent of ADR. Both the member and complainant benefited and got what they could not have got through the complaints process [a refund]. I did not use the term ADR and the parties were not aware that it was ADR. ... In terms of transparency, nobody really knows about this. The Committee doesn't know. It's not a formal matter brought to their attention. Someone could criticize that and say, "You know you kept that in a little pocket there. No one knows about it, so it's not really transparent. It shouldn't have been done that way." (SC7)

Since the legislation, this process had come to an end, to this informant's regret.

> I have to tell you we are now not doing ADR at ICRC, just because we don't have the resources here now that the legislation states that anyone involved in investigation can't participate in ADR or if anyone's attempted ADR, they can't then be involved in the investigation. So ADR has been put on the back burner. Now that the legislation has formalized it, we've basically done away with it. It's just not practical, especially for a small College like us. You just can't physically do it. (SC7)

One of the medium-sized Colleges also came to the conclusion that the formality of the legislated process was more than their resources could absorb and so had decided not to have an ADR process at all.

> As a smaller College, (we're actually medium-sized), we haven't as many resources as CNO, but we must meet all same statutory obligations. The size and capacity of the College affects the processes we can do. Historically, we've not had a lot of complaints. At one point we had 6 to 8 per year. And

> there's absolutely no method of setting up an ADR on how to deal with that. ... So the ADR process was a little extreme for us. (MC1)

Two of the larger Colleges had also decided not to adopt the ADR process, despite the volume of their complaints and their relatively greater resources. One had decided to take a "coaching" approach to the less serious complaints.

> We don't even do the informal resolution anymore. We just said, Look, we're not discouraging people from making complaints, but we're suggesting to them – we're coaching them – instead of saying "Let me do it for you," saying, "Maybe if you go to the member and explain to the member what your concern was or what your misunderstanding was, that may be an opportunity for the member to understand from your perspective what it was that was upsetting to you, and it may be just a very simple misunderstanding and the member may actually thank you for that feedback." So again, we're trying to empower them to do that, as opposed to us calling for them, because it was taking up so much time with limited and questionable success. (LC1)

The other decision was simply to stop doing any informal resolutions altogether – not engage in any further informal complaints resolution, and not adopt the legislated ADR process: "no separate ADR. Period."

One of the reasons mentioned for not adopting the ADR process authorized in the legislation was the opposition of the large professional insurance companies and their aggressive litigators to participating in such a process. "Certainly, with the physicians and dentists covered by insurance for the complaints process, it doesn't take much for the process to be challenged" (MC4). The comment was also made that, while some of the College members themselves might have been open to participating in the ADR process, they were inhibited, if not categorically prohibited from doing so, by the rigid, defensive stance of their insurer.

> If you have a multi-billion-dollar insurer who litigates everything, then that's very hard. Then the scare tactics are what appeal to the individual member who just wants to make sure that nothing bad happens to me, as opposed to thinking about how this could be helpful to me, but also helpful to others in the system. In our approach to ADR, we've tried to educate the large unions who use regular legal counsel. We have regular meetings with them and help them to understand what our processes are and what the impact might be for their members. We sometimes find that, in time, those people become good advocates for these processes because they see, first of all, that their client's interests will be protected, that there's a fair and transparent process, and they also start to see the impact and realize that I don't want my client in a second situation that has other ramifications when you come to the attention of the regulatory body repeatedly. Then it works. We're fortunate in that respect. [However,] you can choose your own legal counsel, and we often encounter people who have a different view of the world and the regulator. And that's hard. (LC3)

One question that emerged in the interviews was whether the ADR process would allow the College to address such issues as refunds and exchanges, which were the principal type of concern of many of the Colleges with a focus on healthcare products as well as services. Some informants concluded that the ADR process could not deal with a matter outside the legal jurisdiction of the ICRC. In their view, the ICRC could not approve an agreement that addressed such a matter. Others were somewhat hopeful that ADR could address these issues, allowing the College to resolve the majority of the complaints they received. Some were prepared to go ahead and include such matters, but others were more cautious and awaited further interpretation of the scope of the ADR process to resolve College complaints.

> There's a whole possibility that our ADR program becomes a mini small claims court, so you're resolving [financial] issues or whatever, and we're talking about that. We haven't come to a decision one way or another as to whether that's reasonable or not, but certainly because of the financial nature

> of the practice and the cases that we deal with, money is often the centre of the issue. (MC2b)

4. 5 The Federation of Health Regulatory Colleges of Ontario

In the course of several of the interviews with College informants, reference was made to the role of the Federation of Health Regulatory Colleges of Ontario (FHRCO). The Federation was founded in the early 1990s to deal with the issues following the passage, but before the proclamation of the Regulated Health Professions Act. There were notable sexual abuse issues at that time, especially linked to the College of Physicians and Surgeons of Ontario. Over time, these informants noted, the FHRC had evolved to become an increasingly helpful and effective mechanism for information exchange among the RHPA Colleges. Several of the smaller Colleges expressed their gratitude to the Federation for sponsoring committees, subgroups and working groups – both formal and informal – to address common issues and share best practices in the various areas of statutory responsibility. A few informants referred to specific meetings that had taken place to discuss ADR and the ADR legislation. The smaller Colleges identified the "leaders" in the regulatory community who "generously shared" their knowledge, resources and experience with the smaller, less experienced Colleges.

> Our College has benefited immensely by being a member of the Federation, because Colleges with the larger resources have stepped up and they've shared with smaller Colleges like ours. So I can't speak highly enough of the Federation and of those larger Colleges and their willingness to share. Otherwise it would be even more challenging than what it is now for us to fulfill our statutory requirements. (SC1)

Several informants commented on the changes taking place within the FHRC to make it more effective. It was noted that a committee had been formed to deal with legislative and policy issues and had "really done a lot of the legwork." As a further sign of responsiveness to evolving circumstances, one informant pointed out, "We [FHRC] do have an accountability working group that surprisingly was formed before that Bill [171] was introduced, but it preempted then our ability to have the dialogue with the Minister" (MC2). Therefore, the suggestion (inferred from the Ministry's comments and actions by several respondents) that the health regulatory Colleges needed "to be called into question, to be held up to be accountable," was especially disturbing to some of the College informants, because, in their view, the Colleges had given proof of their capacity to organize and be responsive – one example being the newly legislated requirement in the RHPA for interprofessional collaboration. As one informant countered, "I think the Federation is an excellent example of how the Colleges collaborated without being legislated to do it" (MC1).

The Federation is not (and cannot legally become) a lobby group, but it was viewed by the Colleges as "actively engaged in legislative change – behind the scenes most of the time, related to all kinds of things."

> So the content of the legislation as it went through its various iterations, we were consulted around that. ... I think we are seen as a go-to collective. I think there's some challenges around various behaviours that create some of the Ministry use as collective discussion, but not the Ministry use as collective partner. I think that's a shift that we're trying to work hard on, and the accountability stuff. (MC2)

Among the changes taking place to make the Federation a more effective voice for the regulatory Colleges has been restructuring affecting the Board of Directors, "structural and functional changes," including "taking a more substantive policy approach" to issues.

In the past the Federation had required unanimous agreement by all the Colleges to the document before making a submission (e.g., to the Minister, to HPRAC) on behalf of the members of the Federation. It was mentioned that the ADR legislation was one such case where there was not unanimity, because "if you've only got 6 of the 24 [sic] Colleges who are actively engaged in some form of ADR, that's never going to carry the day in terms of getting a spot in the submission. Then you're just going to have the individual voices" (MC3).

> We had a policy within the Federation that if we didn't all agree with every "i" and "t" in a submission, that it couldn't be submitted as a Federation document. And that kind of crippled us, and [HPRAC] was of the view that our submissions weren't particularly interesting or useful, because there was nothing left to them by the time we determined what exactly were the things we were going to say. (SC6)

Out of a sense of frustration with the Supervisor legislation and other areas where more consultation – and more respect for the Colleges – was seen to be important, the Colleges frequently voiced the "fond hope," as one informant described it, that the Federation was "moving more in the direction where I think it will gain credibility with the Government. And that's what we've tried to express to Government. If

you've got an issue, involve us in the discussion around the issue. Help us to understand what the issue is that you're facing, and we can offer suggestions to resolve it" (SC1).

Several College informants spoke of the desire to have a more collaborative relationship with the Ministry of Health and Long-Term Care, though it was mentioned they could never actually be "partners," but at least the Federation representing the collective and collaborative representative of the regulatory Colleges could become

> a much more effective body in collaborating with the Ministry from the very early stages of policy development, because we – the Federation – found ourselves in a position of reacting very often in the past, rather than being involved at the front end to really work with Government to try and think about issues together and develop proposals together - proposals relating to professional regulation. Certainly that has been a theme of representations we've been making to the Ministry recently. We've met with the Deputy Minister and with the Minister's office as well, and put the case that we wanted to be more involved early on in the process ... and we've met with a very good reception. ... We've not had meetings with the Minister *per se*, but with the policy analysts and so forth, and so we'll see how that goes. But that certainly is something we would very much like to do, because there's a lot of expertise around the table, and we would very much like to contribute to that process. (SC6)

Chapter Five

ANALYSIS AND DISCUSSION OF FINDINGS

5.1 Introduction

This dissertation has taken two paths towards an understanding of whether and how to legislate the process and practice of ADR. The initial research approach has been theoretical, exploring the range of scholarship to develop a framework of related theories that, taken together, provide a lens through which to view and understand the effects of new legislation on a regulatory community – what constitutes a regulatory community and how the individual and community values, norms, beliefs, assumptions, economic, social and political history and the perceived power dynamics within the community, as well as general influences from outside the community affect the bureaucratic decisions of those governed by the legislation. The first section identified and established connections among regulatory theories that might explain whether, how and why some rules are followed while others are only partially followed, adjusted to fit circumstances or rejected entirely.

Responding to the call for robust empirical research into the theoretical assumptions, the second part of this paper reports on a case study into those regulator perceptions of and attitudes towards the ADR legislation enacted in the HSIA that amended the Schedule 2 Health Professions Procedural Code in the RHPA. The research results recorded so far have addressed the need for concrete empirical evidence of the experiences, relationships and practices in a specific regulatory community; the

particular forms of power and the problems the regulatory community and its stakeholders experience and how these structure their regulatory outlook and produce differences and similarities in their behaviour. This chapter compares the theories and the theoretical framework discussed earlier, and seeks to determine whether and to what extent the empirical evidence supports or challenges the theory in ways that enable a better understanding of the regulatory process, especially in relation to whether and how to legislate ADR.

This chapter analyzes the interviews in relation to the theory regarding regulatory culture, legal consciousness, administrative discretion and ADR legislation. It reflects on how the interview data expose the tension between law and alternative-to-law (other than, or "non" law) and highlight the presence of and resistance to constitutive legalism in ways that are relevant to ADR legislation. Moreover, it addresses the question of whether the insights about various responses to the ADR legislation might be applicable to understanding the intended and unintended consequences of new legislation and new regulation more generally. It also discusses how ADR legislation in particular presents challenges that help illuminate individuals' attitudes to the purpose and efficacy of legislation – how law helps and how law hinders bureaucratic decision-making.

In particular, because several scholars have argued that ADR, as an alternative to a traditional law-based approach to dispute and complaints resolution, requires only

very minimal or no legal constraints on its practice, an enquiry into bureaucratic regulators' responses to new ADR legislation provides an opportunity to observe and record the influence of law versus non-law values, beliefs and assumptions within a particular regulatory community *and* within the more general theoretical framework discussed in this paper that relates legalism, regulatory culture, legal consciousness and administrative discretion as interdependent concepts directly affecting regulator perceptions of and attitudes toward ADR legislation.

Using a qualitative research methodology that encourages the fullest expression of informant views across a broad spectrum of respondents representing the variety of health profession self-regulatory College experience and conditions, the case study research has uncovered and exposed a fuller breadth of contingencies that influence regulator administrative discretion than heretofore studied and reported in relation to the implementation of specific legislation, and ADR legislation in particular. It provides unparalleled access to regulator legal consciousness regarding discretionary administrative decision-making and serves as a model methodology for understanding the regulatory process, particularly the considerations that produce, or contribute to the paradox of intended and unintended consequences of law-making.

The case study research revealed several aspects of regulator perceptions and the influence of these perceptions and their emotional expression on administrative practices, including:

- the various regulator understandings about ADR as a process to resolve the complaints they receive and are responsible under the law for resolving;
- how the ADR legislation aligns with their understanding of ADR and how it changes, supports, undermines or in any other way impacts their current practices or preferences, i.e., how they have responded to the ADR legislation and the reasons for their behaviour;
- why some regulators embrace the legislation, others accept the legislation (though perhaps only reluctantly), some manipulate the legislation to meet their needs, and still others seek to resist, avoid, or subvert the legislation as it is written, often substituting their own preferred practices and rationales.

Chapter Five explores whether the data validate Meidinger's five elements of regulatory culture – general cultural assumptions, political pressures, legal requirements, bureaucratic procedures and structural constraints – as the *causes* or justifications for types of discretionary decision-making in the interpretation and application of the legislation; which of these elements may have greater weight; and whether this enquiry provides a more robust understanding of the grounds for administrative discretion in relation to ADR legislation than more traditional theoretical approaches to regulatory studies, as Meidinger and others strongly suggest. This chapter also analyzes and discusses whether the three elements of Ewick and Silbey's legal consciousness theory regarding individual attitudes toward law and legality – conformity, contestation and resistance – help describe and explain

the types of response representing the *effects* of the regulatory culture elements on administrative discretion regarding whether and how legislation is adopted.

5.2 Friedman's Theories and the Three Key Informant Question Clusters

The Theoretical Foundations and Debates chapter opened with reference to the influence of Friedman on legal culture and consciousness studies, taking particular note of the three critical areas of socio-legal study he identifies as central to the socio-legal field of enquiry: the social and legal forces that press in and make the law; the law itself (structures and rules); and the impact of law on behaviour in the outside world (i.e,, how the law is enacted in and affects the lives of people outside the legal drafting and enactment process). Friedman's three considerations about law in its social context were the foundation for the three main question areas posed to the key informants: What in your view gave rise to the ADR legislation? How appropriate is this particular ADR legislation in your view? What is the impact of this ADR legislation on your previous practices? Using these questions as the starting points for a discussion of the legislation with those directly involved in its development, interpretation and implementation led to robust commentary by the key informants, further enhanced by a series of probing questions by the researcher about the matters raised.

The first question generated a wide-ranging discussion of the perceived origins of the legislation, perceived reasons for the legislation, and perceived goals and purpose of

the legislation. The responses reflect social, economic, political, historical and teleological perceptions and considerations. The first question also uncovered a range of understanding from certainty about the cause or origin of the legislation on the one hand, to uncertainty or expressed lack of knowledge about how the ADR legislation came about or what gave rise to it on the other. In the absence of certainty, some key informants chose to speculate about the forces that might have caused the legislation. Later in this chapter, the considerations mentioned in response to the first question will be analyzed as to whether and to what extent they reflect Meidinger's regulatory culture elements. With regard to Friedman's socio-legal approach to legal studies, it would appear that this question is capable of prompting and uncovering a wide variety of sometimes contradictory perceptions, attitudes, opinions and beliefs about the cause and the purpose of the legislation in question held by those in the regulatory community whose actions the legislation is intended to govern.

Later in this chapter, the importance of the key informants' perceptions regarding the origins and purpose of the legislation will be related to Ewick and Silbey's three categories of responses to the law and discussed as reasons whether, why and to what extent the legislation might or might not be adopted by the regulatory community and its individual member actors. However, the empirical data reported in this dissertation, examined in the light of the Friedman and Ewick and Silbey theories about the basis of legal culture studies and legal consciousness in response to perceived legal situations, reveal that the perceived origins of the law affect the legal

actors' attitudes towards the law and whether and how the law is implemented. The data also reveal that the attitudes and approach to legislative implementation are significantly affected by the size of College, previous experience with informal or alternative dispute resolution, type and culture of profession, access to resources, and levels of trust and frustration with the political dynamic within and impinging on the regulatory environment.

The second question cluster, regarding whether the law is appropriate, uncovered attitudes among the key informants towards the general appropriateness of the legislation, as well as comments about specific provisions of the legislation. The question was intentionally general and neutral to allow key informants to select specific elements of the legislation to comment upon. The generality of the question, by opening the discussion to any aspect of the law that might be judged appropriate or inappropriate, nonetheless prompted very specific responses and reasons for the attitudes and values that informed them. As the discussion unfolded, subsequent questions generated a discussion of the various aspects the first question had uncovered, as the research findings demonstrate.

In general terms, the law was viewed as positive and useful by those who had participated in a consultation process or who believed it either supported or at least did not challenge their current or previous practices. However, even among those with positive attitudes towards the legislation, certain provisions of the legislation

gave cause for concern, principally those concerned with time constraints, risks from the confidentiality provisions, and having to have different staff handle the ADR process, keeping it separate from the rest of the complaints management and investigation process. This neutral question, based on Friedman's focus on "the law itself" as the second of the three elements of socio-legal studies, also opened the conversation to those who had strong negative attitudes towards the ADR legislation, uncovering beliefs that, if adopted, the law would render a previously effective, informal process inflexible, rigid and too formal.

Finally, Friedman's focus on "the impact of the law on behaviour in the outside world" informed the third question cluster regarding the impact of the legislation on College complaints resolution practices. This general question gave rise to a wide range of responses, from the observation of no impact at all, to the legislation requiring stopping informal complaints resolution altogether, with a rich variety of similar and alternative responses between these extremes. The question allowed the informants to recount their general response as well as the particulars – often in rich detail - of the changes to or retention of previous routines or patterns of behaviour in response to or in spite of the new ADR legislation. This neutral question also produced some very passionate responses from the informants, revealing considerable drama within the regulatory community and in relation to various aspects of the regulatory culture that provides essential information about what must be considered when developing and implementing legislation, particularly ADR legislation. Other

dimensions were uncovered in response to followup probing questions in the context of a robust discussion of informant perceptions and attitudes.

Grounding the sets of research questions in Friedman's legal system and legal culture theory provided a clear theoretical framework for this enquiry, while maintaining openness to a wide range of responses among the different types of key informants – policymaker/ legislator, regulator/bureaucrat, regulator/Council member, judiciary/Appeal and Review Board, as the data recorded in the last chapter amply demonstrate. These questions also permitted an open enquiry into the presence of the key elements of Meidinger's regulatory culture as determinants of regulatory administration and provided an opportunity to enquire broadly into the possible grounds for the typical responses to law that Ewick and Silbey and others have documented as forming part of legal consciousness.

5.3 Regulatory Culture and Regulatory Community

Membership and Relationships in the RHPA Community

The key informants spoke to their perception that the Colleges comprise a community, organized in relation to and by the RHPA. At the same time, there is a clear recognition that the members of the community are quite diverse and have different interests and needs according to their position within the larger regulatory, social, economic and political environment. Some Colleges were described as "mainstream," traditional healthcare providers with a long history of self-regulation

in the province under previous legislative frameworks, while other members of the RHPA community were identified as newer to self-regulation, and some, who were not interviewed, were preparing to enter the RHPA community, while still others are hopeful of being included in the future. Some members of the community are seen to have greater power in the wider society by virtue of their numbers (e.g., nurses with some 155,000 members), while others, like the physicians and surgeons, are seen to have power by virtue of their specialized knowledge and standing in the wider society. What all College members of the community appear to have in common is that they represent particular healthcare professions and that they are in the business of professional self-regulation. These two signifiers qualify all Colleges for membership in the RHPA community.

However, there is a wider RHPA regulatory community, which appears to include the Ministry of Health and Long-Term Care with a relationship of authority over the regulatory Colleges, as well as the Health Professions Appeal and Review Board, with a judicial role over the College complaints and registration processes. Because the case study focused on the ADR legislation, it is unsurprising that the legislative authority would be seen by the key informants as a significant element in the regulatory process. Arguably, any regulatory matter within the College community would ultimately involve the legislative authority. They also belong in the community because these officials too are regulators and share that characteristic with the regulatory Colleges.

One key informant pointed out that the key officials in the MHLTC branch responsible for the health regulatory Colleges, including those interviewed for this study, had come to the provincial Government from one regulatory College in particular and therefore had (or should have had) experience and insights into (and perhaps more sympathy for?) the issues the Colleges face. On the other hand, there was also a perception that these Ministry policy-makers and legislators were isolated and divorced from the reality of the regulatory Colleges, being "eggheads" with limited appreciation of the concrete experiences and challenges of "street level bureaucrats." Another College key informant referenced their own background working on behalf of HPRAC at the time of the RHPA review, which they recalled during the interview. Therefore, to some extent the community is populated by officials with experience in different aspects of the RHPA regulatory process and individuals are well known to those colleagues with whom they may have worked in a different capacity. The research therefore appears to demonstrate that Meidinger's community figure operates on various levels that intersect in different, sometimes subtle and interesting ways that may not be obvious to an outsider, much as the regulatory culture and administrative discretion literature suggests.

Because this study focused on matters involving the complaints process, HPARB was mentioned frequently in reference to aspects of the legislation. Had the study addressed some other aspect of professional self-regulation, HPARB would not perhaps have been mentioned at all, and so would not appear to figure as a member of

the RHPA community and its culture, although arguably its presence is always a factor within the RHPA regulatory culture. Some key informants were concerned about HPARB's judicial role and expressed fear of HPARB's power to call them to account, particularly in relation to not meeting the time limits in the legislation. Other key informants appeared to empathize with HPARB's limitations and countered any impression from within the community that HPARB was the "enemy" of the regulatory Colleges. It was mentioned more than once that HPARB was funded by the Government, unlike the regulatory Colleges, thereby being more on the "them" side of the "us-and them" divide that some Colleges unhappy with the role of Government perceived.

HPRAC's reports were cited several times in relation to the ADR legislation, but they appear to be regarded by the Colleges as ancillary to MHLTC, and not as much separate members of the RHPA community, even in the way that MHLTC was perceived to be directly involved in RHPA regulatory community affairs. While some College respondents acknowledged and praised HPRAC's role in defining the issues in relation to ADR, some were dismissive of and even hostile to their work, seeing HPRAC as aligned with the Government in a movement to undermine the autonomy of the Colleges. It may be relevant to note that the HSIA, as well as

legislating the use of ADR in complaints resolution, also contained provisions to clarify and limit HPRAC's consultative and advisory role.[257]

The value most cited as defining membership in the community is the requirement to serve and protect the public interest, which is explicitly required by the legislation[258] and which most informants mentioned as the fundamental duty and object of the Colleges. Among the Colleges, there appears to be a strong sense that this value is being upheld in the various ways that their processes address the public interest, provide public protection and provide public service. Several informants commented that the ADR legislation reflected MHLTC's similar commitment to the public interest, though some College officials thought otherwise, suggesting that the ADR legislation, as written, conflicted with the value of public service and the public interest.

It appeared from the interviews with College officials that while some Colleges view the final ADR legislation positively, several were united as a group within the community in their frustration at the Government's approach to legislating ADR, viewing it as another example of the way they felt disrespected and distrusted as a community. Their sense of grievance and injustice, particularly among the smaller Colleges, especially in relation to what they considered unreasonable demands on

[257] RHPA sections 7 to 17
[258] HPPC section 3

their resources, appears to act as a further determinant of common cause, enhancing a sense of community in a "them versus us" dynamic. At the same time, the smaller Colleges were often forthcoming in their acknowledgement of the larger Colleges as generous mentors, sympathetic to their problems and predicament and ready to take a leadership and facilitative role, mainly through the activities organized by the Federation.

It is also possible to discern fractures among the Colleges in relation to what some perceived as questionable ADR practices carried out by some members of the community. While these may have been justified as a "survival mechanism," others were mentioned as part of a darker element among the members of the community, which caused the ADR legislation to be brought to bear on everyone, whether they had engaged in ADR, had not engaged in ADR (and possibly did not intend to), or were merely considering it. The perception that these members whose behaviour in relation to complaints resolution was seen to have fallen afoul of the community value, putting professional interest ahead of public interest ("protecting their own"), gave rise to comments about the problem of blanket legislation when it means that all may be punished for the sins of a few.

Meidinger makes the point that the culture of regulatory communities reflects shared values and ideals, but accommodates dissonances, inconsistencies and illogicalities, deviances from the norm which reflect community members' own perceived interests

and routinely co-exist with common community values and purpose. Clearly, there is an ongoing discussion within the RHPA community about which College is doing this or that, but there is also, as in many communities, a principle that discussion of questionable or non-conforming behaviours should not be made public, so, while some things were hinted at during the interviews, no Colleges were singled out as being in serious conflict with the overall values of the community, despite some of their activities giving "self-regulation a bad name." Subsequent to the interviews, one College (whose staff was interviewed for this study) was subjected by the Government to an outside review for questionable practices and, following a critical report (by PWC Consultants), had its Council and Registrar replaced by a Supervisor (a retired Registrar of another College included in this study).[259]

The regulatory theory makes reference to the special role of professionals (consultants, lawyers) within the regulatory community as mediating certain aspects of the regulatory process, sometimes indistinguishable from the regulatory clients they serve, and sometimes seen, as the interviews reveal, as players with their own professional agenda and interests within the regulatory community. The key informants made mention of the role of legal counsel in interpreting and applying the legislation and the differing views of legal counsel (some more attended to than others, according to the informants) that determined whether and to what extent

[259] See http://www.health.gov.on.ca/en/news/bulletin/2012/hb_20120326_1.aspx for announcement and http://www.denturists-cdo.com/site/whatsnew?nav=02 for a chronology of related events.

certain aspects of the legislation were adopted and put into practice. The key informants also mention the influence of the large insurers and the unions on the College complaints and discipline processes. It is perhaps hard to make an argument for these being members of the regulatory community in the same way as the Colleges, MHLTC or HPARB, though they undoubtedly affect the complaints and discipline process, including, and especially ADR, sometimes quite significantly, as in the case of the insurers and their legal counsel for the physicians and surgeons.

While having one regulatory framework for a disparate group of health profession regulatory bodies appeared frustrating and constraining to some community members, others saw the framework as providing a legislative structure that provided scope for creativity in meeting the mandate of the regulatory Colleges. The latter view was mainly held by the MHLTC informants and the better-funded (larger membership and/or higher membership fees) regulatory Colleges. It is possible that greater resources allowed them more options by which to benefit from the framework of the legislation.

Framework Legislation

Meidinger identifies regulatory culture as what occurs in a regulatory community. He asserts that the sum of the decisions and actions taken by the members of the regulatory community constitute regulatory culture, which determines how regulation is organized and carried out in specific situations. Primary regulatory groups are

regulatory communities rather than simply discrete bureaucratic organizations, because they influence each other, act with reference to one another, desire each other's respect, act in opposition to other community members, according to values, beliefs, ideas and a shared vision of the community.

The results of the key informant interviews provide important evidence that there is an RHPA "regulatory community" with a "regulatory culture" that determines how regulation is organized and carried out, particularly in relation to the ADR legislation that is the subject of this study. In the first instance, the RHPA is described by several informants as "framework legislation" that governs many different healthcare professions, each one also being governed by its own Act. Several of the key informants drew attention to what some described as "blanket legislation" that required each College to meet the requirements of the RHPA, regardless of the type of services the profession provides, the size of the profession and (hence) College membership, as well as the extent of the resources available to fund the College's business. While some informants commented that the framework type of legislation allowed flexibility and a degree of autonomy and creativity in the specific application of the legislation, others saw the framework legislation as capturing or defining those governed by the legislation within a narrow interpretive and judgmental frame. What one College was seen to have done (or failed to do) could affect all the members of the regulatory community. As the former Chair of HPRAC recently commented, the Government responds to one "rogue regulator" – the "inadequate or inept behaviour

in one profession" – with consequences that impact all the regulated professions. Such "new oversight and interventional mechanisms apply to all the regulated professions in the sector.[260] While there are advantages to being a member of a regulatory community, such as the potential to share information and to learn from one another, as the informants observed, there are also significant disadvantages when the behaviour of one member brings about negative consequences for all. These negative consequences can involve a (sometimes very significant) reduction in the very flexibility that the framework model of governing and informing community behaviour is intended to provide. Some informants believed the flexibility that accommodates individual profession and College differences had been preserved under the "framework" ADR legislation – they were not caught "in a box," while others viewed the ADR legislation as rigid and unworkable for many of the community's members.

Overall, the findings from the key informant interviews appear to support the cross-currents of competition and cooperation within the RHPA regulatory community that were identified in the previous studies of the community by O'Reilly, Spoel and James and by Gilmour et al.

[260] B. Sullivan "The Public Perspective and Confidence in Regulators," Conference slides, Council on Licensure, Enforcement and Regulation Annual Conference, San Francisco, September 2012

5.4 Meidinger's Elements of Regulatory Culture

Meidinger views regulatory culture as the result of individual and collective regulatory community interaction with general cultural assumptions held by the wider society, political pressures from within and from outside the regulatory community, including the pressure to meet the needs of the larger system, legal requirements imposed on the regulatory community, as well as bureaucratic procedures available to and structural constraints experienced by the community as a whole and by its individual constituent members. Meidinger asserts that all these pressures, dynamics and dimensions both within and from outside the community together *make* regulatory culture and regulatory administration. The next section analyzes the findings in relation to the five elements Meidinger cites and discusses how they illuminate community members' responses to the ADR legislation.

General Cultural Assumptions and Political Pressures

Meidinger identified general cultural assumptions and political pressures as two of the five elements that constitute regulatory culture within a regulatory community and influence administrative regulation and discretion. Each of these is both external and internal to the regulatory community. The community reflects the wider social conventions as well as the conventions within the community itself. Black and Pratt describe how the attitudes and actions of members of the regulatory community are not taken in isolation from the wider society in which the regulatory community is situated, and how the decisions of "street level bureaucrats" are informed by the

values, ideas and beliefs that are current and may be predominant in relevant sectors of the larger society.

Influence of General Cultural Assumptions on Regulatory Administration

Constitutive Legal Environment

Regarding the hegemony of law in society and the benefits of certainty that legislative authority conveys, many informants acknowledged the need to reassure the public and certain Colleges, as well as their legal advisors, that ADR is a legitimate process to be used to resolve certain complaints against health professionals. Thus it can be seen that, for this reason, enshrining the ADR process in law is an effective means to legitimize its use. However, it is also evident from the interviews that there is a contrary view of ADR as a flexible, spontaneous, non-law process which should not be shackled by legal constraints. This issue was articulated in the discussion of the "alternativeness" of ADR, which some College informants interpreted as being alternative to, apart and distinct from what they viewed as the constraints of a law-based complaints resolution process. At the heart of this dichotomy is the tension between the permissive freedom that legal authority confers to use the process and the constraints legal authority places on how that freedom is to be exercised. Several informants commented on this tension, expressing appreciation for the greater clarity and legitimation of ADR as a process to be used, and concern about the perceived restrictions the law placed on the process. A few Colleges and the MHLTC

informants thought the right balance had been achieved between law's benefits and potential costs.

The MHLTC informants noted that the College ADR processes had to be aligned with "civil law doctrines" and constitutional rights and protections, thus invoking the general legal culture as a model and influence on the ADR legislation. They also noted that the *legal* principles of confidentiality, due process and procedural fairness should govern the practice of ADR in the College complaints resolution process. One College informant expressed frustration and a sense of insult that the Government seemed therefore to be implying that the Colleges did not follow these legal principles from the general legal culture. On the other hand, one well informed College informant acknowledged that in some instances Colleges were not practicing according to these principles, thus inciting the Government to take steps to correct this "problem" of deviance from the principles accepted in the general legal culture.

Erosion of Professional Self-Regulation

O'Reilly's study of the introduction of the RHPA in the period 1989 – 1994 records what she sees as the adaptation of health profession self-regulation in Ontario to emerging values and standards of the day. She observes the rise in the rhetoric of consumer rights and services and a shift to greater holistic and collaborative values. Among the predominating values O'Reilly cites as part of a new social paradigm taking precedence in Ontario are transparency, accountability and responsiveness to

consumer needs for improved service and involvement in the self-regulatory process. The informant who characterized the ADR legislation as the Government promoting an agenda of collaboration ("the flavour of the month") begrudgingly acknowledges the Government agenda that O'Reilly identified as opening the self-regulatory judicial process to greater public involvement. The MHLTC informants and others also confirmed the importance of making the complaints process accessible to the public, not simply as witnesses to the process, but as participants in the process.

At the same time, it seems evident that, as the scholarly studies referred to suggest, the ADR legislation was perceived to narrow the previous ability of the Colleges to manage their complaints resolution process in a manner that met their needs and the needs of the complainants and College members. The ADR legislation may have been considered more favourably by more College informants had it conformed to the practices and suggestions the Colleges made to HPRAC and, through them, as well as directly, to the Government. Instead, the ADR legislation appeared to be embraced by the few Colleges that said they had played an active role in its design and on whose previously existing ADR processes the new legislation was modeled, as evidenced by the comments by those Colleges. For Colleges without the resources, or with particular issues that made it more difficult to adopt the legislation in its entirety, the legislation presented significant challenges that prevented its adoption, with various consequences.

Public interest

Several informants addressed the question of whether the new ADR legislation was in the public interest. Various aspects of the public interest were put forward as justifications both for and against the ADR legislation. These can be seen as reflecting the various concepts of public interest within the larger society. Scholars have debated what exactly constitutes the public interest, and there is perhaps no clear and generally accepted definition of it, as it is often seen to be inflected by the values of particular "publics" and their interests, as the Spoel and James and Gilmour studies demonstrate. It is in the very nature of the public interest debate that public interest can be interpreted quite flexibly to bolster the arguments and agendas of those who use the concept to promote their cause. [261]

Those who claimed that the ADR legislation promotes the public interest saw it as creating consistency and standardization among the various College processes, providing clear expectations and guidance to those administering and participating in the process. They claimed that the legislation made the process more transparent to those participating in it. It would no longer be perceived as something occurring behind closed doors, skewed in favour of the professional, and less committed to protection of the public.

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[261] See, for example, M. Feintuck, "The 'Public Interest'" in C. Scott, ed., *Regulation* (Oxford: Oxford University Press, 2004), who argues that the concept of "the public interest" can be defined in so many ways and is often used to legitimize and advance the interests of various actors in the policy and legislative development process. Its lack of definition makes the concept vulnerable to capture by interest groups, in a manner contrary to the collective values that the term seems to imply.

Use of ADR in the Larger Society beyond RHPA Regulatory Community

The responses from the key informants acknowledge that the use of ADR in other areas of society – family, civil and labour disputes were cited – had helped to bolster the use of ADR means to resolve complaints in the RHPA College systems. The use of ADR in the wider society was viewed as a factor influencing some of the earlier adopters of ADR processes among the regulatory Colleges. CNO, CPSO, RCDSO and CPO were among those Colleges identified as having successfully imported alternative dispute resolution ideas, methods and practices into their own processes, providing examples of what appeared to be working successfully and therefore worth adopting more generally within the community. However, the past history of ADR approaches and practices in some Colleges was also cited by HPRAC in its two RHPA review reports as *not* appropriate for a regulatory College established to serve and protect the public interest.

As one informant stated, the use of ADR "was undeniable," as a valid approach to certain kinds of dispute *outside* the regulatory community and as it was being used *inside* the regulatory community. One MHLTC informant noted that ADR had become the "watchword in the past few years." Thus the influence of events in the general culture about what is acceptable and appropriate influenced the early proponents of ADR and their practice and example (for good or not) helped advance the adoption of ADR more widely within the RHPA community, ultimately leading to the kinds of questions, problems and challenges that provoked this legislative

solution. As some informants commented, the ADR process in the world outside the RHPA community has been subject to various definitions and constraints, depending on the environment, leading to a growing body of common or accepted practices, which appeared to be the basis for some aspects and provisions of the legislation. However, it was also pointed out that the RHPA complaints resolution process is not a dispute between a patient/client and a healthcare professional, and is not similar to the majority of disputes in the wider community and therefore should be imported and used within the complaints resolution process with caution. In fact, the complaints resolution process may be closer to a criminal allegation, with the onus on the College ("state") to prosecute or to reach an agreement. If that is the case, then the ADR being proposed for the RHPA community may be more closely aligned with the community or healing circle approach to criminal matters, in terms of the role of the accused, the state and the court, with the community and the alleged victim playing a more active role in the resolution of the case.

Consumer Service

Being able to offer ADR in the complaints resolution process to the complainant and the member was frequently viewed during the interviews as an improvement in service to both parties. Both MHLTC and College informants emphasized this aspect and, in some instances, the importance of providing a service appeared to be aligned with the primary duty of the Colleges "to *serve* and protect the public interest." On the one hand, it was argued that being able to provide an ADR process

would enhance service and improve relations between the profession and its clients and the wider public, and would thus also improve the profession's standing in the eyes of the Government and the media. At the same time, the actual ADR legislation appeared to several College informants to undermine the perceived duty of service by making the process cumbersome, intimidating, complicated and difficult. They questioned whether the provisions improved accessibility, compared with the informal processes several Colleges had developed over the years to address complainant needs. Several commented that the previous informal process, usually conducted by telephone, allowed easy resolution of most non-serious cases. It was pointed out in contrast, that the new legislation did not improve service to the public (and thus was not in the public interest). Far from making the College complaints process more streamlined, as the Introduction to the legislation promised, several informants viewed the ADR legislation as creating burdens on and obstacles to the Colleges' ability to provide streamlined services to complainants and to members.

For some with existing ADR processes, ADR is already a "difficult sell" to the public who expect the College to take the complaint out of their hands and handle it and are not interested in participating in the resolution process. They did not view the ADR legislation as making the process any more "saleable" to complainants. They appeared distressed that the limitations the legislation imposed would diminish their options for providing an effective service to the public and impede their ability to fulfill their statutory duty of serving the public interest.

Influence of Political Pressures on Regulatory Administration

Meidinger emphasizes the role of political pressures and their influence on the regulatory community and on regulatory culture, which, in turn, determines what occurs in administrative regulation. Several political factors were identified by informants as having influenced the development of the legislation. College informants' perception of these political factors, and their positive or negative role in the provenance and passage of the legislation, in turn may have influenced the College informants' attitudes towards interpreting the legislation and their behaviours in applying it.

Some informants identified the role of the media in influencing the political climate and the Government's attitudes toward the self-regulatory Colleges. As mentioned previously, the media appetite for scandal has led in the past to publication of College complaints process practices that had not met public expectations of transparency, fairness and accountability. In the view of some informants, these media stories reflect on all the Colleges and also call into question the Government's own accountability for overseeing and enforcing public expectations for the whole self-regulatory system. While no informant condoned unfair or shady complaints resolution practices, most thought that the negative media reports reflected only a few of the thousands of complaints cases dealt with each year and therefore unjustly deprecated the whole College complaints resolution system.

Those who commented on this aspect also linked the media reports to the Government's political sensitivity to being held publicly accountable. The Government or opposition parties' desire for (re-)election was seen to frequently prompt measures to address these media reports, not always in a way that reflected best practices in public policy development – a "knee-jerk" reaction to political pressures rather than a measured and thoughtful response to an issue requiring attention. For some College informants, this was perceived to be a significant factor in the imposition of the ADR legislation. The findings also reflect the perception that the Government responded to media and public criticism of its own practices ("scandals") by taking exemplary action to control or punish bodies under their legislative authority. Thus the ADR legislation, in some sense, could be interpreted as the Government treating the Colleges as handy (and defenseless) "whipping boys" whose behaviour, in the Colleges' view, in no way justified this treatment.

Another political pressure identified during the key informant interviews relates to the trend identified in the O'Reilly study towards greater openness and collaboration between Government and the public. A few respondents noted the Government's attention to collaboration as the "flavour of the month," and Government's desire to appear "trendy" to the public by appearing to encourage more public involvement in College processes – to empower the public within the professional self-government process. Legislation was also perceived as providing evidence to the public and media of Government action and effectiveness. The Government was perceived by

some informants to be "legislating like crazy," with the purpose of building a powerful image with the public and the media, whether the legislation was actually needed or not. This was interpreted by several of the College informants as unwelcome Government interference, as inappropriately "putting their oar in" and treating the self-regulatory Colleges as government agencies. Not all respondents commented on this aspect of the legislation, but most felt at least some distrust of the Government as a result of its behaviour towards the regulatory community and a few noted that the distrust was clearly mutual.

The data suggest other possible political pressures that were observed by the regulatory community to have influenced the legislation. One that stood out was the observation that the personal political ambitions of the Minister of Health and Long-Term Care at the time of the development and passage of the legislation may have influenced the manner and degree to which the legislation reflected a directive, rather than facilitative approach to legislative design. Wishing to appear a strong and uncompromising political figure, the Minister was perceived as ignoring the advice of the members of the regulatory community. Thus, the legislation in the end failed to reflect the concerns of the smaller Colleges about their ability to implement the legislated requirements and the concerns of larger Colleges about the possible perils of the confidentiality provision – and did not appear to add anything, as one informant noted, to the enhancement of public protection.

Influence of Bureaucratic Procedures on Regulatory Administration

Almost no College informant suggested that the ADR legislation was a welcome stimulus to improve their own procedures or process. Each College appeared to have an existing process to deal with complaints, and, as the findings show, many of these were seen to be highly effective by those Colleges in dealing with the types of complaints that that profession and that College most commonly dealt with. The College informants (perhaps not unnaturally) thought that many of the problems that the ADR legislation was intended to resolve were those caused or experienced by other Colleges. A majority viewed the legislation as helping to clarify and clean up practices in other Colleges and thus enhancing public protection. Slightly fewer than a majority believed that the legislation would improve the uptake of the ADR process by reassuring the public and complainants of its legitimacy through having the process and its procedures enshrined in legislation.

The question of the need for the standardization and consistency of the process among Colleges was set against the need for recognition of the various professional and College cultures and the bureaucratic procedures that reflected those different professional cultures, as well as the differing nature of the complaints. All the various types of College complaint resolution procedures were described as intended to reflect the profession's practice while meeting the values of professional self-regulation and the need for organizational efficiency. The formal and informal complaints management and resolution procedures were perceived to be aligned with

other management processes and procedures within the College organizational management system. For several Colleges, the changes the legislation would require to the College organization appeared impossible for the very practical reason of lack of financial and human resources.

As Pratt points out, capturing both the external influences and internal management imperatives, "enforcement officials and bureaucracy, rather than making individual decisions with reference to the legislation, are significantly influenced by internal bureaucratic values as well as by larger, mutating social values in applying their decision-making discretion to particular cases."[262] This view is given more detailed relevance in Banks' observation regarding the difficulties the bureaucrat faces in dealing with regulation, noting the additional burdens it imposes of additional paperwork, distortions in decisions about agency and organizational priorities, limits to choice, additional cost impositions and reduced flexibility, thus prolonging decision-making, using up scarce resources and inviting the temptation to evasion as much as (or more than) compliance.[263] Thus, additional regulation frequently leads to unintended consequences as the manager seeks to avoid changing procedures to conform to the legislation.

While the MHLTC informants viewed the legislation as making the complaints and discipline process more efficient, there were several dissenting opinions among the

[262] Pratt *supra* note 21
[263] Banks *supra* note 15 at 26

College informants who saw the new procedures as complicating and burdensome on the College's organizational management and as restricting management efficiency within the College and with the complainant and member, thus leading to what they perceived or imagined would be ineffective and frustrating ADR experiences. One of the principal bureaucratic procedures that presented difficulties and wide variations in proposed or actual practices was how to decide which complaints would be referred to the ADR process. This was complicated by the intention by some Colleges to maintain a form of informal complaints process for one type of complaint while identifying other types of complaints for ADR.

Influence of Structural Constraints on Regulatory Administration

For the purpose of this analysis, structural constraints are taken to be those aspects of the structure of the system and the bureaucratic organization that affect its ability to carry out the requirements of the legislation – its *capacity* to put the legislation into effect. Such constraints might include time available, human resources, money available to purchase technology or services, decision-making procedures, communication procedures, organizational structure, physical settings.

The findings demonstrate that, for many of the Colleges, the new ADR legislation presented significant structural challenges, particularly for the smaller and medium-sized Colleges. Several commented that, because of limited financial and human resources, they had struggled to fulfill their RHPA statutory obligations even before

the new ADR legislation required them to adopt what they viewed as a costly procedure, in some cases requiring them to replace an informal complaints resolution procedure which was intended to make complaints resolution more cost efficient in relation to these structural constraints.

Financial Constraints

Lacking financial resources, several informants commented that the requirement to ensure separation between the person facilitating the ADR process and others involved in the complaint investigation and resolution process placed an impossible burden on the College. While some envy of larger Colleges' access to financial and human resources emerged, their willingness to share those resources within the regulatory community was recognized and appreciated. The cost of hiring a mediator from outside the College, and the uncertainty about how much time (and cost) the process would involve led some to view engaging this process as tantamount to writing a "blank cheque." On the other hand, one College using a mediator's services estimated the average cost of mediation services per case at $250 to $300. Clearly there exists some uncertainty and fear about cost control that affects some Colleges' decision to use ADR. Another financial concern was the possibility of undertaking two parallel processes of investigation and mediation. For some Colleges this double cost appeared excessive and an ineffective way of spending members' fees, where carrying out an investigation (perhaps preceded by some preliminary informal enquiries) was a more prudent, if less participative option for the parties.

Time Constraints

Many identified the time limits imposed by the legislation as a serious constraint affecting their willingness to undertake the ADR process. The community role of HPARB as overseeing the fulfillment of time requirements was viewed differently among the members of the community. Some College informants were concerned about the consequences of not meeting the time constraints imposed, while others stated their belief that any time overrun could be justified and that such a justification would be acceptable to HPARB. Several comments about the time limits being unreasonable and a deterrent to the adoption of the ADR process appeared to reflect a more general view among those commenting that the Government was being unreasonable in imposing these conditions with the legislation requiring both the investigative and the ADR options to be completed within the 150-day timeframe.

Human Resource Constraints

While financial constraints often determine Colleges' access to human resources to engage in the ADR process as required by the legislation, several informants expressed concern about where they would find appropriate facilitators, even assuming they were financially able to engage them. They also queried the ability of complainants' to understand the process and what College support would be required to help a non-English speaker to participate.

Decision-Making Procedures

Some Colleges described the existing or customary College complaints decision-making process as potentially constraining their adoption of the ADR legislation. The respective decision-making roles of the Registrar, the Director or Manager responsible for managing and administering the complaints process and the Committee of the College with the statutory responsibility for disposing of complaints would, in several instances, be challenged or complicated by the requirements of the legislation. Interestingly, some Colleges perceived that a framework policy and decision-making process, approved by the College Council and/or the Inquiries, Complaints and Reports Committee, would be necessary to guide and direct staff who would then be delegated to make ADR case selection on the basis of the approved policy.

Other College senior staff took very literally the role of the Registrar to refer a case to ADR, insisting that the ICRC would have no direct role in deciding whether a case should be referred to ADR. While all noted that the ICRC had the decision-making role at the end, when a case had been settled, some College staff informants were convinced that their Committee would approve the agreed settlement without knowing the details, while other College staff thought the Committee would never decide to approve a settlement for which they were not fully aware of the background. The range of responses appeared to reflect different professional cultures, and also the degree to which Committees were active decision-makers, how far they appeared to trust the College staff (Registrar and/or Director of Complaints),

as well as the extent of the Registrar's power and control over the members of the statutory Committee and their willingness to follow the Registrar's direction.

Summary of Regulatory Culture Observations

The Findings in response to the three question sets posed appear to confirm that the elements of Meidinger's regulatory culture were present and identified by the key informants as influencing their attitudes towards the ADR legislation and their decision-making considerations as to whether and how they would be inclined to adopt, adapt or evade the legislated requirements. The elements Meidinger identifies appear to have a significant effect on the legal consciousness and the administrative discretion of those responsible for implementing the legislation. The most frequently mentioned considerations related to the elements of regulatory culture were:

- the potential costs of implementing the new procedures
- the complexity of the new procedures in practice, thus making the process appear less accessible, less "user-friendly" and less "alternative"
- the challenges to existing roles and decision-making processes within the organization
- the time constraints imposed that appeared to challenge organizational resources and values of procedural fairness and thoroughness
- the apparent increase in Government control over College process and procedures and further loss of self-regulatory autonomy

Positive regulatory culture elements mentioned in the findings include the recognition of ADR as a legitimate process and the work of the community leaders that had adopted and used the process successfully, the sharing of information among members of the community, the sense of a maturing community that is prepared to collaborate to achieve public policy objectives. These and other themes that emerged in the course of the interviews and which can be characterized as aspects of regulatory culture appear to have influenced the informants' legal consciousness with respect to the ADR legislation.

5.5 Influence of Legal Consciousness on Administrative Discretion

The empirical findings provide various examples of Ewick and Silbey's conformity, contestation and resistance attitudes towards the legislation. For example, the findings reveal significant differences in perception of the legislation between those College informants who think they were fully consulted and their views heard and included; those who perceive they were consulted, but their views were not heard or were overruled, overlooked or dismissed; those who perceive that they were not consulted but others were; and those who were not consulted and concluded that therefore no College was.

Interestingly, those who thought (or assumed) that the important, experienced, leading members of the community (those they said they respect and trust) were appropriately consulted, concluded therefore that due diligence had been done and

that the outcome was the best possible for the regulatory community, and so could accept the ADR legislation, even if it was difficult for them to implement. Those who were not consulted and didn't know about the legislation till it happened, tended to view the legislation as a sudden and arbitrary imposition which they must adopt or adapt to, while others who believed their interests were not canvassed or taken into consideration appeared to be more inclined to reject the legislation.

Conformity and Compliance

Some Colleges were prepared to adopt (or had already had procedures in place that reflect) the provisions of the ADR legislation. These Colleges were usually the models on which the ADR legislation was designed and they reported having had discussions with other Colleges and with the Government prior to the drafting of the legislation about their experience with ADR to resolve complaints. For several of the Colleges – large, medium-sized and small with more formalized participatory complaints resolution processes – the ADR legislation represented an acceptable development from their own procedures. With some minor adjustments to their own procedures, they were able to conform to or comply with the legislation. They were not troubled by a sense of the Government having ulterior motives towards the Colleges or towards self-regulation that may have skewed their attitudes against the Government and against adopting the legislation. They were not concerned that the alternativeness of ADR was being lost, as the prescribed procedures closely matched what they had already accepted as necessary constraints on the use of ADR within

their own organization and culture. They were thankful that, for the most part, they got what they had wanted and were prepared to comply with the legislation.

Contestation

Among the Colleges interviewed there were several, as the findings demonstrate, who viewed the ADR legislation as an opportunity for creative interpretation, not only in the gaps between the words, but, as one informant pointed out, in the very "clarity" of the legislative wording. The clarity, as well as the ambiguity of the legislative drafting, were seen to be starting points for a continuing legislative development process by which the legislation could be adapted to address and manage practical issues, as well as deal with values and other cultural concerns that the legislation raised. These informants were not necessarily troubled by Government motives or attitudes towards the regulatory Colleges, though some clearly were and viewed their prerogative to contest the legislation by freely adapting it to meet their own purposes and circumstances as a way of asserting their autonomy and compensating for any perceived loss of their own authority by the Government's asserting its power to dictate ADR procedures which, in their view, imposed unacceptable costs, impossible deadlines and/or diminished choice or status on the Colleges.

Resistance

Several Colleges reported that they would not be adopting the ADR legislation. These included Colleges with little or no previous informal complaints resolution

experience who viewed the prescribed ADR process and procedures as too onerous and even counter-productive within their own professional culture or in terms of relations with the public and clients. Others with significant previous informal complaints resolution practices had decided to discontinue them altogether in light of the new ADR procedural requirements and not to adopt the new procedures as too costly and cumbersome. From having had a process that they considered met their public interest and public service obligations, they moved to no process at all – other than investigation of complaints. Some feared that they would not be able to carry out the new procedures adequately and, rather than risk running afoul of the authority figures (Government, HPARB), they would not continue their previous practices or adopt the new procedures. Some of these suggested they would wait till other Colleges had tried the new process and would adopt the procedures once they had been "test-driven" by other, less cautious community members. These more cautious members preferred that any blame for inadequate performance fall upon one of their colleagues rather than on themselves.

A third category of resistant Colleges were those who had had long-term robust informal or more formalized complaints resolution processes and expressed frustration with a legislative development process that, in their view, failed to take their legitimate concerns into consideration. As a result of their frustrating consultation experience, leaving them with a sense of procedural unfairness, as well as such other factors as resistance to the legislated process from major stakeholders,

such as their members' unions or liability insurers, they dismissed the legislation out of hand as inappropriate and unusable.

Some appeared to be concerned that the "one size fits all" approach to the legislation was insensitive to the needs of the various professional cultures and, in some cases, the lengthy experience of complaints resolution within certain Colleges. There were several comments about the bluntness of the legislative and regulatory tools the Government had taken to using, Government's lack of respect for the flexibility of the original RHPA framework concept of legislating to accommodate different professional cultures, Government's lack of consultation with the key regulatory stakeholders, and one telling comment about the "eggheads down on Wellesley," that, together, provide a strong sense of the values- and culture-based grounds for resistance and subversion of the intent of the Government ADR legislation.

5.6 Influence of Regulatory Culture and Legal Consciousness on the Administration of the ADR Legislation

Lande advocates only minimal, flexible and permissive ADR legislation to accomplish desired goals, principally to ensure process pluralism and to create legitimacy and security for the process. Beyond those goals, he accepts that rules may be needed to protect confidentiality, to clarify the relationship with the courts, to protect consumers, and to provide default options when ADR agreements do not address certain issues. Lande insists that rules of any kind introduce risks, since laws where there were none before influence the way issues are viewed, interpreted and

understood. The RHPA legislation would appear to reflect Lande's guidelines and concerns in both the positive and negative senses.

Despite the MHLTC officials' insistence that the legislation is minimal and flexible, several of the College informants' negative, even hostile reactions appear to be based on a resistance to the imposition of law where no law existed before. The very act of defining in legislation creates the "cabining" effect that Cooper refers to in the study of juridification of previously discretionary processes and fuels regulatory resistance, leading, as Lande notes, to unintended consequences, since definitions can, by themselves, have a major impact on the processes they seek to regulate.

Macauley speaks to the types of reactions to ADR legislation which are represented in the findings, namely to ignore the "legal commands" altogether or redefine them to suit self-interest or "common sense." The findings suggest that ADR legislation appears to be as susceptible, and perhaps more so than some other forms of legislation, to responses of contestation and resistance, given general culturally held beliefs about the benefits of its informality and flexibility, which are seen to be undermined, as Lande suggests, by fixing and prescribing ADR procedures in law. However, in addition to a basic resistance to law as Edelman, Stryker, Suchman and Lande suggest, the findings also demonstrate that this effect is increased when the ADR legislation is introduced into a regulatory culture where there is considerable suspicion, distrust and resistance towards the legislating authority. This is further

influenced by the elements of regulatory culture, when the new ADR law brings costs, resource demands, new procedures that may conflict with previous organizational practices and values or with ongoing organizational priorities.

Pou describes the "obvious tension" in ADR laws of "trying to legislate flexibility" – a view expressed or alluded to by some of the key informants who found such attempts as ironic and inherently ridiculous as Pou considers them. His observation that informality is generally taken to be the "lifeblood of the administrative process" is borne out in the interview data by those key informant descriptions of the usual type of complaints resolution that they found to be practical and effective prior to the ADR legislation. At the same time, Pou acknowledges the "bureaucratic anxiety" that clearly existed among those unsure whether ADR was a legitimate process if it was not authorized directly by law. The key informants from MHLTC, as well as some College informants appeared to subscribe to Pou's view that the informality of the ADR process works best when it occurs within a prescribed framework. Legislation can provide that framework and give officials who require that measure of certainty comfort about using the ADR processes or, in the case of Government, overseeing the ADR processes.

Pou's view of the rationale justifying ADR legislation does not, however, reflect several other important considerations – embodied in regulatory culture and contributing to legal consciousness regarding the ADR legislation – that are seen in

the findings to have influenced regulators' decisions about whether and how to implement the legislation. Indeed, Pou's important list of the desirable characteristics of ideal ADR legislation fails to take into account much of what was revealed in the candid comments of bureaucrats, judiciary and government officials interviewed for this study regarding their interests, concerns, needs and desires and the interesting ways that these intersected with, challenged and compromised the practical application of the ADR legislation within the realities of the RHPA regulatory community and its constituent organizations.

The "ideal government support" Pou identifies as being helpful to promoting ADR legislation is conspicuously missing from the RHPA situation, if key informant accounts are to be relied upon. The Government did not appear to offer leadership, training, financial and human resources, and long-term design and resource decisions that are based on solid evaluation data to support the ADR legislation. It may be that Pou envisions a different system upon which his suggestions are modeled and to which they apply, but his admittedly "ideal" suggestions for government support for ADR legislation seem far from the "real world" of the particular government-directed ADR framework and procedures that are richly reflected in the comments of the key informants of this study. However, in the absence of such Government incentives and support, which clearly were seen to be needed if the legislated ADR system were to work, especially for the smaller Colleges, the study informants described the regulatory community itself, informally and through the Federation, as providing

some of that support. In particular, the larger and/or more experienced Colleges were recognized for providing leadership and contributing their expertise, mainly through workshops that allowed members of the regulatory community who wished to learn about and discuss ADR issues to do so.

It might be argued that Pou did not have the self-regulatory model in mind when suggesting how Government could support the implementation of ADR legislation. However, with the power to impose legislation on the self-regulatory Colleges, the Government was, with some justification, perceived by many of the regulatory Colleges to have placed very onerous expectations and requirements on Colleges adopting the "official" ADR process which led, to a tactical, under-the-counter or black market in *alternative* alternative dispute resolution processes or no process at all, as Ewick and Silbey and other legal consciousness scholars cited earlier might have predicted.

Pou contrasts "cross-cutting laws that provide general authorization" with "specific laws building ADR into a particular agency program or decisional process." He favours the more general approach as averting the "fragmentation and confusion" that may result if ADR legislation is "balkanized." In a regulatory community such as the one studied here, where the constituent members are highly diverse in terms of culture, resources and experience, an important concern expressed was the unsuitability of the "one size fits all" ADR legislation approach. Several key

informants suggested that, apart from a general statement legitimizing the ADR process in the RHPA, the specifics of the process each College would adopt – as best suited to its culture, resources, frequency and type of complaint and focus of practice – could and should be described in a regulation specific to that College. Informants cited precedents for following that formula, including the authority to delegate controlled acts to other healthcare professionals. Because regulations must be drafted, consulted about in a public process and finally approved by the provincial Government as meeting the public interest duty of the College, this was perceived by some to be a better approach to legitimizing ADR *and* creating more appropriate, College- and profession-specific ADR procedures. This approach would also have allowed some measure of autonomy and authority to the individual Colleges to design their own procedures, rather than having the same ADR legislation, even legislation modeled on the decades-long experience of other Colleges, imposed on all. That is not to say that, had this approach been taken, many of the College-specific ADR regulations would not have reflected and been modeled on the experience and processes of experienced Colleges with similar cultures and practices. Because the ADR legislation took the "broad-brush" approach, it may have aroused resistance in the legal consciousness of those bristling from other examples of what they perceived as Government authoritarianism exercised through law.

Pou asserts that broad-based ADR legislation (statutory framework) can promote thoughtful, consistent policy towards agencies' use of ADR. However, as key

informants reported, the policy towards the agencies may be consistent, but the practice of the agencies may be various and inconsistent. Pou refers to the role of agency lawyers in the process, the professional "filters" referred to earlier. He views broad-based legislation as raising their awareness and giving them comfort. Several key informants commented on the advice of various College counsel in relation to the ADR legislation. It was evident that Colleges' counsel had very different understanding of the legislation, took very different positions and offered what appeared to be widely divergent advice to their College clients about whether and how to implement the ADR legislation. Some of this divergent legal advice may have related directly to the differences among the Colleges and the professions, but clearly several College informants and consultants viewed the difference in advice as arising from the personal values and beliefs and professional style and approach of these lawyers.

5.7 Legal Gatekeepers and the Clarity and Ambiguity of the Legislation

Several informants referred to the role of lawyers and the legal community in the development and the interpretation of the ADR legislation. The theoretical literature suggests that these professionals play a significant role in mediating between the law and its application in practical circumstances. The MHLTC informants were very clear and insistent that the ADR legislation had been carefully vetted by legal counsel to ensure that it conformed to all civil, administrative and constitutional law requirements and that the process enshrined in the legislation took into account and

reflected best practices in the field of ADR in the courts and other venues. These comments reflect the sense of comfort and assurance legal gatekeepers provide the legislators, that the law as designed and drafted meets the standards of legal form, precedent and practice. As the MHLTC informants took pains to emphasize, the new ADR law had been properly vetted and met current legal norms, conventions and standards in the wider society, as O'Reilly observed regarding the earlier RHPA development process.

College key informants also offered comments about the legal gatekeepers and their advice to the regulatory community, which appeared to vary significantly from College to College and lawyer to lawyer. The RHPA regulatory community engages a relatively small number of experienced, specialist firms to provide advice on a very wide range of College matters. A number of these lawyers have particular expertise in the area of the College complaints and discipline processes, representing the College in member prosecutions and providing advice on College policy and practice in related areas. The College's relationship to law may be partially deduced from the various comments made about the approaches and advice provided by their legal counsel and others' legal counsel as gatekeepers, guardians and interpreters of the law, and their account of the impact of legal advice on College staff and committee behaviour.

Some Colleges had evidently received advice that the ADR legislation was necessary in order for the College to justify and defend its use of ADR in the complaints resolution process. Other Colleges had been reassured by legal counsel that the use of ADR could be justified by the residual clause in the previous RHPA that permitted action not inconsistent with the Act. It was also reported in the interviews that some Colleges had been advised by their legal counsel to stay away from ADR following the legislation, on the grounds of its being a costly and risky process. Those Colleges reported that they therefore had not adopted the ADR process as legislated, although the most compelling reason reported, for which the legal advice provided an additional justification, was the cost. For some Colleges, legal counsel's caution provided an external justification for non-adoption of the legislation, while the managerial costs and other bureaucratic complications appeared to be at least as important a factor influencing their decision.[264]

Legal counsel's advice appeared to be critical to several Colleges in developing an ADR program and in making decisions about the selection and progress of individual complaints cases. This may reflect an individual or cultural fear of the law as a threatening minefield of possible interpretations, and hence of possible mistakes and of "getting it wrong," as was expressed during several interviews. It appeared that

[264] One College informant noted that all he heard in his mind when he read the ADR legislation was "Ka-ching!" – the sound of a cash register, and made up his mind against it at that point. He was pleased that subsequent legal advice to the ICRC cautioning about risks provided additional support to his decision based on cost.

the ADR legislation might not be adopted simply because it would require constant vigilance and consultation with legal counsel to ensure that no wrong steps were taken. Other informants also viewed the ADR legislation and the RHPA as a field of possible interpretations, but relied upon their legal counsel to guide them to the most advantageous and practical among those interpretations, while maintaining adherence to the "spirit" of the law. Their legal counsel might advise them, as was explained, that they could carry out "X and Y" provisions of the legislation, but did not need to do "Z" provision. These legal counsel were perceived by their clients and others to be expert game strategists, able to guide their clients in creative interpretations of the law, while managing to keep them on the right side of compliance. Thus these lawyers were perceived as effective gatekeepers in upholding the law while exploiting its clarity and its ambiguities to assist their clients to meet their other managerial goals.

It also emerged in the interviews that there might be occasions when the College counsel's legal advice on the ADR legislation would be sought, but then modified or disregarded in practice, since College legal counsel was perceived as not really in touch with or capable of understanding the practical realities of the College's work. This appears to suggest that some Colleges in the RHPA regulatory community trusted their own ability, upon receiving legal advice, to decide for themselves what is defensibly "law-abiding" behaviour, that, in their view, meets the standards set by the

legislation, while also accommodating the realities of managerial and professional practice.

Legal counsel for members being complained about were also seen to be important actors in interpreting the ADR legislation to benefit their clients in their relationship with the professional College. Some College informants commented on how a "wily lawyer," acting on behalf of a member with questionable practices, might advise their client to disclose other inappropriate behaviour in an ADR process, so as to shield it from later prosecution under the terms of the Confidentiality provision. Several Colleges expressed concern that these lawyers could "game" the system on behalf of their clients, putting the College and the public at risk. Again, and for this additional reason, the ADR law was perceived by some as introducing potentially risky conditions that, "in the hands of a wily lawyer," could threaten the security and stability of the College and the public interest, and was therefore to be avoided or handled with the greatest caution and with appropriate College legal advice and support, or not used at all.

From the case study there emerged three categories or types of legal gatekeepers of the ADR legislation: the legislators who drafted the legislation with the advice of their legislative counsel, in such a way as to serve the Government and the Ministry's various political and public interest purposes; the regulators who, with the advice of their respective and various legal advisors' opinions, adopted, adapted, resisted or

avoided the provisions of the legislation; and the College members and their legal counsel who might legitimately game the legislation to seek whatever benefits and to avoid whatever costs the legislation might provide or exact. From these observations, drawn from the informant interviews, there emerges a picture of a competitive and collaborative dynamic power struggle among the key regulatory community actors, enabled and mediated, assisted and abetted by their legal advisors, in support of the public, legislator, regulator and College member interests as embedded in and extractable from the provisions of the ADR legislation. The data from the key informant interviews clearly establish the important role legal advisors play within the regulatory community in defining and modifying regulatory culture, in influencing regulatory actors' legal consciousness and in enabling or limiting regulator administrative discretion, as the theory suggests.

5.8 Pou's Ideal Terms and Conditions for ADR Legislation

In addition to suggesting that the ADR legislation reflect an "appropriate balance between prescription and flexibility in employing these processes," Pou suggests that broad-based ADR legislation should protect sensitive communications, acquire neutrals' services and assure judicial oversight. The Confidentiality provision in the RHPA ADR legislation does seek to protect sensitive communications within the process, but informants expressed significant concerns about the appropriateness of such a provision in terms of protecting the public and the public interest, if serious risks were uncovered during the course of an ADR and could not be exposed. At

least one College declared that this condition caused them to hesitate using ADR for any but the most inconsequential complaints, thus losing the use of a process that was needed to help handle the hundreds of complaints received each year. Clearly, the ADR legislation as written does nothing to help in securing professionals' services and thus left many of the smaller or medium-sized Colleges without human resources to make use of the legislation. The ADR legislation does provide for judicial oversight, principally by the ICRC of the College who must review and approve each ADR agreement. However, the confidentiality provision was seen to conflict with the judicial oversight provision in sequestering any information on which the Committee could base its approval or rejection. The HPARB, on the other hand, was seen by its Chair, and by one or two of the College or Consultant informants, to have the authority to supersede the confidentiality provision on an appeal, in the somewhat unlikely circumstance that an ADR agreement approved by the Committee would be referred to the Appeal Board.

Pou further comments that broad-based ADR legislation can assign responsibility within agencies and more broadly for ADR implementation. The Registrar is identified by the ADR legislation as the individual who refers a complaint to the ADR process and the Registrar was most frequently identified by the informants as the key decision-maker regarding the adoption and implementation process. The ADR legislation does state that "the Registrar may, with the consent of both the complainant and the member, refer the complainant and the member to an alternative

dispute resolution process," thus assigning the responsibility to initiate a specific ADR complaint resolution to the College Registrar. In some Colleges, however, the ICRC was seen to play the key political and decision-making role in deciding whether and how to implement the ADR legislation, and whether to refer specific complaints to the ADR process. A variant of that arrangement was a staff recommendation regarding an ADR referral to the ICRC, noting that normally (but not necessarily) the ICRC would follow staff advice. Some Colleges appeared to rely entirely on their legal counsel to advise them whether and how to implement the ADR legislation, so it might be said that legal counsel in those instances were given (or took) the responsibility to decide how the College would proceed with the legislation.

Broad-based legislation, according to Pou, can afford a basis for legislative oversight of agency dispute resolution initiatives and Lande's ideal ADR legislation contains a provision for ongoing review and evaluation of the effectiveness of the legislation. MHLTC commented that there were no plans for reviewing Colleges' ADR initiatives. However, several informants expressed the fear that if the ADR process were not carried out as the Government intended, there would be negative consequences for the offending College. Another suggested that an adverse HPARB review of a College's process, particularly in terms of time taken (despite comments of how complicated, cumbersome and labour intensive the new process appeared to be), there would be a chilling effect on the Colleges and "that would be the end of

ADR everywhere" – that type of response to negative oversight being identified as a distinctive aspect of the RHPA regulatory culture.

Pou also comments that ADR legislation can require agency personnel to focus on the use of ADR case-by-case, in selected settings. The prohibition on the use of ADR for sexual abuse cases was clearly understood by all informants and most expressed their reluctance to use ADR in "serious" cases, or those where there may be additional concerns. Most therefore confirmed that the decision to offer ADR was made case by case, though the categorization of appropriate cases might vary greatly among Colleges. One example involved the use of ADR to resolve financial issues. For those Colleges whose members sold healthcare products or prosthetics, the majority of complaints might concern faulty or otherwise unacceptable products or services. For some of these Colleges, an informal resolution of such complaints was routine, while for others it was seen to fall entirely outside the jurisdiction of the College, belonging instead in Small Claims Court. The ADR legislation offered no guidance to those Colleges regarding these dilemmas over jurisdiction.

Pou concludes with an expression of concern that ADR legislation cannot change the attitudes of individuals or institutions so that they take their statutory mandates seriously and comply genuinely and thoughtfully, not minimally and in a self-serving way. Far more will be needed, he says, to achieve this level of engagement with the ADR legislation. While the ideal approach to and content of ADR legislation sounds

compelling, it is difficult to imagine how these would apply in a typical regulatory community such as the RHPA regulatory community. The theory regarding ADR legislation does not adequately acknowledge and take into account the real and present concerns experienced by individuals and organizations within the community, the power dynamics and relationships within and between organizations, the management and bureaucratic contingencies and the influence of cultural assumptions and political pressures on the organization and the community.

The Howse study captures the attitudes, values and beliefs expressed by the members of a regulatory community regarding the adoption of ADR legislation for their complaints resolution system. The important dichotomy was between those who favoured legislation as providing legitimacy and authority on the one hand, and those who feared loss of discretionary flexibility on the other. While providing qualitative evidence of attitudes towards ADR legislation, since no such legislation had been imposed, no concrete experience of the impact of ADR legislation could be gathered to validate the opinions expressed. This study provides current and concrete data to supplement the evidence presented in the earlier study and confirms some of their subjects' expectations regarding the benefits and costs of ADR, while challenging others.

5.9 The Alternativeness of ADR and the Power of Law

As discussed above, legislation has the capacity to empower and facilitate and to restrict and control behaviour. It also has the capacity to affect attitudes that colour

and determine legal consciousness and, conversely, legal consciousness has the power to colour attitudes towards legislation. The key informant interviews show that when legislation is perceived to empower (e.g., by legitimizing) established behaviours, it is usually viewed positively and easily complied with, even when some additional burdens are involved. The data appear to demonstrate that when legislation is perceived to control or restrict established or preferred behaviours, it may be resisted or interpreted in such a way as to accommodate preferred behaviours wherever possible – by the creative use of the many loopholes and leeways that legislation usually provides.

Lawmakers often enact legislation to govern and control certain behaviours where they perceive inadequate or inappropriate action is being taken, as the MHLTC informants observed in the case of some College complaints resolution processes. However, there are other reasons for legislation, including demonstrating power for strategic purposes, e.g., for personal political advancement, as a compensatory device, and/or to distract attention from negative perceptions of the lawmaker – these two being cited by some of the key informants in the case study. Where the regulated perceive ulterior purposes being carried out at their expense, the data in this study demonstrate that there is likely to be distrust and greater resistance to the legislation, just as the legal consciousness and regulatory culture studies suggest.

Trust, therefore, is an important issue in legislative compliance: demonstrated trust and respect by the legislator for those being regulated; and trust by the regulated in the motives and intentions of the legislator. The interview data contain several examples where trust was expressed by certain Colleges in the ability of the Government to address their needs, as well as by the Government in the capacity of the Colleges to address ADR areas of concern and generally to meet public policy expectations. However, trust was obviously lacking in several Colleges' perceptions of Government, which factor appeared to increase their tendency to avoid, resist, disregard or contest the legislation. The observations in the regulatory culture studies of safety culture, as well as in Cooper's studies of local government undergoing additional juridification of their practices, that the "good faith" of management in introducing new rules is a significant factor in whether the rules are followed and in what spirit and to what effect, appears to be borne out by many of the informant comments.

Understanding the complexity of motives for developing and imposing legislation, as well as the complexity of considerations that influence the response is highly relevant to the discussion of ADR legislation in the Howse study and in Kleefeld's article, and relates to many of the observations by Lande and Pou about ADR legislation. The Howse study presents a hypothetical scenario to representatives of the regulatory community and seeks their responses. These responses are interesting and relevant insofar as they are treated as hypothetical situations. The case study developed and

reported here demonstrates that *particular* ADR legislation takes on the power and other social, political and economic dynamics of the community into which it is introduced and can only be understood and evaluated in that context. It is no longer an abstract process or concept whose features may be viewed as negative or positive in the abstract. It comes down to who will answer the telephone, how consent letters will be drafted and followed up, what might be said or omitted in confidential conversations, whether a particular complaints committee is cautious or overbearing, and so on. These are critical and practical contextual dimensions producing varied and unpredictable responses to any legislation.

The data also suggest that both the Government and College respondents, the College consultants, and the HPARB informant had various personal attitudes towards ADR that also influenced their perceptions and their responses to the ADR legislation. Some perceived ADR in a very positive light and were pleased that the legislation endorsed its use, while others who also viewed ADR as positive and highly beneficial were saddened or discouraged by what they saw as the legislation's constraints on ADR's potential to enhance the complaints resolution experience and the relationships with member and public. A minority viewed ADR as a costly and time-consuming process that, with or without legislation, is more effort than it is worth. Some of those intended to continue with complaints investigations only, while others were intent on avoiding ADR (for the various reasons given), but continuing to carry

on an informal resolution process that they viewed as efficient, practical and within their resources.

The concept of "alternativeness" also appeared to influence informant perceptions and hence responses to the legislation. The MHLTC informants suggested that now that ADR is "a watchword" and had been accepted widely in the justice system, it would be appropriate to recognize it in legislation. The suggestion that, with time, and with wider acceptance, some of the "alternativeness" had been sufficiently reduced that it would be "safe" to endorse it as an appropriate process, but with significant safeguards on its alternativeness to protect users (and the Government) from any residual risk. ADR had become a safe and acceptable enough "alternative" for the Government to be able to endorse it, within strict limits. On the other hand, a number of College informants openly regretted what they perceived as the loss of the "alternativeness" that ADR represented to them. For them, ADR's alternativeness signified possibility, creativity, something outside the usual and the normal. For them, ADR appeared to hold the promise of something new and hopeful, interesting and potentially transformative. They characterized the legislation as limiting and even destroying ADR's potential and the prospect of its capture and destruction appeared to cause them discomfort and even some distress in the telling.

From the case study findings, it appears clear that ADR represented different values to different members of the regulatory community and those values influenced how

they saw ADR being dealt with by the legislation. Some mourned the diminishment or loss of ADR's potential, others were pleased that it had been recognized, others were resentful when it appeared to threaten managerial efficiency, while still others were relieved they could simply disregard a "trend" they had no or little knowledge of or time for. Therefore, it seems clear that the study and the development of ADR legislation – whether and how to legislate ADR – must take into account the legal actors' concepts of ADR as negative, neutral or positive. Such ADR policy development should consider the implications were ADR legislation to be implemented in specific contexts, including the practical aspects that influence how the legislation is interpreted and enacted, in order for the phenomenon that is ADR legislation to be fully explored and understood and effective solutions identified and agreed. The theories of regulatory culture, legal consciousness and administrative discretion, as described earlier, provide the policy researcher with appropriate tools to undertake this complex and demanding task.

5.10 The ADR Legislation and Public Policy Goals

Government statements at the time the legislation was introduced, which were echoed in the interviews with MHLTC informants, declared that the ADR legislation, along with some other legislative provisions, was intended to make the College complaints resolution process more efficient, more transparent, more accountable, more consistent and standardized across Colleges, and more streamlined. It appears evident from the interviews with the College informants that the ADR legislation

might achieve some or all of these goals in only some or a few of the situations where the legislation would apply. For those Colleges that simply refused to adopt the legislation, reasons given included their concern that, far from streamlining the process, it would make the process more cumbersome, costly and complicated, hence not worth adopting. Hence they would continue with their previous processes which the legislation was intended to change.

Over and over in the interviews, concerns were raised that the requirements could not be met by many of the Colleges. The legislated requirements presented such a range of difficulties to many of the Colleges with different kinds of complaints, different cultures, different resources, different bureaucratic procedures, requiring various adjustments to the legislated ADR process or no ADR process at all, that the Government's expectation of consistency and standardization appeared to be significantly undermined. Also, from the comments of several College informants, the requirements in the legislation did not necessarily enhance the efficiency of the process within the College or as experienced by the member or the complainant. Duplication of resources to carry out both investigation and ADR processes within the designated timeframe and parallel processes that might diminish the effectiveness of ADR, were seen to be only two of several "inefficiencies" the legislation introduced into existing processes.

Because the ADR process as legislated presented several insurmountable obstacles to many of the Colleges, several of these had decided to take their informal resolution processes "underground," so as to preserve the option of conversations, enquiries and information requests that might resolve an issue at an early stage, exchanges and arrangements that might have been more or less transparent previously were, in the shadow of the ADR law, less visible and less transparent and accountable. These would not be dealt with by the ICRC and would mostly happen, according to informant accounts, under the legal "radar." In these ways, the declared public policy goals might be met in some instances where ADR was actually applied, but appeared to fail to achieve their purpose in many other situations.

5.11 Permissiveness, Prescriptiveness and the Power of Consequences

Much of the theory regarding whether and how to legislate ADR focused on the issues of prescription and permissiveness and what might be an ideal balance between the two, as well as rigidity and flexibility of the legislation so as to permit adaptation of the rules to the particular needs and interests of the stakeholders, thus preserving informality and creativity as important features and benefits of ADR. The informant responses to the ADR legislation suggest that taking advantage of the clarity as well as the ambiguity of rules to exercise administrative discretion allows significant flexibility for individual and collective interpretation of what the law permits and what it prohibits. Some prohibitions were very clear to the informants, but in some cases, these clear prohibitions (e.g., no sexual abuse cases, confidentiality of

mediation, facilitator not to participate, time limits not to be exceeded) led to an outright refusal to use the legislated process, even in complaint resolution situations that would not be affected by the legislation.

Several informants commented that the consequences or penalties for creative or alternative interpretations of the legislation, apart from the few important prohibitions, were either nonexistent, or not credible. Few College respondents believed that, apart from the media, there were adequate monitoring mechanisms for ADR activity among the Colleges. HPARB was perceived not to have the resources (or the authority) to monitor the ADR process, apart from investigating specific complaints received. Whether as a result of consultation with College legal counsel, independent analysis, or following discussions within the regulatory community, the College informants' conclusion regarding the lack of penalties for not following the legislation also appeared to influence their decisions about how to interpret and apply the legislation in resolving complaints.

Within the regulatory community, informant interviews revealed, there was an ongoing informal exchange of information about various College activities, including those that might appear questionable (or even shocking), but no official mechanism existed to receive, investigate or evaluate the information beyond its being regulatory community hearsay. Therefore, even a serious breach of the legislated prohibitions might escape attention or reporting, thus calling into question the power and effect of

the legislation beyond the administrative discretion of those interpreting and applying it. The theory suggests that community norms and the regulator's desire to be accepted or esteemed within the regulatory community could, in some instances, curb excessive disregard of the law. Informant comments about the expansion of the community to include more professions that may be different from the norm, and references to "turf battles" among long-term community members, suggest a potentially weaker influence of community norms on the individual Colleges.

In the end, the data gathered in the case study appear to confirm that the power of administrative discretion, the possibilities inherent in the ambiguity of rules and the influences affecting the legal consciousness of the various regulators, in the absence of strong cultural norms to act as a restraint or deterrent, determine to a very significant extent whether the ADR legislation can be an effective instrument of Government public policy and intent.

Chapter Six

CONCLUSIONS AND FURTHER RESEARCH

As stated in the Introduction, the subject of this study developed out of reading and reflecting on Lande's and Pou's approaches to the debates regarding ADR legislation and Meidinger's work on regulatory culture, administrative discretion and the indeterminacy of rules. In working to establish a connection between those two aspects of and approaches to regulation, it became apparent that legal consciousness theory might provide a useful bridge to understanding how the theories in these two areas (ADR legislation and regulatory culture, administrative discretion and indeterminacy of rules) support and illuminate one another. With the field of Ontario professional self-regulation providing a recent example of ADR legislation to explore and test the theories, the case study idea was conceived, to be based on theoretical concepts, primary document research and extensive, in-depth qualitative interviews with members of the regulatory community.

6.1 Conclusions from the Theoretical Research

The theoretical research on ADR legislation reported on and discussed in the first part of this dissertation (Lande, Pou) suggests that there are certain rules to follow in developing "ideal" or effective ADR legislation that, if observed, will produce an ADR process that promotes and fulfills, through flexibility and freedom of choice, the benefits of ADR's special character as an alternative to traditional law-based dispute

resolution and the law-based perspective (constitutive legalism) that appears to dominate much Western societies' thinking about the means for resolving disputes and for organizing, controlling and empowering social behaviour (Menkel-Meadow, Edelman and Stryker, Edelman and Suchman).

However, the theoretical research cited also postulates that no rule, however ideal or "clear" is unequivocal, unambiguous or determining in any absolute sense. Whether "clear" or ambiguous, it can be – and usually is – interpreted – narrowly or broadly – to fit the situation, circumstances and context to which it applies, and in the process of applying the chosen interpretation, the rule may become distorted from its framer's intention, thus producing some combination of intended and unintended consequences (Meidinger, Banks, Ford). The circumstances, situation and/or context into which the law is inserted are as defined and understood through the lens of the interpreter's perceptions (legal consciousness) regarding the intentions (overt and tacit) of the law-makers, the historical and current power relationships in the community, and the requirements of the law itself and its potential impact on their conscious and unconscious interests (Friedman, Ewick and Silbey, Meidinger, Reiman and Oedewald, Tharaldsen and Haukelid, Black, Pratt, O'Reilly).

Responses to any new law, therefore, are the result of a complex process of deliberation, much of it invisible, affected by individual interests as well as by the norms, conventions, history and power dynamics of the regulatory community –

regulatory culture – and the substance and purpose of the community's activities, which give rise to the law and to which it is applied (Meidinger, Freeman, Black, Pratt). If the rule appears to align with perceived organizational and/or professional or personal circumstances, interests or goals, it is likely to be complied with. If it presents challenges or is a difficult fit with perceived circumstances, interests or goals, it is more likely to be contested, gamed or negotiated. If it appears to threaten personal, professional or organizational interests, it is more likely to be avoided, evaded, resisted, delayed or ignored (Meidinger, Ewick and Silbey, Cooper, Hull, Larsen, Marshall and Barclay).

Whether any law, including legislation governing the use of ADR, is viewed as coercive and constraining or facilitative and empowering, or a complex and sometimes contradictory combination of these, is deeply influenced by administrators' perceptions of how the law affects the assortment of general and particular interests (values, beliefs, needs, fears, etc.) that are experienced at the level of the individual, the organization and of the larger, in this case, regulatory community (Meidinger), with its narratives of "turf battles" and of competing and complementary interests (O'Reilly, Spoel and James, Gilmour et al). The "alternative" aspect of ADR, perceived as the opposite of law, complementary to law, or escape/freedom from ("non") law (law's power and control), acquires and projects a significant additional dynamic into the discussion of ADR legislation understood within the context of ongoing struggles over interests and power.

The theoretical research described and discussed in this dissertation strongly suggests that ADR legislation, while subject to the dynamic that surrounds any new legislation, carries a special significance, by its very nature as a law about an alternative to law-based approaches and practices. The general conclusions from the theoretical research findings presented in this paper, are that, in order to be truly relevant and useful, theoretical studies of ADR legislation should take into account the phenomena that surround and affect the interpretation and application of any new law; that theory about ADR legislation within a regulatory environment ought to pay attention and be sensitive to the influence of legal consciousness and regulatory culture on how ADR legislation is developed, interpreted and applied within the history, meaning-making and other cultural aspects of a regulatory community; and that the concept of "alternativeness" attached to ADR, carrying with it many possible meanings, is itself an integral dynamic that influences how ADR legislation is interpreted and applied.

This study of ADR legislation is the first to make these necessary and important connections between the landmark theory regarding ADR legislation and recent regulatory, regulatory culture and legal consciousness theory that reveals and explains heretofore overlooked and under-explained aspects of ADR legislation that can significantly influence whether and how ADR legislation is developed, interpreted and applied.

6.2 Conclusions from the Methodological Theory

Primary Document Research

Preparation for both the theoretical and interview research included extensive document research and intense reading and analysis of primary resources, including Government and HPRAC reports, scores of detailed submissions to Government and HPRAC by a wide range of stakeholders, an extensive sequence of debates in the Ontario Legislative Assembly and in the Legislative Standing Committee on Social Policy, scores of College publications (numerous monthly newsletters and annual reports over a period of years for all the Colleges included in the survey, as well as several others not interviewed directly), College website pages describing the complaints resolution process to members and to the public, and published commentary on the legislation by legal firms specializing in RHPA regulatory community issues. While this primary research was necessary and invaluable in creating a knowledgeable and aware researcher, able to search the regulatory and legal consciousness theories for relevant arguments to explain, sustain or challenge the researcher's assumptions about the culture of the community and comments made by the various legal actors in the field, it may have also encouraged in the researcher certain premature conclusions about the culture question, "What is going on here?" and introduced possible biases that affected parts of the research design – including the interview approach and questions and the organization, coding and analysis of the results – for better and for worse. One conclusion that emerges from this observation is that further study of this subject from other theoretical perspectives, including and

perhaps especially non-issue-focused grounded research, could reveal and mitigate such biases.

Case Study Approach and Method

Several of the theorists cited in this paper express frustration with the lack of solid and detailed in-depth empirical studies to support or challenge existing theories. The theoretical research also revealed a growing field of legal consciousness case studies, including an examination of the effects of "juridification" of local government discretionary powers in the U.K. (Cooper). A recent Australian and New Zealand case study enquired hypothetically about the possible impact of ADR legislation in those jurisdictions' health profession self-regulatory field (Howse et al). These studies suggest how legal consciousness may influence regulator attitudes toward legislation and ADR legislation in particular. However, no comparable study existed to enquire and demonstrate whether and how the theory about ADR legislation – its development, interpretation and application – might be influenced by regulatory culture, legal consciousness, administrative discretion and the indeterminacy of rules. This gap in the research called for a case study into the impact of an actual piece of ADR legislation introduced into a regulatory community. The ADR legislation contained in the Ontario Regulated Health Professions Act revisions provided an opportune example.

The design of the case study was intended to produce evidence (if such existed) of legal consciousness, regulatory culture and administrative discretion in relation to the new ADR legislation among the key stakeholders in the RHPA community – Government, Colleges and HPARB (judiciary). Therefore, an issue (ADR legislation)-focused, in-depth, phenomenologically oriented approach (Sackmann) was selected, which produced robust results for analysis. The identification of the issue (this particular ADR legislation) allowed respondents to express themselves freely, in the course of which many tacit as well as overt assumptions, attitudes, beliefs, values (phenomena) were revealed, reflecting a rich, dynamic and complex combination of personal, organizational and community perceptions regarding the legislation, its context and its impact. In the course of the analysis it became clear that the issue chosen as the focus for this type of enquiry influences what aspects of the informant's perceptions/phenomenology are revealed (thus leaving other, perhaps important aspects undiscovered and unidentified). The researcher's focus on the issue also has the potential to give more importance (positive or negative) to it than it would otherwise have in the informant's mind if the researcher had not suggested it.

With these caveats about the approach, which are generalizable to nearly all phenomenological studies, it is nonetheless worth noting that this case study is the first to enquire as deeply into the perceptions and reactions of legislators and regulators to actual ADR legislation and the first to seek to verify the theory regarding the need for ADR legislation and the range of factors that might influence

whether and to what extent it is adopted. Since a grounded study might have produced different data and avoided the possible skewing of informant perceptions towards the researcher's interest, giving an aura of greater importance to the ADR legislation and encouraging the informants to develop speculations about it where previously there might have been little interest, it is not possible to conclude that the research approach taken is necessarily the best, in terms of producing data totally uninflected by researcher influence. However, this might be an interesting avenue of future research regarding the phenomenology and perceptions of ADR legislation.

The richness of data produced by the three sets of questions based on Friedman's description of legal studies suggest that the "Friedman formula" is a useful organizing conceptual framework and focussing tool for investigations to determine what "social and legal forces press in to make the law," how to understand the core provisions of the law in relation to its origins, and how the values, beliefs, attitudes, circumstances and conditions that gave rise to the law governing a regulatory community influence the behavioural responses to it.

6.3 Conclusions from the Interview Data

A careful and systematic analysis of the interview data led to the following conclusions about the relationships among the theories regarding ADR legislation, regulatory culture, legal consciousness, administrative discretion and the indeterminacy of rules.

In discussing regulatory culture, the five elements Meidinger cites served as a model for analyzing the dimensions of the RHPA regulatory community and the RHPA culture revealed in the interview data. Moreover, the data appear to demonstrate clearly that the relationships among the organizations and individuals responsible for and affected by the RHPA constitute a regulatory community as Meidinger describes it. Furthermore, the elements that Meidinger identifies as constituting regulatory culture that, in turn, constitutes regulatory administration, appeared in the findings to influence regulatory attitudes and behaviours.

The data also provide evidence that legal consciousness – the ways in which legal actors perceive and respond to law and to the legal environment – is a significant determinant of how administrative discretion will be exercised in response to the legislation. Awareness of and participation in the legislative development consultation process appeared to be particularly relevant to the regulators' choice of how to respond to the ADR legislation. Thus the concept of procedural fairness (and its opposite, procedural injustice) can be seen to have influenced legal consciousness and thereby bureaucratic decision-making in the legitimate exercise of administrative discretion. The sense of not having participated in the development of a law with significant impact on the values (e.g., public service, efficiency, fairness, accountability, transparency) and bureaucratic processes (e.g., costs, benefits, staff and committee decision-making procedures) of the organization, or having been consulted but having any serious concerns and recommendations ignored, appeared to

influence the extent to which previous informal bureaucratic practices were continued or discontinued and the new system adopted, avoided, distorted or resisted.

Administrative discretion regarding whether, to what extent and in what manner to implement the ADR legislation also appeared to correlate strongly with how the informants viewed the values and purpose of ADR, based on their understanding of ADR as a process distinct from and alternative to law and as an efficient way of handling complaints of a "non-serious" nature that provided an appropriate level of public service while protecting the public interest.

The set of questions and the subsequent conversation regarding the appropriateness of the law provoked discussion of the nature of ADR and whether it is appropriate to legislate ADR, what aspects should be legislated and what left to the discretion of the particular organization, allowing it to accommodate its particular needs within a flexible legislative framework. The legislation was seen to confer necessary authority and legitimacy on an alternative process, much as the ADR law theorists assert to be a legitimate purpose for legislating minimal ADR legislation, while at the same time sacrificing at least some of ADR's flexibility and creativity in favour of the certainty and consistency that law, through its coercive and social-cultural power, may provide.

The tension between the "alternativeness" of ADR and the prescriptiveness of law was reflected in some regulators' intention to maintain the previous informal system

as a somewhat hidden, "backroom" alternative to the formal ADR process and its constraints, thus seeking to escape the "cage" or "gaze" of the law. Discretionary decision-making therefore appeared to the bureaucratic decision-makers to be a legitimate way to extend the policy- and law-making process to adapt "the law on the books" to the practical sphere of the regulatory organization, its culture and its resources, and also possibly a way of expressing community and individual power beyond the reach of the law. Such practice of discretionary law-making can be observed in this case study to have produced both intended and unintended consequences, because the law, while seemingly precise, contains just enough leeway and loopholes, as the theorists cited earlier predicted, and as the Government officials openly admitted, that the regulator has some latitude to interpret and adapt it *in situ*, as so many of those interviewed had already done or intended to do. The data thus support the theory and provide numerous examples of how "street-level bureaucrats" have exercised or intend to exercise their discretionary power, prerogative and authority to "manage" – optimizing or minimizing – the impact of the law in their regulatory domain.

In introducing the *Health System Improvements Act* 2007 in the Legislature, the Minister identified several specific goals that the new complaints resolution provisions, including ADR, were intended to achieve:

1. Streamline the complaints process, addressing the concerns of patients and citizens frustrated by the lack of transparency or the slowness of the complaints process;
2. Standardize the complaints process;
3. Create very clear timelines and expectations about the appropriate response;
4. Create circumstances that will, in a very deliberate way, enhance the transparency with which these matters are addressed.

The interview data demonstrate, therefore allowing us to conclude, that the legislation is only partially effective in achieving its purpose. In many of the situations described, the process does not appear to have been streamlined. It appears to have been complicated or done away with in several of the Colleges. It does not appear to be standardized across Colleges, with informal processes persisting in many situations, and a wide variety of interpretations as to what types of complaints can be included, how and when to, as well who should, obtain consent, when and how the Committee should be involved, and so on. The timelines turn out to be less clear than the legislation leads us to expect and the levels of transparency are highly varied among processes. The theory outlined in this paper provides several very plausible reasons why the ADR legislation fails or only partially succeeds in meeting the public policy goals, and while many of these outcomes might have been anticipated from knowledge of the theory, the case study provides concrete evidence both of the specific behaviours and of many of the motivations behind them.

Have well-established bureaucratic practices subverted the achievement of those goals? On the basis of the interview data, it can be concluded that, at a minimum, bureaucratic needs, interests, resources and habits have influenced the extent to which the legislation has been adopted, adapted, resisted or ignored. The data also reveal that other, less tangible influences may determine the extent of cooperation with or resistance to the ADR legislation. I believe we can fairly conclude from this study that, through the evidence presented of conscious and unconscious meaning-making, community norms and conventions and bureaucratic interests, ADR has been construed as both a conceptual ideal and a useful instrument of bureaucratic efficiency and effectiveness at one end of the spectrum, and as a symbol and tool of interfering and intrusive Government power at the other.

On the basis of the findings of this study, interpreted through the lens of the theory presented, future ADR legislation drafting would benefit from greater emphasis on enquiring into and understanding the motives for the legislation, from the perspective of all the major stakeholders. Good faith intentions and trust among the parties appear to be two important factors in the development of legislation that influence outcomes. Cynicism regarding motives for the legislation appears to be one serious impediment (among others) to successful achievement of legislative goals. In-depth study and open discussion of the issues and interests within the regulatory community that influence regulatory culture would perhaps be desirable in order to build more conscious awareness of the issues at stake and enable more meaningful legislative

consultations in the early stages, thus avoiding at least some of the negative unintended consequences. These discussions would benefit particularly those smaller players who proportionately may have more at stake in terms of resources required to implement the legislation. Procedural fairness appears to be an important value in how those discussions are organized and carried out.

The data from this study make an important contribution to the growing body of empirical evidence that reveals the wide range of power dynamics within the regulatory bureaucracy that influences legal consciousness and regulatory administrative discretion. However, very little such evidence is currently available to inform the development of ADR legislation. Since ADR use is growing in many settings, including regulatory communities of many types and in various domains, it can be confidently argued, on the basis of this study, that a greater understanding of the factors and issues at play in the regulatory environment is critical to ensuring more effective ADR legislative development processes that lead to more appropriate, more manageable and/or more predictable outcomes for those involved with administering and participating in the ADR process and for those with a stake in the value of ADR as a concept and as a useful instrument for complaints and dispute resolution.

6.4 Further Research

Further research is required to test this research method in other areas where ADR legislation has been proposed or enacted. It would also be important to return to the sample regulatory community studied in this case to find out whether and how the challenges identified at the time of the interviews have been met and overcome and whether any new challenges or obstacles have been found in the process of applying the legislation over time. As noted above, a comparative case study might apply the method, but take a more grounded approach to data-gathering, thereby reducing the bias the researcher's interest in ADR legislation might introduce into the study, and report on any difference in the results.

6.5 Final Thoughts

Various categories of legislation have their own unique dynamics that affect how they are perceived. ADR legislation is especially interesting because it deals with and tests the boundaries between law and alternatives-to-law and offers a unique opportunity to explore how people, in this case regulators, perceive law and non-law or alternatives-to-law. ADR legislation raises provocative questions about whether and how law can or should be applied to non-law or alternatives-to-law. At the heart of these questions there is a paradox, a certain tension and irony surrounding attempts to "legislate flexibility" that Pou describes as "inherently ridiculous," and that constitutes part of the provocation and the interest in exploring whether and how

those exposed to ADR legislation, or the possibility of it in their field of responsibility, recognize and deal with this tension and paradox.

This study has explored these provocative questions as they have been discussed in the theoretical literature about ADR legislation and legalism. Having found a gap in the scholarship addressing ADR legislation that left much of the whether, why and how to legislate ADR processes unexamined and hence poorly understood, this study has focused on developing a theoretical framework for exploring ADR legislation in the regulatory field in order to expose and better understand what dynamics affect the development of and responses to ADR legislation.

Regulatory theory research yielded a promising approach to and process for analyzing legislative development and the outcomes of legislation – an analytical framework that combines three well-researched theoretical fields – thus creating a new analytical tool that can be applied to understanding ADR legislation and perhaps a useful approach to the broader field of regulation. By developing a set of three core fields of questions from Friedman's socio-legal theory to elicit responses that can be grouped into one of Ewick and Silbey's three legal consciousness categories that in the regulatory sphere are manifested in acts of administrative discretion, the results can then be analyzed by applying the five elements of Meidinger's regulatory culture to yield possible causal connections and the possibility of more effective solutions to regulatory and ADR process issues. The study then applied this formula or method to

a specific case study of ADR legislation in the regulatory field to test the method's validity and efficacy.

Therefore, while this study draws inspiration from and builds on previous studies and theories of ADR legislation, it goes well beyond those studies, particularly recent research into the use and appropriateness of ADR legislation in the self-regulatory model, by introducing and applying current theory about and empirical research into regulatory culture, legal consciousness and administrative discretion. It answers the need for real-world data about how regulators think, feel and act with respect to legislation that affects the exercise of their statutory obligations and may challenge their regulatory authority and sense of autonomy. It also provides a research model or framework for future regulatory research and, in this example of the framework in use, provides unparalleled insights into the significant considerations that influence and may ultimately determine whether, why and how ADR legislation – and perhaps any new legislation – is adopted, contested or resisted in the regulatory field.

APPENDIX A

COMPREHENSIVE METHODOLOGY

QUALITATIVE RESEARCH APPROACH AND METHODS

A. 1 Document Research

In addition to consulting the relevant legislation, a number of critical documents informed the design of the dissertation and of the case study. Principal among these were the Health Professions Legislative Review report, *Striking A New Balance: a Blueprint for the Regulation of Ontario's Health Professions* 1989 (Toronto: Queen's Printer); and the consultative documents and reports of the Health Professions Regulatory Advisory Council, *Weighing the Balance* 1999; *Adjusting the Balance: A Review of the Regulated Health Professions Act* 2001; *Regulation of Health Professions in Ontario: New Directions* 2006.

The HPRAC consultative process elicited a significant number of responses from stakeholders of the regulated health profession system. A search was made to obtain as many of these representations from the health regulatory Colleges and from interested stakeholders, such as patients' rights organizations, that addressed the discussion of ADR use in the College complaints and discipline processes. Some sixty documents were searched and read to understand the issues associated with the ADR process at different points in the time before and after the introduction of Bill 171, the *Health System Improvements Act* 2007, which contained the ADR legislation

in the form that is discussed in this paper. The primary document research process began in 2007, after the Act was introduced and before it was proclaimed and continued throughout the dissertation research.

In addition, a search was made of the Debates in the Ontario Legislative Assembly at the time the legislation was introduced and at subsequent readings. Stakeholder representations to the Legislature Standing Committee on Social Policy were reviewed for references to the ADR legislation and any concerns raised by the Colleges regarding the provisions at that time. Many written submissions to the Committee were available on College websites and these too were consulted for references to the ADR legislation and any concerns raised about it.

Extensive research was also conducted into the College websites and their descriptions of their complaints process, with special attention to descriptions of informal or formal resolution processes, both prior to and after the legislation was proclaimed. Those web pages were retained in pdf format for the purposes of noting changes following the proclamation of the legislation. In addition to the College descriptions of the complaints processes, many College newsletters and annual reports archived on the websites were consulted for articles describing the new ADR legislation and its impact on the College processes. These included the period from approximately 2006 (before the legislation) to 2011 (after the legislation).

Grey Areas, a newsletter published by law firm Steinecke, Maciura and LeBlanc, Barristers & Solicitors, and archived on the company's website, was consulted for analysis and advice it provided, mainly to the RHPA regulatory community, regarding ADR processes and Bill 171, published over the period 2001 – present.

Intensive research and careful reading of the Government, HPRAC, College and other stakeholder documents during the initial period of investigation provided a rich background narrative comprising many voices and perspectives regarding the issues to be addressed in the dissertation and provided initial direction for the theoretical research undertaken in the second phase of the research, leading to the development of the case study.

The recent report by Justice Patrick Lesage on his enquiry into the complaints and discipline process of the Ontario College of Teachers (2012) was also reviewed in detail, as it makes substantial reference to the revised RHPA complaints and discipline processes as a useful resource to address the perceived problems that gave rise to his appointment by the College of Teachers in response to media criticism.

A.2 Case Study – Initial Approach

In order to test the theory regarding ADR legislation, and the connections between legal consciousness, regulatory culture and administrative discretion that might help

to elucidate and explain regulatory responses to it, it seemed useful to design and conduct a case study to gain empirical evidence from those directly involved in the field of regulation. Being aware of the recent ADR legislation in the revised RHPA, the first step in planning the project was informal consultation with three experts close to the potential field of study. These individuals confirmed my initial belief that a case study could be developed and were helpful in suggesting sampling criteria that might ensure adequate representation, as well as suggesting individuals to approach.

Design of the Case Study

The theoretical framework and the document search influenced the case study design. The theory strongly suggested an exploration of informants' conscious and unconscious attitudes toward the legislation, what gave rise to it and how it would influence their practices. Much of the literature on discretion emphasizes the influence of community on individual perceptions, values, beliefs, motivations and behaviours. It was important, therefore, to find a research approach that could elicit and capture as much of the tacit as well as the acknowledged sources of beliefs and behaviours as possible.

A number of possible approaches were considered, including survey questionnaires; structured interviews with a series of questions relating to the ADR legislation and regulator practices; in-depth, unstructured interviews with key informants; and in-depth, semi-structured interviews with key informants or a combination of

questionnaires and interviews. Issues of representative sampling, how to frame the research to potential informants (how much to suggest to them without influencing their responses) and how to record the data were among the key issues identified and considered.

Investigations by Reiman and Oedewald,[265] Sackmann,[266] Sommer and Sommer,[267] and Ewick and Silbey[268] that directly address and discuss the challenges of exploring phenomenological elements of the subjects' legal consciousness and the influence of the community, were carefully reviewed in the light of the regulatory culture and administrative discretion scholarship. After considerable deliberation, it was decided that this study would rely on a combination of investigative methods that have been shown to yield robust results when examining administrative decision-making and cultural phenomena in the regulatory field.

In-depth, issue-focused, phenomenologically oriented interviews

Sackmann's research into various types of culture studies suggests that the most fruitful investigations of culture rely on a combination of inductive and deductive

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[265] Reiman & Oedewald 2002 *supra* note 17
[266] Sackmann *supra* note 233
[267] B. Sommer & R. Sommer, *A Practical Guide to Behavioral Research Tools and Techniques* 4th Ed. (New York: Oxford University Press, 1997)
[268] See particularly the discussion of legal consciousness methodology in Ewick & Silbey 1998 *supra* note 21 at 251

qualitative research, principally in-depth semi-structured or unstructured interviews with key informants that are issue-focused.

> In-depth interviews are used to uncover culturally based values, cultural beliefs, or knowledge structures. ... [S]uch an in-depth interview may be called *ethnographic,* clinical or *phenomenological.* The common denominator is that researchers do not introduce cultural issues from the outside or from their own cultural reference groups. Instead, by using broad and open-ended questions, by trying to use the insider's language, and bracketing their own assumptions, the interviewers entice the interviewees to unravel aspects of their everyday life in their particular cultural setting.[269]

A semi-structured in-depth interview intended to uncover unconscious cultural beliefs, values, understandings or assumptions can sometimes frustrate or fail its research purpose by its lack of direction or focus. Therefore, Sackmann goes on to argue that

> "[a]n issue focus enables both the surfacing of the tacit components of culture, and comparisons across individuals and research settings. ... The [issue] should have the quality of a projective device – that is, provide a specific context but leave enough latitude for interpretation. ... The tacit components of culture become apparent in the specific interpretations attributed by respondents. ... [A]n issue focus enables comparisons, because it introduces a specific context that forces respondents to draw on the same stock of knowledge. It channels the attention of respondents to the same cultural aspects within a given organization and reveals their framework about this issue. ... The issue serves as a projective device, leaving latitude for different interpretations." [270]

Sackmann favours combining the issue focus, that surfaces cultural understandings in relation to a specific circumstance, with a phenomenological orientation that focuses "on insiders' perspectives, their everyday theories of organizational life, and what

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[269] Sackmann *supra* note 233 at 301 (italics in original; references omitted)
[270] *Ibid* at 304

they consider relevant in that particular setting."[271] The combination of an issue focus and phenomenological orientation invites and promotes open and in-depth exploration of the informants' awareness and understanding through the lens of a specific issue with which they have reasonable familiarity. As the informants discuss the issue, Sackmann asserts, the phenomenology of the culture is revealed and any researcher bias is significantly reduced. The issue, as "projective device" (in this case, the ADR legislation), allows "respondents to reflect on taken-for-granted aspects of their work life. It [is] sufficiently ambiguous and thought-provoking to surface subconscious beliefs and at the same time non-threatening, because respondents ... answer freely and openly."[272]

Reiman and Oedewald assert that the phenomenon under study, such as ADR legislation, can only be understood in the context of the culture from "which it is difficult or impossible to separate the phenomenon itself."[273] Their research into regulatory culture confirms other cultural researchers' findings that questionnaires are inadequate means to uncover embedded cultural understandings. Their comparative research among regulatory culture research methodologies validates and extends the cultural research methodology outcomes earlier reported by Sackmann.

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[271] *Ibid* at 305
[272] *Ibid* at 310
[273] Reiman & Oedewald 2002 *supra* note 17 at 8

Timing of the Interviews

The interviews were scheduled to take place in the latter part of 2009 and early 2010. By that time, the ADR legislation had been discussed in connection with the 2006 HPRAC report and advice to the Minister of Health and Long-Term care on RHPA revisions. A period of comment had occurred prior to the introduction of the legislation in the Legislative Assembly later that year. Early in 2007 the legislation had been debated and submissions heard at the Legislative Standing Committee on Social Policy, and passed in June 2007. The proclamation date of the legislation was June 7, 2009. Therefore, the legislation had been known for fully two years prior to the interviews, a period during which preparations could be made to implement the legislation at the time of its proclamation. Just before interviews were scheduled to take place, the Government introduced, on May 11, 2009, new legislation to amend the RHPA,[274] giving the Government power to appoint a Supervisor to take over the management of an RHPA College, replacing the elected and appointed Council members and the Registrar in directing all College affairs. This development appeared to shock and perplex many in the RHPA community and it was frequently referred to in the interviews that were held while the Standing Committee on Social Policy was conducting hearings on the Bill during late 2009. It is likely that this

[274] Bill 179, Regulated Health Professions Statute Law Amendment Act SO 2009 c 26 www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b179ra.pdf at 8. For a summary of the Colleges' concerns, see Ontario Legislative Assembly, Standing Committee on social policy, "*Bill 179, Regulated Health Professions Statute Law Amendment Act, 2009*" in Official Report of Debates (Hansard), No SP-34 (September 29, 2009) at 1500

surprising turn of events had an impact on the way at least some of the College informants in particular viewed the Government's motives towards the Colleges and their attitudes towards collaborative policy-making and self-regulation. Thus their view of the ADR legislation during the period of the interviews was, to some extent, and in some cases, coloured by this event. However, the currency of this issue also helped to highlight and make more vivid existing dynamics within the regulatory community that might not otherwise have been as immediately accessible. In other words, this development helped to define the cultural landscape in ways that were useful to this study.

Case Study Sample

The key informants were selected so as to obtain a diverse array of College and other key stakeholder perspectives from those most directly involved or associated with the policy development and practical implementation of the ADR legislation. Therefore, it made sense to include representatives of the Ministry of Health and Long-Term Care (appointed administrative officials), the Health Professions Regulatory Advisory Council (appointed advisory and consultative officials), the Health Professions Appeal and Review Board (appointed judicial officials), and representatives of the professional regulatory bodies (Colleges), including large, medium and smaller Colleges, Colleges where the professions provide services funded by the provincial

public health insurance program (OHIP) and those whose services are funded privately, by individual clients or by their private insurers.[275]

From the Colleges, input was sought from the Registrars (chief administrative/ executive officers with overall regulatory and statutory as well as management responsibility under the new legislation for determining complaints cases suitable for ADR), senior College staff responsible for the administration of the complaints resolution process, elected College Council members responsible for judicial decisions regarding complaints resolution, consultants to the College complaints resolution processes, including ADR experts and legal counsel. This selection was made to ensure broad input to the study as well as to explore and validate, as far as possible, Meidinger's concept of a regulatory community whose interactions constitute a regulatory culture that influences individual responses to regulatory change.

Among those approached, only the two HPRAC officials declined to be interviewed – one because he was in retirement, and the other for want of time. It would perhaps have provided a more complete (and more complex?) view of the regulatory community had these perspectives been included, but it is doubtful that their absence invalidates the relevance or the usefulness of the findings.

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[275] See Appendix A: Methodology - Exhibit 1: Health Regulatory Colleges in Ontario

In the end, interviews took place with 24 individuals,[276] 17 of whom were College officials (comprising 11 College Registrars, 5 Directors of Complaints and 1 Complaints Committee Chair). Two senior officials of the Ministry of Health and Long-Term Care were interviewed, as well as the Chair of the Health Professions Appeal and Review Board, 2 College legal counsel and 2 consultants in the field, both of whom had long-time, in-depth experience working with the complaints process within the RHPA regulatory system and experience of providing complaints resolution support to Colleges other than those interviewed directly. The College key informants were selected to provide a representative sample of conditions and experience. Fourteen of the total 21 Colleges (sixty percent) were included, comprising 7 representatives of the smaller Colleges (up to 4,000 members), 4 of the medium-sized (4,000 to 8,000 members) and each of the 3 largest (more than 8,000 members) Colleges. A sizable majority of the 21 Colleges have fewer than 4,000 members.

The study comprises Colleges that had well developed, structured ADR processes, more informal processes and no process, prior to the ADR legislation. Further criteria for selecting Colleges and interviewees were the type of healthcare the College members provided, specifically whether the care was direct, hands-on client interactions, technical services with little or no client interaction, and/or provision of

[276] See Appendix A: Methodology - Exhibit 2: Key Informants Interviewed

products, including prosthetics or other assistive devices, or a combination of those services. A final criterion was whether the services provided were publicly or privately funded. The sample selected attempted to ensure as much inclusiveness as possible of the potentially significant variables that might influence a) the types of complaints received and b) the perceptions of the appropriateness of the ADR legislation and the administrative responses to it.

Approach to Key Informants

An informal approach was made to the informants identified, explaining in general terms the purpose of the study and inviting them to participate.[277] Based on their response, contact was made by email or by telephone to schedule the interview. No conversations about the subject of the interview took place prior to the interview itself.[278] Attached to the email scheduling the meeting was an Ethics Letter[279] setting out the university's policy regarding ethical research on human subjects. The letter also described the form of the interview as a discussion or conversation and the time period requested between 45 minutes and one hour. The letter also set out how the interview would be recorded – through traditional note-taking and by voice recording. It also set out the policy for safeguarding informant information and the schedule for destruction of notes.

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[277] See Appendix A: Methodology - Exhibit 3 – Original Contact Email
[278] See Appendix A: Methodology - Exhibit 4: Email Scheduling Meeting
[279] See Appendix A: Methodology - Exhibit 5: Ethics Letter

The letter introduced some topics that the informant could consider prior to the interview, however there was no expectation of this being a formal question and answer survey. The suggested areas for discussion can be found in the Ethics Letter, copies of which they would be asked to sign at the interview, including an option to have their comments attributed to them directly in the dissertation or not. All but one informant opted to be quoted according to the terms laid out in the letter. However, in light of the depth and candidness of the conversations, and in order to protect individuals while ensuring that all the relevant issues could be heard, it was decided not to identify sources by name in reporting the findings of the study.

Bias

As a researcher, my presence within the regulatory culture asking questions about the ADR legislation no doubt inflected the discussion. The fact that research was being undertaken into the subject area gave it a prominence, albeit briefly, that it might not otherwise have had for the informants. Therefore, simply drawing attention to the subject in some sense can distort its importance. Also the fact that it was a faculty of law student, as opposed to a sociology or political science or health administration student, might reasonably be supposed to have conditioned to some extent the way the informants viewed, prepared for and responded to the interviews.

The articulation of these themes in advance of the interview was intended to provide a focus for the informant, but, it must be said, mentioning specific themes also had a

potential to influence the informants' attitudes towards the researcher and toward what information they might imagine the researcher to be seeking (problem of *social desirability*). The risk would be that some would try to provide what they thought the researcher was looking for, while others might take an oppositional stance, while others still might be uninfluenced one way or another by the themes mentioned. It was decided to risk mentioning the themes in advance and then to take any possible influence that decision might have caused into account during the analysis and reporting of the responses.

Data Collection: Key Informant Interviews

Meetings with the Ministry officials took place in a meeting room at the Ministry offices in downtown Toronto. HPARB and College key informants were interviewed in their respective offices throughout the Greater Toronto area. Consultants and legal counsel were interviewed either in their offices (one of which was outside Toronto) or in convenient public places that afforded privacy and confidentiality.

The informants signed the Ethics Letter prior to the start of the interview and the length of time available was established at generally one hour. The purpose of the interview was again briefly explained and permission to record the interview was requested and in every case was granted. In three cases, two people attended the interview. Having been notified of this in advance, two letters were brought for signature. In the case of these three interviews, the conversation at times during the

interview became a dialogue between the informants, with the researcher in the role of interested observer of animated exchanges in which important issues were debated by two knowledgeable professionals. This format was beneficial in revealing and demonstrating, in even a small way, the content and the dynamics of the discourse that takes place within the organization and within the regulatory community.

The interviews focused on three core subject areas: What do you think gave rise to the ADR legislation? In your opinion, how appropriate is the actual ADR legislation? What impact has the ADR legislation had on College practices? This basic interview protocol, designed principally for College key informants and their consultants/ advisors, was modified slightly to reflect the different perspectives of the officials of the Ministry of Health and Long-Term Care and the Health Professions Appeal and Review Board.

Interviews lasted approximately one hour. Only a few were briefer and most were longer. The discussions within each stage of the interview process were lively and intense, and included many probing, follow-up questions by the researcher for clarification and further explanatory information. At times the sequence of core question sets were varied when the informant(s) included information addressing a subsequent area of enquiry in their initial responses. The interview then flowed in the direction the informants led, thus providing precious insight into their perceptions and the inner logic of their responses. An opportunity was found later in the interview to

return to any interview area that had been "skipped" as a result of the informant's free flow of ideas.

Conclusion and Acknowledgement of Key Informant Interviews

The interviews concluded with a summary of how the information would be handled and with a request for permission to follow up with additional questions for clarification, if that appeared necessary. All informants agreed to that request, although no further follow up occurred. Shortly after the interview, an acknowledgement email was sent to each informant, thanking them and acknowledging the time and information they had contributed to the research.[280]

Data Analysis

All the key informant interviews were voice-recorded and the recordings were professionally transcribed. The transcripts were reviewed many times and the substance of the interviews was analyzed according to principles of deductive coding based on the previous theoretical and document research. The interview results (the verbal and conceptual content of the respective interview transcripts) were analyzed and clustered by similarity of major concepts and themes mentioned, with respect to perceptions of how the ADR legislation came about, how appropriate the ADR provisions appear to be and what impact the ADR legislation has or will have had on College practices that were being followed prior to the legislation. Further interaction

[280] See Appendix A: Methodology - Exhibit 6: Sample Acknowledgement Email

with the data, and deductive analysis of the comments with respect to concepts that emerged from the interviews themselves, led to additional, finer categorization of the responses according to additional major and minor themes that emerged, supporting a more detailed analysis and subsequent reporting of the data.

As a result of the deductive coding process, some twenty-four hours of remarkably candid reflections were condensed into some fifty pages describing the constellation of issues that, taken together, embody and represent the informants' perceptions of the various regulatory culture dimensions within their legal consciousness that govern their administrative discretionary decision-making, as revealed in their attitudes toward the ADR legislation. Through attention to these narratives, it is possible to gain a sense of the community and the individuals that comprise it and to hear the tensions and the challenges expressed in their own words. From more than twenty hours of conversation, observations have been selected that appear most relevant and important to the subject matter of this study and useful to understanding the individual decision-makers and the community and culture in which they live and work.

Because the data reported are individual perceptions formed from a variety of influences and reflecting the informant's conscious or unconscious interests and ideas about what may be appropriate or beneficial for them to reveal/say to the researcher in the context of the interview and the overall research project, this dissertation makes

no claim that the perceptions recorded, reported and which form the foundation for the data analysis, discussion and research conclusions are "facts," or in any sense objectively "true." The informant perceptions are phenomena of subjective truth or reality regarding how they perceive themselves, their work and the community that they voluntarily reported as the context for their administrative choices. The possibility that the specific nature and choice of perceptions reported by the informants may have been intended to influence the researcher's perceptions, reporting of results and the outcome of the research is, in itself, a phenomenon worth noting. Other scholars accessing this rich resource of material would perhaps focus on different aspects of the material presented, interpret the comments differently, make different observations and draw different conclusions from those presented in this dissertation.

In reporting these results, the source is indicated by a code that reflects the College size (SC, MC, LC) and a number that has been assigned to that College within that size-type. The comments here are reported verbatim, except for minor "cleansing" of the very common ums, ahs, and "you knows." Some minor editing for clarity is indicated by square brackets [ ] and breaks (...) in the quoted text.

Following the example of other legal consciousness case studies (e.g., Ewick and Silbey, Cooper), the Findings sections include robust selected narratives that convey a real sense of the individuals, their perceptions and perspectives. Ewick and Silbey's

reports on the legal consciousness of their subjects is the model for reporting the views expressed by the key informants in this study. By providing more than the most condensed snippets from the interviews, this report allows the reader to enter more fully into the culture the informants inhabit and glimpse the values, understandings, beliefs and meanings that inform the informants' thinking and behaviour about their work, their responsibilities, the power dynamic and socio-legal framework they perceive as governing their work and the impact of the ADR legislation within that cultural context. I believe that the chosen methodology has produced robust results that offer unparalleled insights into the administrative discretion process within the RHPA regulatory culture, thus promoting a more grounded and nuanced understanding of the consequences of legislative initiatives in the regulatory sphere, particularly with regard to ADR.

APPENDIX A METHODOLOGY - Exhibit 1: Health Regulatory Colleges in Ontario (those interviewed indicated by boldface & X)

SC – Small College; MC – Medium-Sized College; LC – Large College

College of Audiologists and Speech-Language Pathologists of Ontario (MC)

College of Chiropodists of Ontario (SC)

College of Chiropractors of Ontario (SC) X

College of Dental Hygienists of Ontario (LC)

Royal College of Dental Surgeons of Ontario (MC) X

College of Dental Technologists of Ontario (SC)

College of Denturists of Ontario (SC) X

College of Dietitians of Ontario (MC) X

College of Massage Therapists of Ontario (LC)

College of Medical Laboratory Technologists of Ontario (MC) X

College of Medical Radiation Technologists of Ontario (MC) X

College of Midwives of Ontario (SC)

College of Nurses of Ontario (LC) X

College of Occupational Therapists of Ontario (MC)

College of Opticians of Ontario (SC) X

College of Optometrists of Ontario (SC) X

Ontario College of Pharmacists (LC) X

College of Physicians and Surgeons of Ontario (LC) X

College of Physiotherapists of Ontario (MC) X

College of Psychologists of Ontario (SC) X

College of Respiratory Therapists of Ontario (SC) X

Colleges Transitioning towards Proclamation in 2013 or 2014 (not interviewed)

College of Homeopaths of Ontario
College of Kinesiologists of Ontario
College of Naturopaths of Ontario
College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario
College of Registered Psychotherapists of Ontario

APPENDIX A METHODOLOGY - Exhibit 2: Key Informants Interviewed (titles at time of interview)

Anita Ashton, Director, Professional Conduct, College of Physiotherapists of Ontario

Mary Bayliss, Manager of Policy and Investigations, College of Respiratory Therapists of Ontario

Dean Benard, Benard + Associates, Mediation and Investigation Consultant to RHPA Colleges

Tim Blakley, Manager (Acting), Legislative and Special Projects Unit, Health Professions Regulatory Policy and Programs Branch, Ministry of Health and Long-Term Care

Anne L. Coghlan, Executive Director & CEO, College of Nurses of Ontario

Jill Dougherty, Lawyer, Weirfoulds LLP, Legal Counsel to RHPA Colleges

Irwin Fefergrad, Registrar, Royal College of Dental Surgeons of Ontario

Maryan Gemus, Manager of Investigations and Resolutions. College of Pharmacists of Ontario

Rocco Gerace, Registrar, College of Physicians and Surgeons of Ontario

Mary Lou Gignac, Registrar, College of Dieticians of Ontario

Linda Gough, Registrar, College of Medical Radiation Technologists of Ontario

Mina Kavanagh, Director of Professional Programs, College of Opticians of Ontario

David Lamb, Senior Policy Analyst, Legislative and Special Projects Unit, Health Professions Regulatory Policy and Programs Branch, Ministry of Health and Long-Term Care

Linda Lamoureux, Chair, Health Professions Appeal and Review Board

Tina Langlois, Complaints & Discipline Case Manager, College of Medical Laboratory Technologists of Ontario

Kristina Mulak, Manager, Inquiries, Complaints, Reports, College of Chiropractors of Ontario

Cliff Muzylowsky, Registrar, College of Denturists of Ontario

Christine Robinson, Registrar, College of Respiratory Therapists of Ontario

Jan Robinson, Registrar & Chief Executive Officer, College of Physiotherapists of Ontario

Peter Ruttan, Chair, Inquiries, Complaints, Reports Committee, College of Physiotherapists of Ontario

Sharon Saberton (former Registrar, CMRTO), Sharon Saberton Consulting

Debbie S. Tarshis, Partner, Weirfoulds LLP, Legal Counsel to RHPA Colleges

Murray Turnour, Registrar, College of Optometrists of Ontario

Catherine Yarrow, Registrar & Executive Director, College of Psychologists of Ontario

APPENDIX A METHODOLOGY- Exhibit 3 – Original Contact Email

Date:
From: Christine Forsyth
To: xxxxxxx@xxxxxxxx
Subject: Interview Request

Dear [person's name],

I am a third-year Ph.D. student at Osgoode Hall Law School, York University, completing research for my thesis on the reasons for and effects of the ADR (alternative dispute resolution) provisions in Bill 171, the Health System Improvements Act, 2007, proclaimed on June 4, 2009. As a mature student, I come to this research with a professional background in ADR and in the regulation of the health professions in Ontario.

I am working with Professor Paul Emond, an expert in ADR, Professor Joan Gilmour, an expert in Ontario health law and regulation, and Professor Liora Salter, an expert in public policy, governance and regulation, and have benefited from their suggestions regarding critical issues to be addressed. I am writing to you to request a brief interview at your convenience (hopefully some time in September or early October), to discuss whether and how the new ADR provisions might affect the College of XXXXXX's current and future complaints process and practices. I anticipate the interview will take between forty-five minutes and one hour, depending on your schedule. If you agree (and I hope you will), our conversation will be governed by the university's guidelines regarding ethical research, which you will have an opportunity to review.

I will follow up this request with a phone call to your office in the week of XXXX. In the meantime, please do not hesitate to contact Paul Emond (pemond@emp.ca) for a reference, or me directly if you have any questions. My email address is XXXXX and my phone number is 416 XXX XXXX. I very much look forward to a favourable response and to speaking with you soon.

Sincerely,

Christine Forsyth

Direct Line: XXX XXX XXXX

APPENDIX A METHODOLOGY - Exhibit 4: Email Scheduling Meeting

Good morning, XXXX,

I want to thank you again for agreeing to meet with me on Monday September 14 at 10 am at your office to discuss the ADR provisions in the Health System Improvements Act.

As I mentioned, according to research protocols, I have prepared a letter covering research ethics, which I will bring with me on Monday for your signature. A copy is attached for your review in advance. It also contains a list of subject areas that I hope we might discuss. I do not expect you to prepare much for our conversation, but would very much value your views and opinions on these and related issues according to your current awareness of them. I am also attaching a summary of the ADR provisions in the Act and hope that both those items will be of assistance for our discussion. Please let me know if you have any comments or questions prior to our meeting.

I very much look forward to seeing you on Monday morning and hope you have a pleasant weekend.

Best regards,
Christine

Direct Line: XXX XXX XXXX

APPENDIX A METHODOLOGY- Exhibit 5: Ethics Letter

[My Address]

[Date]

[Key Informant's Name]
Registrar & Executive Director
College of XXXXXXXX of Ontario
[College Address]

Dear [name],

I am writing to thank you and to confirm our meeting on Wednesday, September 30 at 2:00 pm regarding the doctoral research I am conducting on the new alternative dispute resolution (ADR) provisions in the Health Professions Procedural Code. I am working with Professors Paul Emond, Joan Gilmour and Liora Salter of Osgoode Hall Law School. The research I am undertaking has been reviewed and approved by the York University Human Participants Review Subcommittee for compliance with York's Senate ethics policy.

My understanding is that you are involved in the application of the new legislative provisions in your capacity as Registrar and Executive Director of the College of XXXXX of Ontario. Your perspective on the issues related to the ADR provisions would be very valuable to me. I anticipate taking approximately no more than forty-five to sixty minutes of your time.

Some aspects of the ADR legislation I would appreciate your input and observations on are:

- What impact (intended or unintended) the ADR legislation has/will have on the College and its processes, on regulating the professions and on protecting the public interest
- What impact other aspects of the new ADR legislation (e.g., new time limits on the complaints resolution process) will have on the College's adoption of all or aspects of the ADR provisions
- What College actions, in your view, the ADR legislation requires, permits, or prohibits
- How the ADR legislation impacts the principles of transparency, accountability, fairness, efficiency, consistency, timeliness and clear public/member expectations
- Why and how this ADR legislation came about and whose interests it serves
- Who, in your view, benefits from these ADR provisions, who may be adversely affected and how the use or non-use of ADR in the complaints resolution process may alter stakeholder relationships

Our meeting would be more like a consultation or discussion than a formal interview. My intention is to use the notes from our discussion in my thesis. Theses are published, but not widely circulated. As well, I may later wish to publish an academic article that relies upon our discussion.

Needless to say, you are under no obligation to meet with me or to answer any one of my questions, and you may call the session to a close at any time. Normally I take notes and use a small voice recorder to assist my note-taking. I would be pleased to speak with you on a not-for-attribution basis or, if you prefer, to attribute comments you make, or ideas we have discussed to you. However, if I do wish to quote you by name or in any way that could be attributed to you, I undertake to provide you with a copy of the intended quotation. You will have the opportunity to review and clarify any comment that will be associated with your name.

At any time you have the right to withdraw and/or stop participating in the interview and, should you withdraw, all data collected as a result of your participation will be destroyed by shredding and will be disposed of commercially. The notes and recording from our discussion will be kept in my safekeeping for a period of at least two years. I will treat the notes as confidential to the limits allowed by law, as is York's policy. I shall shred and dispose of all notes from our conversations at the end of the two-year period.

Neither the topics we will discuss, nor any writing I will do afterwards is intended to be a "report card" on any person or organization, and I do not anticipate your providing me with information that might be considered confidential or "off the record."

I look forward to meeting you next week. Please do not hesitate to be in touch with me if you have any questions or concerns. I can be reached at [my phone number] or at [my email address].

As I have mentioned, York University has a policy on research ethics. You will find this at http://www.yorku.ca/grads/policies/ethics.htm. You are also welcome to contact York's Office of Research Ethics if you have any questions or concerns (309 York Lanes, 4700 Keele St., Toronto ON Canada M3J 1P3 telephone 416 736 5055) www.research.yorku.ca

At the interview I will ask you to sign and date my copy of this letter to ensure that you have given me your informed consent.

Yours sincerely,

Christine Forsyth
Ph.D. Candidate

I consent to have this discussion

_____

Date _____

With attribution _____

Without attribution _____

APPENDIX A METHODOLOGY- Exhibit 6: Sample Acknowledgement Email

Dear [Key Informant's Name],

Thank you so much for meeting with me yesterday and for sharing your thoughts and experience about the impact of the new ADR legislation on the College, how the legislation evolved and your reflections on the larger context of professional self-regulation. I really enjoyed our conversation and came away with new insights and a much richer understanding of the situation as it is playing out in the "real world" of College processes, as well as inspiration regarding some new lines of enquiry. Thank you too for suggesting that I meet with XXXX to gain the perspectives of a knowledgeable, seasoned staff ADR practitioner. I look forward to hearing from XXXX about arranging such a meeting.

I will certainly check with you if I wish to use any identified quotes and I will be very happy to share the contents of my dissertation with you and with members of the Federation or others you suggest when it is finalized.

In the meantime, my most sincere thanks for sharing your insights and experiences so generously with me.

Kindest regards,
Christine

Direct Line: XXX XXX XXXX

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APPENDIX C

GLOSSARY OF ACRONYMS

ADR Alternative Dispute Resolution

CNO College of Nurses of Ontario

CPO College of Psychologists of Ontario

CPSO College of Physicians and Surgeons of Ontario

FHRCO Federation of Health Regulatory Colleges of Ontario

HPARB Health Professions Appeal and Review Board

HPPC Health Professions Procedural Code (Schedule 2 of RHPA)

HPRAC Health Professions Regulatory Advisory Council

HSIA Health System Improvements Act, S.O. 2007, c. 10 – Bill 171

ICRC Inquiries, Complaints and Reports Committee

MHLTC Ministry of Health and Long-Term Care

RCDSO Royal College of Dental Surgeons of Ontario

RHPA Regulated Health Professions Act, S.O. 1991, c.18

SPPA Statutory Powers Procedure Act, R.S.O. 1990, c. S.22