Trends in Canadian & Global Regulation

The Fifth Gertler Family Lectureship in Law
Honouring the Robert McKercher Family

University of Saskatchewan, Saskatoon
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Summary of Remarks

1. Is it important for lawyers, regulators, clients & others to be aware of global trends?

2. Global (& Canadian) Trends in Lawyer Regulation
   - Who regulates lawyer?
   - What and whom is regulated?
   - When are lawyers regulated?
   - Where are lawyers regulated?
   - How are lawyers regulated?
   - Why are lawyers regulated?

3. Do these trends really matter outside of London, New York, Sydney & Toronto?
I. Who Cares?

Why should Canadian lawyers, clients, regulators, and other stakeholders care about global trends in lawyer regulation?

Globalization & the Legal Profession

Source: WTO Secretariat Report on Legal Services, S/C/W/38 (June 2010), at ¶7
Global Legal Services & Canada

Legal Services Balance of Payments


‘The Americas’ Dominate Global Trade

Chart 2: Global Legal Services Market Segmentation: 2008
Percentage share by value

Source: 2010 WTO Secretariat Report, supra, at ¶5
US Legal Services and Canada

2009 U.S. Exports (Canada was 3rd)

Source: USITC, Recent Trends in U.S. Services Trade, 2011 Annual Report, Pub. 4243 at p. 7-16

2009 U.S. Imports (Canada was 4th)

Canadian Legal Services & the US

Canadian Legal Services Trade in Millions of $
This is More Than a Big Law Phenomenon

• According to a 2010 StatsCanada study:
  – By 2031, between 25% and 28% of the population could be foreign-born
  – By 2031, 46% of Canadians who are ≥15 years old will be foreign-born (or have one foreign-born parent)

• Consider what this means for small business in an era of technology & globalization

BRICs: Brazil, Russia, India, China

South Africa has joined this group which is now known as “BRICS”

*Most will be concentrated in 33 census metropolitan areas (includes Saskatoon)*
*Chinese & South Asians will be the largest visible minority groups (BRICS)*
*Saskatoon’s foreign population will be ≈10% (See Figure 12)*
II. Lawyer Regulation Trends

Who regulates lawyers?

- Self-regulation, co-regulation, or non-lawyer regulation?

The Troika: IMF, ECB, Eur. Commission

(Solicitors Regulation Authority)

(independent regulatory body of the Law Society)

(independent regulatory arm of the Bar Council)

Legal Services Regulation Bill 2011

An Bille um Rialai Seirbhisi Dlí, 2011
**Who regulates & Canada**

- Government entities (e.g., AG, Competition Bureau)
- Provincial legislatures (e.g. Ontario, Manitoba & Nova Scotia acts on fair registration practices)
- National standards
- Canadian academic commentators
- International entities:
  - Federation of Law Societies of Canada v.
    Canada (Attorney General), 2011 BCSC 1270

**What (or whom) is regulated?**

- What should regulators regulate…
  - Legal services or [traditional] legal providers?
  - Firms or individuals?
What (or whom) is regulated & Canada

- Regulators are asking this question
- Academics are asking this question
- Commentators are asking this question
  – Jordan Furlong speaking to the FLSC in 2010

Entity-based regulation

Sask. Benchers’ Digest (May 2012):

Another interesting article from the Law Society Gazette advises that in England and Wales, a solicitor’s regulatory authority is entitled to license alternate business structures with non-lawyer ownership. Among the first licensees is the Co-Op, and the headline is “Legal Services Outperform Groceries at the Co-Op.” Could this be the future in Saskatchewan? (at p. 2)
**When are lawyers regulated?**

- **Before problems or after problems?**

**Office of the Legal Services Commissioner**

Ten areas to be addressed to demonstrate compliance with “Appropriate Management Systems”

<table>
<thead>
<tr>
<th>Objective</th>
<th>Key concepts to consider when addressing the Objective</th>
<th>Examples of possible criteria or systems that may be used</th>
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<tbody>
<tr>
<td>Competent work products avoid NEGLIGENCE</td>
<td>Ten examples practice only in areas where they have appropriate competence and expertise</td>
<td>A written statement setting out the types of matters to which the practice will accept instructions and that its structure and systems will be in any other type of matter</td>
</tr>
<tr>
<td>All firms must have a good system of complaints procedures in place</td>
<td>All firms must have a good system of complaints procedures in place</td>
<td>A written record of attendance at CORE, and its management planning and performance in relation to the objectives set for it</td>
</tr>
<tr>
<td>The legal profession does not exist or regulated bodies reduce the performance of the practitioner, or the role of the practice, or of the practitioner, or the role of the practice, or of the practice</td>
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<td>A written statement of the objectives set for it and the means for achieving them</td>
</tr>
<tr>
<td>Legal practice directions are regularly reviewed and updated, and the plans are in place</td>
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<td>A written record of the number of files assigned to each fee earner, data and methods of the review</td>
</tr>
</tbody>
</table>

**When are lawyers regulated & Canada**

- **Canadian regulators have been asked to think about this issue:**

*International Conference of Legal Regulators*

*This Sept. 2012 London conference included Zeynep Olsen, LSUC, on the Proactive Regulation Panel*

- **Leading academics have called for changes:**
  - “Law societies should emphasize standard-setting and other **proactive oversight activities**, rather than simply responding to specific instances of serious professional misconduct.” (Woolley & Rhode 2012)
**Where are lawyers regulated?**

- Can geography-based regulation function in a world of virtual law practice?

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**Where are lawyers regulated & Canada**

  - It is an exciting time to be a lawyer, but watch out. Over the next ten years we may see more changes in the delivery of legal services than we have seen in the last 100 years.
How are lawyers regulated?

**Entity-based regulation**

UK Smedley

**Outcomes-focused regulation**

The legal services market is changing. On 6 October 2011, we introduced outcomes-focused regulation (OFR). Soon, alternative business structures (ABSs) will enable lawyers and non-lawyers to share the management and control of businesses providing legal services.

**Delivering OFR**

Alternative business structures

Risk and OFR

Supervision

Relationship management

Videos about OFR

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**Delivering OFR**

Alternative business structures

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**Outcome-based regulation**

**How are lawyers regulated & Canada**

• “British Columbia is an ambitious champion of principles-based securities regulation & outcome-oriented regulatory practice” (2008 BC prof)

• Calls to retain principles-based regulation after the economic crash (2010 BC prof in McGill journal)

• Questions about unitary lawyer regulation systems (Hutchinson & government lawyers)

• Canadian legal academics discuss the paradigm shift to outcomes-focused lawyer regulation and questions about how to regulate (Dodek & Woolley)

**Fair Registration Practices Act**
**Why are lawyers regulated?**

Terry Regulatory Objectives article discusses LSA §1, Legal Services (Scotland) Act 2010, Draft Irish bill, Draft Indian bill, & various Canadian provisions

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**Why are lawyers regulated & Canada**

2012 changes

Adopting Regulatory Objectives for the Legal Profession

Laurel S. Terry,* Steve Mark,** & Tobias Gordon***

80 Fordham L. Rev. 2685 (2012)

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2010 changes

2011 Paper
Does any of this Matter in Saskatchewan?

  - 1929 practicing members (2416 less 487)
  - 3 firms with ≥51 lawyers; 1 firm with 26-50 lawyers
  - 0 Foreign Legal consultants
- Other pressing issues: 40% of Sask. lawyers have been in practice ≥26 years
  - Aging lawyer issues
  - Shortage of lawyers in rural areas (See 2011 Annual Report of the Law Society of Saskatchewan)

My Conclusion

- Yes! These developments are relevant for Saskatchewan lawyers, regulators & clients
  - E.g., “Saskatchewan is seeing an unprecedented increase in the demand for land …coming from … investors across Canada and beyond.” (Dec. 2012 News from Law Society Sask.)
- Lawyers follow clients & Canada’s clients have transactions around the world
- Pattern recognition can help us understand the issues and help us find (or reject) solutions
- Global communication is worthwhile

• *See also* Laurel S. Terry, Steve Mark, Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 Fordham L. Rev. 2685 (2012)

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Links to Publications by Topic:
http://www.personal.psu.edu/faculty/l/s/lst3/
Global Legal Practice Resources Webpage:
http://www.personal.psu.edu/faculty/l/s/lst3/globalprac.htm
Presentations Webpage:
http://www.personal.psu.edu/faculty/l/s/lst3/presentations.htm

To read my law review articles for research on the topics listed below, please visit my "Publications By Topic" section of my webpage:
- Global Development in general (See 1.1, 9.69 and 11.58)
- Case law: ECJ and UK.
- Law and Business: Corporate Law, Antitrust, etc.
- *Cross-Border Business*
- *alternative business structures* (ABS) development in Australia and elsewhere (See 1.1, 9.69)
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- *Alternative Business结构s* (ABS) development in Australia and elsewhere (See 1.1, 9.69)
- *APEC Legal Services Initiative* (See 11.58)
- *Australian Legal Practice Development* (See 1.1, 9.69)
- *the Bolsonaro Process* (See 1.1, 9.69)
- *the Bolsonaro Process* (See 1.1, 9.69)
- *Classification Systems for Counting Legal Services* (See 11.58, 11.62)
Additional Resources…

- ABA Commission on Ethics 20/20
  - http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html

- CCBE Committees Page

- UK Legal Services Board, SRA & BSB Consultations
  - http://www.sra.org.uk/consultations/

- International Conference of Legal Regulators

- APEC Legal Services Inventory
  - http://www.legalservices.apec.org/overview.html

More Sources to Read All About It…

- International Association of Legal Ethics (and the biennial International Legal Ethics Conferences including BANFF ILEC V)
  - http://www.stanford.edu/group/lawlibrary/cgi-bin/iaole/wordpress/

- LawWithoutWalls Materials
  - http://www.lawwithoutwalls.org/

- Archived program materials from conferences at, *inter alia*, Harvard, Stanford, Georgetown, Fordham, McGeorge, MSU, Akron, & Hofstra