Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession

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With the enactment of the Law Society Act, 1970, the government of the legal profession in Ontario has been, for the first time in a half-century, subjected to systematic scrutiny. The significance of this scrutiny extends beyond the precincts of Osgoode Hall, “the permanent seat of the Society”, beyond the benchers who “govern the affairs of the Society”, and indeed beyond the profession itself. The quality of the internal government of the Law Society is an important determinant of the profession’s relations with the public it serves and a model for the internal government of other social and economic groups.

The statutory monopoly enjoyed by members of the Law Society to render legal services invests the regulation of their admission, standards of behaviour, and modes of practice; with a public character. The use, non-use, or abuse of the Society’s regulatory powers affects the administration of justice in its broadest sense.

No less important than the Society’s crucial role in the administration of justice is its influence as a model for other groups who claim similar status, based on real or spurious analogies to the legal profession. Such disparate groups as engineers, funeral directors, teachers, and real estate salesmen have claimed varying degrees of statutorily-authorized self-government. It is, of course,

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1 S.O., 1970, c. 19.
2 s. 4.
3 s. 10.
4 s. 50.
possible to confine this privilege to groups which are “professions”,
defining that term narrowly on the basis of either a priori concepts
or the identification of the characteristics of the historic profes-
sions. But we live in a society of groups, of sub-cultures, whose
desire for autonomy and self-determination will not be deflected
by a mere definitional exercise. So long as the legal profession
governs itself, other groups will continue to press for the right to
do so. Those who win self-government will be heavily influenced
by the shape and philosophy of the Law Society’s constitution.

I. Powers and Functions of the Law Society.

(1) Admission to Practice

The Law Society Act assigns control over admission to the
legal profession to its governing body, the benchers, in a rather
off-hand manner:

The benchers shall govern the affairs of the Society, including the call
of persons to practise at the bar of the courts of Ontario and their
admission to practise as solicitors in Ontario.\(^5\)

That the “affairs of the Society” should include admission to
practice would not be so casually assumed by lawyers in many
other jurisdictions, including those in the United States,\(^6\) some
continental countries,\(^7\) or even solicitors in England.\(^8\) In Ontario
(as in the other Canadian provinces) this assumption is apparently
so self-evident as to require no further and fuller statement.

In aid of their power to regulate admissions, the benchers
have express authority to “maintain the Bar Admission Course
... [and] ... grant degrees in law”,\(^9\) to “make rules relating to
... student members and prescribing their rights and privileges,
... fees and levies ... oaths, ... employment ... while under
articles, ... degrees in law ...” and to prescribe “procedures for
the call to the bar of barristers and the admission and enrolment
of solicitors”.\(^10\) Moreover, subject to the approval of the provincial
内阁, the Society “may make regulations respecting ... the
admission, conduct and discipline of ... student members ... [and] legal education, including the Bar Admission Course”.\(^11\)

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\(^5\) S. 10.
\(^6\) For a summary of American state and federal bar admission pro-
cedures see Brand, Bar Associations, Attorneys and Judges (1956), p. 1037
et seq.
\(^7\) See e.g. Cohn, The German Attorney—Experiences With A Unified
Profession (1960), 9 Int. & Comp. L.Q. 580, (1961), 10 Int. & Comp. L.Q.
103; Ginsburg and Bruzelius, Professional Legal Assistance in Sweden
(1962), 11 Int. & Comp. L.Q. 998.
\(^8\) While the Law Society in England enjoys plenary disciplinary powers
over solicitors, membership in the Society is not, in fact, compulsory, see
Abel-Smith and Stevens, Lawyers and the Courts (1967), c. 8.
\(^9\) S. 52.
\(^10\) S. 54.
\(^11\) S. 55.
Lurking in this loose web of language is the shade of an old controversy: should the profession control legal education? After more than a century of direct intervention in the processes of legal education, the Law Society had progressively, since the mid-1950's, ceded *de facto* control to the university law schools.\(^\text{12}\) The survival of these vestigial traces of its *de jure* power in the 1970 statute is thus somewhat surprising, and indeed was criticized during legislative debate on the new Act.\(^\text{18}\) In effect, the Society now assumes direct responsibility for the practical instruction of those seeking admission through the Bar Admission Course, which comprises an “external” portion of apprenticeship in a law office, and an “internal” portion of full-time attendance in a programme of formal instruction in procedural matters. Through its ability to control entry into its Bar Admission Course, the Society is in a position to influence—if not to dictate—the content of a student’s programme in law school; by so doing the shape of law school curricula is, in turn, effectively moulded. In point of fact, the Society and the university law schools have reached a *modus vivendi* based upon mutual respect for the integrity and autonomy of each other’s educational enterprise. Nonetheless, the continuing power of the Society to “grant degrees in law” does preserve the possibility that the profession may reassert its control over the entire field of legal education if its working relationship with the university law schools should deteriorate.

In addition to the relationship between the law schools and the Law Society, control over admissions necessarily involves control over the transfer to Ontario of lawyers from other jurisdictions.\(^\text{14}\) Transfers are permitted on a progressively more limited basis to lawyers, respectively, from other Canadian common law provinces, Quebec, the United Kingdom, Australia and New Zealand, “Other Commonwealth Countries” and the United States. Rule-making power is also expressly conferred to govern occasional appearances in Ontario courts by counsel from other jurisdictions.\(^\text{15}\)

In all cases, including “occasional appearance as counsel”, the right to practise is limited to “Canadian citizens or other British subjects”.\(^\text{16}\) To the extent that training in the common law tradition is sought to be made a precondition to transfer, such a provision may be quite unobjectionable. However, it is clear that the citizenship requirement has some other basis, since

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\(^\text{12}\) See Bucknall, Baldwin and Lakin, *Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957* (1968), 6 Osgoode Hall L.J. 137.

\(^\text{13}\) See Mr. Sopha (L.-Sudbury), Legislature of Ontario Debates, 28th Legis. (1970), 3d sess., at pp. 1481-1482.

\(^\text{14}\) S. 28(c)(iii).

\(^\text{15}\) S. 54 (1) 24.

\(^\text{16}\) S. 28(c).
the Act also provides that a lawyer who loses his citizenship thereupon becomes ineligible to practise. Presumably, this requirement reflects the historic fact that lawyers, as officers of the Queen's courts, were required to swear allegiance to the sovereign. However, the effect of the citizenship requirement is to potentially bar from the profession otherwise qualified lawyers. At the present time, the groups most likely to be affected are the children of recent immigrants, young American college and law school graduates who have emigrated to Canada, and lawyers from non-Commonwealth countries. Of purely symbolic significance is the Anglophilic reference to "British subjects" rather than, say, "Commonwealth citizens". Its more offensive implication was avoided with the deletion from the Act in its final draft of a requirement that the secretariat of the Society likewise be Canadian citizens or British subjects.

Beyond the requirements of scholarship and citizenship, the new Act for the first time requires that applicants for admission be "of good character". Ontario had not previously imposed such a statutory requirement, although it had informally (and ineffectually) required the filing of character references, which were never actually scrutinized. The new "good character" requirement is almost certain to do more harm than good: it is unlikely to identify potential trust fund absconders, but may well deny access to the profession to persons with idiosyncratic political beliefs or life styles.

In one important respect, the status of applicants for admission is made more secure. An applicant who has met all the requirements cannot be refused admission, and is guaranteed a hearing, a written statement of the reasons for refusal, and the right to reapply at any time upon fresh evidence. However, rather surprisingly in view of the opportunity for judicial review afforded disbarred lawyers, no right of appeal exists for rejected applicants.

(2) Discipline

The new statute contains elaborate procedural provisions relating to discipline. However, the traditional vague grounds of "professional misconduct" and "conduct unbecoming a barrister
and solicitor” remain the only articulated substantive standards for discipline, although lawyers who are found mentally incompetent or similarly incapacitated may also be suspended from, or limited in, their practice.

Such open-ended language as “professional misconduct” or “conduct unbecoming” obviously invites more precise definition. This task may be undertaken in part by a “common law” approach of deciding individual cases as they arise, in part by a “legislative” approach of laying down a code of professional conduct with fairly precise standards. There seems no imminent likelihood that the benchers will depart from the present common law approach, which is supplemented only by a collection of non-binding, advisory “rulings” and the rather vague, largely hortatory, Canons of Legal Ethics adopted by the Canadian Bar Association in 1920 and by the Society forty years later. Even if the benchers do decide to move in the direction of more carefully drafted and enforceable “legislation”, however, they presumably could also continue to look to the broad statutory standards.

The Law Society Act, then, continues the benchers’ broad powers to define the grounds for disciplinary action. However, whether they adopt the “common law” or “legislative” approach, they are subject to potential external controls. Should they decide to promulgate a code of ethics, the consent of the provincial cabinet must be obtained. Should they simply proceed on a case-by-case basis, there is a right of appeal to the Ontario Court of Appeal from their decisions.

The existence of this right of appeal has important implications for the development of substantive standards of professional conduct. Potentially the appellate court’s power to “make such order as the court considers proper” could involve a shift in the locus of lawmaking from the benchers to the court. If the court rejects standards developed by the benchers, and substitutes its own, the traditional wall around the self-government of the profession will have been breached. This prospect must give concern both to traditionalists who believe that uninhibited self-government is best, and to those who favour some form of public regulation for the profession, but do not have confidence that the courts would be its most appropriate instrument.

A more subtle potential for change in the quality, in the sub-

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26 S. 34.
27 S. 35.
28 Now formally adopted by regulation under the Law Society Act, 1970, O. Reg. 419/70, s. 23.
29 Power to make regulations “authorizing and providing for the preparation, publication and distribution of a code of professional conduct and ethics” is found in the Law Society Act, s. 55.
30 See e.g. Hall v. Ball (1923), 54 O.L.R. 147.
31 S. 44 (6).
stantive content, of disciplinary rules is also buried in procedural provisions. The new Act requires a reasoned decision by the benchers.\textsuperscript{32} Coupled with the growth of a body of appellate judgments, such decisions will provide a corpus of knowledge about the basis of discipline which is presently lacking.\textsuperscript{33} This, in turn, will make possible a more sophisticated analysis of the issues by those who decide cases, and by outside observers, and will facilitate the growth of a jurisprudence of professional conduct.

Finally, the right to appeal is conferred upon “any person dissatisfied with a decision” in a disciplinary matter.\textsuperscript{34} This language is broad enough to embrace not only the lawyer who has been disciplined, but the complainant who is disgruntled because the benchers have refused to vindicate his complaint. Indeed, on its face, the section would appear to permit any member of the profession or the public to appeal. Should the benchers adopt an unduly protective or cautious approach to discipline, they might be moved to a more vigorous course by the invocation of this right of appeal.

The statute, as indicated, deals with the substantive grounds of discipline only by indirection. Its major thrust is to establish disciplinary procedures. Regulations adopted under the Act\textsuperscript{35} contemplate a three-step procedure. The Secretary of the Society (its senior administrator) is authorized to conduct a preliminary investigation “where information comes to the notice of the Society” of the possible misconduct of a member. If he finds “reasonable grounds” for doing so, he refers the matter to the Discipline Committee under whose direction a formal complaint is issued, and a formal hearing convened. The Committee itself possesses only the power to reprimand the member (and, of course, to dismiss the complaint).\textsuperscript{36} If serious misconduct is found, the Committee reports its findings of fact, conclusions of law, and recommended decision to Convocation, the plenary body of benchers; Convocation alone may impose the full range of sanctions—reprimand, suspension or disbarment.

Considerable concern for due process is the most obvious feature of the new statute, especially in relation to the hearings of the Discipline Committee. Provision is made for a formal complaint, notice, a full hearing, right to counsel, limited protection against self-incrimination, transcription of evidence, and other

\textsuperscript{32} S. 33 (12).
\textsuperscript{33} At present, only a brief conclusory statement accompanies the formal announcement that a lawyer has been disciplined. For the only published data relating to the grounds upon which lawyers have been disciplined, see S. Arthurs, Discipline in the Legal Profession in Ontario (1970), 7 Osgoode Hall L.J. 235.
\textsuperscript{34} S. 44 (1).
\textsuperscript{35} O. Reg. 419/70, s. 13.
\textsuperscript{36} S. 37.
familiar attributes of ordinary civil trials (including the rules of evidence). However, proceedings are to be held in camera unless the “accused” lawyer requests a public hearing, presumably to safeguard both his reputation and the client-complainant’s secrets. Strangely, neither the statute nor the draft regulations appear to extend the same guarantees to the final hearing before Convocation, except that the “accused” is apparently to be afforded an opportunity to challenge the Committee’s findings and recommendations in this ultimate forum.\textsuperscript{37}

Where the Committee has itself exercised its power to reprimand, the member has the right to appeal to Convocation. Ironically, in this latter situation members of the Discipline Committee are expressly precluded from sitting on appeals from their own decisions,\textsuperscript{38} although they are implicitly permitted to participate in Convocation’s disposition of their recommendations in much more serious cases involving suspensions and disbarments.

Another curious defect in the regulations is the failure to afford complainants the right to appeal from an adverse decision of the Discipline Committee to Convocation. Since the statute envisages that complainants should ultimately be able to appeal from Convocation to the Court of Appeal, it seems clear that the regulations should provide a means of reaching Convocation in the first place.

(3) Protection of Clients’ Interests

In addition to punishing lawyers who have been guilty of misconduct, the Society has increasingly sought to safeguard the interests of clients from various forms of intentional and other harms.

As a defensive measure, the Society has promulgated a detailed code relating to the handling of trust funds,\textsuperscript{39} its only “legislative” attempt to define specific parameters of professional misconduct. This code is enforced vigorously, both by a systematic monitoring of lawyers’ accounts, and by investigative measures when misfeasance is suspected. Offenders are inevitably dealt with severely.

However, the Society is committed to going beyond mere preventative and punitive measures. Upon application to a Supreme Court judge, the Society may obtain a “stop order” to freeze the accounts of a lawyer suspected of misconduct.\textsuperscript{40} If “a . . . practice is neglected to the prejudice of any person or no provision has been made for the protection of [a] client’s interests” due to the death, disappearance or discipline of a lawyer, a trustee may be appointed to preserve, carry on, or wind up the practice.\textsuperscript{41}

\textsuperscript{37} Ss 33-34 and 39.
\textsuperscript{38} O. Reg. 419/70, s. 17-22.
\textsuperscript{39} S. 42.
\textsuperscript{40} S. 43.
case of clients who actually suffer losses due to their lawyer's dishonesty or professional negligence, the Society has accepted the responsibility of providing at least partial indemnity. The cost of indemnification is born by a levy upon the profession as a whole.

(4) The Quality of Legal Practice and the Administration of Justice

The Society is specifically authorized to establish programmes of continuing legal education, and extension courses, and to provide bursaries and scholarships, (presumably in the Bar Admission Course, in the law schools, or for post-graduate study).

While all of these powers are no doubt intended to promote high standards of professional practice, they are not self-executing. Three elements must be combined if the level of legal practice is to be significantly upgraded.

First, the Society must be prepared to mobilize the financial and human resources required for any significant educational endeavour. Second, individual lawyers must be prepared to devote time and sustained effort to self-improvement; occasional attendance at a large public lecture will not significantly alter the quality of legal services. Third, the enforcement of at least a minimum standard of competence and the recognition of superior qualifications must both be formally undertaken by the Society. As noted, the new statute envisages the establishment of a system of indemnification for clients injured through their lawyer's incompetence. When claims on this fund mount, the Society will almost surely be driven to control or eliminate those whose incompetence creates a burden shared by the whole profession. As to the recognition of superior qualifications, the Society has for some time been studying the certification of professional specialists.

That the legal profession should assume responsibility for improving the quality of legal practice is hardly surprising. However, the Society also enjoys a mandate for much broader participation in the administration of justice. Two responsibilities traditionally assumed by it, and continued under the new Act, warrant special mention.

The reporting and publication of court decisions is, curiously,
not a function of the courts or the provincial government, but of the Society, which has delegated its statutory responsibility to a commercial publisher. Even the litigant is forced to purchase reasons for judgment in his own case from the Society, while the selective reporting of cases in the law reports, necessitated by considerations of cost, inevitably introduces an element of editorial subjectivity. Thus, commercial exigencies limit the easy access of interested citizens to public documents affecting themselves, and of the profession to the entire corpus of case law.

Secondly, there is the matter of law libraries. Although an indispensable adjunct to the courts in any legal system based on precedent, law libraries in each county town (serving the local court-house) and in Osgoode Hall (serving the Supreme Court) are the responsibility of the Society. Through a system of grants to local law associations, the Society has established a farflung, if thinly stocked, network of local law libraries. While obviously better than no libraries at all, relatively little return can be anticipated from the modest sums made available by the Society. The obvious problem is that the resources are those of the Society and the local associations, drawn from membership fees, rather than public funds. Absurdly, too, this produces the result that a lawyer who chooses not to belong to his local law association (in which membership is voluntary) may be denied the use of the only law library available to him.

Surely, in both areas, a compelling case can be made for the transfer of responsibility for these important services to the public agencies involved in the administration of justice.

The Society also has a mandate to promote legal research. This area of activity, hitherto confined to the law schools and the provincial Law Reform Commission, would represent a new venture for the organized bar. While support for research from any quarter can hardly be discouraged, the nature of the Society's involvement does raise a real issue relating to its future role. In brief, attempts were made both by members of the Society and

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49 S. 55.
50 O. Reg. 419/70, s. 25.
51 S. 54 (1).
52 For example, O. Reg. 419/70, s. 34 contemplates an annual maximum subsidy of $600.00 to cover the salary of a librarian and telephone service. S. 36 provides that the total annual grant will not normally exceed $2,000.00 (except for York County, which embraces Toronto, the provincial capital). A few large, affluent law associations could add to this amount, but most could not afford to.
53 O. Reg. 419/70, s. 38.
54 S. 54 (1).
55 A proposal was advanced—and defeated—at the first annual meeting of the members of the Society in Windsor, Ont., on Feb. 8th, 1969, “to include in the objects of the Society the consideration and initiation of Law Reform and the making of submissions to the proper authorities on matters of Law Reform on behalf of the Society”. Letter to the members of the Society from W. G. C. Howland, Q.C., Treasurer, March 20th, 1969.
by legislative critics,\(^\text{56}\) to move the Society into a more active posture in relation to law reform. These attempts were unsuccessful, due to at least three countervailing forces. First, the Society’s wide range of existing and proposed activities, apart from law reform, already presented a formidable financial and administrative burden. Second, conceivably, some conservative benchers (and legislators) were reluctant to mobilize yet another agency of change, especially such a powerful pressure group as the legal profession. Third, some reformers, paradoxically, were anxious to limit the Society to its traditional functions of accreditation and discipline, for fear that intervention by the organized bar might as often be hurtful as helpful to the cause of reform. Thus the residual “legal research” powers of the benchers may be read, implicitly, as a suggestion that the Society should not be involved in the more politically sensitive area of active “law reform”.


The evolution of Anglo-Canadian parliamentary government can be said to have moved through three phases—from absolute royal authority to accountability to democracy.

The period of absolute royal authority, the Stuart regimes of the seventeenth century, was one in which the monarch asserted (if he could not always effectively insist) that he alone bore the ultimate responsibility and privilege of government. With the rise of parliament in the eighteenth and nineteenth centuries, the king became accountable for his actions, both in fact and in theory, in fiscal matters, in foreign affairs, and finally in all aspects of executive activity. However, he was accountable to two elite groups: first, to a parliament which comprised lords and commoners, who were responsible, respectively, only to their progenitors and to a narrowly-based electorate, and secondly, to a judiciary also closely identified with privilege and prestige. Only in the latter part of the nineteenth century, with the move towards universal suffrage, is it possible to identify the advent of democracy, in the contemporary sense of the term. Indeed, in the mid-twentieth century, we have begun to question whether, and how, citizen participation can be effectively extrapolated from the periodic voting exercise to more frequent and more direct forms of contribution to the processes of government.

Similar strains can be traced in the evolution of the government of the legal profession in Ontario, although this suggestion must be accompanied by two disclaimers.

First, it is natural that forms of private government should

\(^{56}\) See e.g. Mr. Bullbrook (L.—Sarnia), \textit{op. cit., supra}, footnote 13, at p. 1288; Mr. Nixon (L.—Leader of the Opposition), at p. 1325; Mr. Renwick (N.D.P.—Riverdale), at p. 1334.
reflect philosophies of public government current at the time of their adoption, although the parallels are obviously not perfect. Thus, some features of the Law Society which date from its establishment in the early nineteenth century are bound to appear anachronistic 150 years later.

Second, criticism of the forms of government does not necessarily entail criticism of substantive policies. Although the Law Society's governmental structure was rooted in the values of an earlier era, those who administer the structure at present have considerable freedom to use it to pursue contemporary social values. This they have done to a considerable extent in such areas as legal aid and clients' compensation funds. Whether they have acted out of a sense of public duty or out of self-interest is open to debate, although one observer makes a cogent case for the latter:

[A]doption of policies in the public interest is most likely to result when the situation in which the organized profession must act is such that meeting or anticipating the higher levels of public expectations become conditions for safe-guarding or attaining important interests of the profession.57

Keeping these two disclaimers in mind, what is the present constitutional structure of the Law Society, and to what extent can it be described as reflecting a philosophy of absolute authority, of accountability, or of democracy?

The new statute constitutes the Law Society of Upper Canada "a corporation without share capital composed of the Treasurer, the benchers, and other members from time to time".58 Responsibility for its day-to-day governance, however, is clearly vested in the benchers.59

Initially, the benchers occupied a position analogous to that of the absolute monarch, self-perpetuating and all-powerful.60 As with the monarchy, much of what survives of this former regime in the new constitution is purely symbolic: the anachronistic use of "Upper Canada" rather than "Ontario", of "Treasurer" rather than "President"; the gratuitous reference to the Society's original statutes of incorporation "passed in the thirty-seventh year of the reign of his late Majesty George III [and] ... in the second year of the reign of his late Majesty George IV",61 and the

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58 S. 2. The implications of this provision are discussed infra.
59 S. 10.
60 See Riddell, The Legal Profession in Upper Canada in its Early Periods (1916), p. 135 et seq. The author suggests that the initial assumption of plenary power by the benchers over the affairs of the Society may have been *ultra vires*.
61 This reference elicited an extended jibe during the legislative debate by Mr. Sopha, *op. cit., supra*, footnote 13, at p. 1342:
meticulous prescription of the Society’s seal (“... on the dexter side . . . the figure of Hercules, and on the sinister the figure of Justice. . . .”)\(^62\) and its coat of arms (“... a sable on a chevron between two stags trippant. . . .”).\(^63\)

While this is hardly the image which a modern profession with high ideals of public service should project, however, it is important to realize that these arcane references are draped upon an institution of rather more contemporary design. By the mid-1960’s a number of developments had already begun to signal the advent of the benchers’ accountability to the rank-and-file members of the profession, if not to the public.

Most obviously, of course, the benchers themselves had long since been elected by the profession itself, rather than self-perpetuating.\(^64\) In addition, the benchers had developed various informal techniques of communication with the members: publication of minutes of Convocation in the *Ontario Reports*, an annual luncheon address by the Treasurer to the profession at the mid-winter meeting of the Canadian Bar Association (Ontario Section), and latterly publication of the *Law Society Gazette*.

Until 1969, however, no formal meeting of the membership had ever been held, and until the new Act was introduced, there was no statutory mention of its very existence, or constitutional status. And if the winds of change had blown but gently in the direction of internal accountability, the notion of public accountability was entirely becalmed. Aside from direct legislative intervention, or the moral suasion of newspaper editorial writers, the benchers could conduct the Society’s affairs as they deemed best. Essentially, the new legislation has created procedures through which the benchers can, for the first time, be made accountable.

In so far as this process relates to public scrutiny of the affairs of the profession, its genesis is, quite clearly, the McRuer *Report*:

The traditional justification for giving powers of self-regulation to any

\[\ldots\] if there ever was a father who was afflicted with dissolute and reprobate sons, it was George III. Of the five that he ushered into this world, that George IV should never be enshrined in a statute of this province under any conditions at all. His character was absolutely beyond rehabilitation. The way he treated Mrs. Fitzherbert was shocking to say the least, absolutely shocking. He announced himself that by the age of 17 he was much addicted to wine and women, and he continued to drag the throne into degradation until his fortunate passing in 1830. . . .

Now really, in 1970 do we have to have that kind of thing in a statute? Cannot we just say the law society is continued?”

\(^63\) *Ibid.*, s. 3.

\(^64\) S.O. 1870-71, c. 15. Interestingly, this statute was entitled “An Act to Make the Members of the Law Society of Ontario Elective by the Bar Thereof” (emphasis added). This accidental acknowledgment by the statutory draftsman of the fact of Confederation has never since been repeated.
body is that members of the body are best qualified to ensure that proper standards of competence and ethics are set and maintained. There is a clear public interest in the creation and observance of such standards. This public interest may have been well served by the respective bodies which have brought to their task an awareness of their responsibility to the public they serve, but there is a real risk that the power may be exercised in the interests of the profession or occupation rather than in that of the public. This risk requires adequate safeguards to ensure that injury to the public interest does not arise. . . . [L]ay members should be appointed . . . to the governing bodies of all self-governing professions and occupations.65

Moreover, the pervasive concern of the McRuer Report with the principle of due process is mirrored by the elaborate procedural provisions of the new Act.

Indeed, from its inception as a draft prepared by the Society to its ultimate enactment as a government-sponsored public bill, the yardstick by which supporters and critics of the new Act have measured its adequacy was the McRuer Report.66 The “Explanatory Notes” with which the Act was prefaced give a tabular accounting of the McRuer recommendations which are respectively “adopted”, “not applicable”, or “not adopted”, while the Attorney General in moving first reading of the new legislation, stated that it generally followed the McRuer recommendations.67

What are the devices established by the new Law Society Act which make the benchers accountable to the public?

In two important areas, the benchers’ exercise of their powers is subject to legal controls. Regulations made by the benchers require the approval of the provincial cabinet, in so far as they affect such important matters as the admission, conduct and discipline of lawyers, the publication of a code of professional conduct and ethics, legal education, and the operation of local law associations.68 Secondly, as has been noted, the benchers’ decisions in disciplinary proceedings may be appealed to the Court of Appeal.69

These provisions follow the general principles articulated by the McRuer Report that the courts should have ultimate control over all adjudication, and that the cabinet, politically responsible to the legislature, should pass on all significant “subordinate legislation”.70 Their probable effectiveness can only be judged in the light of experience. Will the judges prove more or less “public-minded” than the benchers? Will the cabinet effectively scrutinize

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66 See e.g. the colloquy between Mr. Sopha and Hon. Mr. Wishart (C.—Attorney General and Min. of Justice), op. cit., supra, footnote 13, at p. 1497 et seq.
68 s. 55.
69 s. 44.
regulations submitted to it by the benchers, or merely rubber-stamp them?

In addition to these two provisions, both of which relate to the review of specific action taken by the benchers, the new statute also establishes two instrumentalities by which the public may audit the broad policies pursued by the Society.

The province’s Attorney General is a bencher *ex officio*, and although he has no right to vote, he is nonetheless specifically designated as “the guardian of the public interest in all matters within the scope of [the Law Society Act] or having to do with the legal profession”. To discharge this function, he is empowered to require the production of any document relating to the affairs of the Society, and is specifically protected against disciplinary reprisals by his fellow benchers for any action taken by him in discharging the functions of his office.

The Attorney General, of course, will inevitably be a lawyer, and is a member of the benchers, the very body whose conduct is to be reviewed. More to the point, he will almost always be (or soon become) part of the legal “establishment”. His voice, in any event, is only one amongst many, and is not, as noted, even fortified by a vote. Thus, his guardianship of the public interest may not be entirely effective.

The major defence of the public interest therefore rests with a novel body to be known as “the Law Society Council”, which has a statutory mandate “to consider the manner in which members of the Society are discharging their obligations to the public and generally matters affecting the legal profession as a whole”.

The membership of the Council is one clue to its probable effectiveness. It is, to be sure, fairly heavily weighted with members of the profession’s elite: the Treasurer and the chairmen and vice-chairmen of the benchers’ standing committees, and the head of the Ontario section of the Canadian Bar Association (a voluntary organization embracing most lawyers). However, there are a number of other constituencies within the profession which may provide a diversity of informed opinion in the debates of the Council: representatives of local law associations, the law schools, law students, and three lawyers of less than ten years’ seniority. Finally, perhaps most importantly, nine lay members are to be appointed by the provincial government.

A second clue to the Council’s probable effectiveness relates to its statutorily-defined powers and procedures. Unfortunately,

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71 S. 12 (2).
72 S. 13 (1).
73 Ibid.
74 S. 13 (3).
75 S. 26 (1).
76 S. 26 (2).
from this perspective, the prospects for vigorous and intensive scrutiny of the profession are less than certain. The Council is to “meet at least twice a year, and ... report after each meeting” to the benchers and the provincial cabinet.\(^7\) However, no provision is made for a permanent secretariat, for the undertaking of research, for the compulsory production of reports or other documentation by the Society. The basic foundation of any evaluation of the profession must be facts—and the Council is singularly lacking in the machinery to gather and analyze facts. Indeed, it has no budget of its own, and is dependent on the Society for funds.\(^7\) There is at least a risk that the members of the Council (especially its lay members) will be unable to discharge their mandate effectively. To what extent the Society will recognize and dispel this risk, by openness and frank disclosure, remains to be seen. At a minimum, however, it is clear that the new statute does not go as far in the direction of public accountability as the McRuer Report had proposed; the key recommendation of public representation on the Society’s governing body has been compromised.

To assert that the McRuer recommendations were, or were not, followed does not, moreover, provide us with a definitive judgment on the Act. The more fundamental question must be asked as to whether accountability is a sufficient guiding principle for the constitution of a modern professional organization. The McRuer Report itself goes no farther than accountability; internal democracy—whether through representative institutions or through direct participation of members—is no part of its concerns. This deficiency is a serious weakness of the McRuer Report, but should not be viewed as a reason for failing to trace the degree to which democratic values are enshrined in the new Law Society Act.

The inquiry begins with the process of enactment of the new statute. Revision of the Law Society Act apparently originated with the benchers rather than the government, although no doubt the latter’s commitment to the McRuer recommendations would have led it to press for revision at some point.

By November 15th, 1968, Convocation had approved for publication what was described as the ninth draft of a statute.\(^7\) In addition to comments from the press, the judges, law students, and some individual lawyers, this draft Act was the subject of heated discussion at a general meeting of the members of the Society in Windsor on February 8th, 1969.\(^8\)

\(^7\) S. 26 (3).
\(^8\) S. 26 (6).
The Windsor meeting, significantly, was the first general meeting of the membership ever held. To be sure, for several years the Treasurer had delivered an annual “state of the profession” report to a luncheon held in connection with the mid-winter meeting of the Canadian Bar Association. However, on no previous occasion had there been an opportunity for formal discussion of the Society’s affairs. The need for such an occasion was conclusively proved by the course of the discussion. A series of resolutions concerning the draft statute was introduced by representatives of the County of York Law Association, and endorsed by representatives of several other local law associations as well as by individual members. Those resolutions, which were adopted by the meeting, included proposals to increase the number of benchers (from thirty to fifty), the frequency of elections (from five-year to three-year intervals), to gradually eliminate life benchers (who held office by virtue of having served as elected benchers for fifteen years), to formally recognize (as the draft statute did not) that the Society comprised not merely the Treasurer and benchers, but members as well, and to make permanent the new institution of an annual meeting.81

The presentation of these resolutions and their passage suggested the existence of a “grassroots” sentiment that the benchers’ control over the profession was out of keeping with contemporary democratic expectations. Their common theme was to enhance the democratic character of the Society’s government through greater membership participation.

No less significant was the emergence of the local law associations as important organs of opinion within the Society. While the benchers had long recognized the local law associations as representative bodies for purposes of fixing local minimum fee tariffs,82 and administering local law libraries,83 the practice of systematically consulting them on broad policy issues84 has matured quite recently. Yet the constitutional status of the local law associations within the Society was (and continues to be) unclear. No lawyer need belong to his local association, and no local association need be formed in any county or, if formed, need pursue any particular activities.

Thus, while the local law associations are themselves broadly-

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81 Two other resolutions related to the Law Society’s participation in law reform and establishment of a liability insurance scheme (discussed supra). The former resolution was defeated; the latter passed.
82 See L.S.U.C. Professional Conduct Handbook. Ruling 31 (adopted October, 1957). However, the propriety of such tariffs was subjected to a scathing indictment in Re Solicitors, [1970] 1 O.R. 407 (Taxing Officer McBride).
83 See supra.
based and reasonably democratic, they were not part of the formal governmental processes of the Society. The Windsor meeting itself, on the other hand, was formally convened by the benchers and was open to all members of the Society, its agenda and procedures were established by the benchers, and the benchers decided what effect to give to the deliberations. The reaction of the benchers to the Windsor resolutions was therefore somewhat surprising.

In a letter to the members of the Society, the Treasurer affirmed that “serious consideration” had been given to the Windsor resolutions, but implicitly indicated that the benchers had not felt themselves bound by the action of the membership meeting:

Convocation . . . felt that the members would expect it to recommend such amendments as it considered to be in the best interests of the profession as a whole. 

Subsequently, in a letter to the Leader of the Opposition, the Treasurer took the position that:

The Benchers felt that they would be subject to considerable criticism if they treated the general membership as being bound by important resolutions which it did not know were being considered. 

To be sure, as the Treasurer indicated, no advance notice of the resolutions was circulated to the profession, and only a small fraction of the whole profession was present at the meeting. In this sense, the voice of those assembled could hardly be said to be “vox populi”. However, the Windsor meeting was the only formal opportunity afforded for collective membership action, and it is therefore unfortunate that its resolutions should have been treated in this way. In the result, the reaction of the local law associations, and of individual lawyers, was considered together with the Windsor resolutions, and a new draft statute, the eleventh, approved for publication on April 18th, 1969. The benchers actually did adopt some of the Windsor resolutions in the new draft, but did not accept them verbatim. In two particular instances, the benchers adopted an obvious posture of compromise: elections were scheduled for four-year intervals, and the number of elected benchers was set at forty.

Members were again invited to transmit their reactions through their local law associations, whose corporate views were also sought, and the benchers ultimately concluded that a broad consensus had been reached within the profession. The Society then presented its draft statute to the government. After discussions

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85 O. Reg. 419/70, s. 28, now provides for the formation of local law associations, but assigns them no governmental function other than the management of a local law library.
87 See legislative debates, op. cit., supra, footnote 13, at p. 1282 et seq.
between the benchers and the Attorney General, and further mutually acceptable changes, the new Act was finally given first reading in the legislature on February 27th, 1970, as a government bill.\textsuperscript{88}

The processes by which the Law Society reworked its own constitution do demonstrate a willingness on the part of the benchers to seek the views of the members, to afford these views some weight and ultimately to give to the members an accounting of the action taken by the authoritative decision-makers, the benchers. But while this acceptance of full internal accountability is praiseworthy, it still cannot be described as effective democracy. The only constituent meeting of members produced the Windsor resolutions which were not accepted as binding by the benchers, and which were modified in the light of the views of the local law associations and of individual lawyers.

If the processes of constitution-making were not fully democratic, the new Act itself does represent considerable progress towards that goal. Of course, democratic election of the benchers had already been guaranteed under the old statute, and in that sense the ultimate basis of membership control had already been established. However, the increased frequency of elections and numbers of benchers will likely ensure a greater turnover in the ranks of those elected, and thus presumably make Convocation more nearly reflective of membership views. In this regard, a provision\textsuperscript{89} in the new election rules which identifies all incumbent benchers can only be intended to assist their reelection, and thus must be viewed as contrary to the whole thrust of the amendments adopted following the Windsor resolutions.

A significant step towards democratization was the capture of Convocation and its committees by the elected, rather than \textit{ex officio}, benchers. In the former Law Society Act,\textsuperscript{90} and in the draft of the new Act first circulated by the benchers,\textsuperscript{91} a number of benchers held office without a renewable electoral mandate. In addition to a number of purely honorary benchers who would obviously never have participated in the Society's affairs,\textsuperscript{92} the \textit{ex officio} benchers under the former statute included the provincial Attorney General (to whom new and important duties are now assigned), retired Ontario judges of the Supreme Court of Canada and the Exchequer Court, retired judges of the Ontario Supreme Court, ex-Treasurers and benchers who had won four successive

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  \item[88] Letter to the members of the Society from W. G. C. Howland, Q.C., Treasurer, March 4th, 1970.
  \item[89] Rules, \textit{op. cit., supra}, footnote 19, s. 12 (1).
  \item[90] Law Society Act, R.S.O., 1960, c. 207, s. 5.
  \item[91] Draft of a Proposed New Law Society Act, as approved by Convocation on November 15th, 1968, s. 12 (c).
  \item[92] This group included a former prime minister, the Governor-General of Canada, and a member of the Royal Family.
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In effect, Convocation had become a unicameral parliament with an admixture of Lords and Commons. Inevitably, the greater experience and prestige of the “Lords”, the ex-Treasurers and long-serving benchers, must have given them the opportunity to dominate the Society’s deliberations. Whether they used this opportunity or not is impossible to document, but if they did not, it is a tribute to their self-restraint rather than to the inherent wisdom of the institutional arrangements. The position in Ontario of long-serving benchers, for example, should be contrasted with that of some other provincial societies which, far from conferring life tenure on long-serving benchers, compulsorily retired them. The point, however, is not that they exercised a decisive, conservative influence on the policy of the Society—many, no doubt, were active and forward-looking—but rather that their very presence was undemocratic in principle.

As has been noted, one of the key Windsor resolutions provided that no more life benchers should be appointed. Following the Windsor meeting, the draft statute of April 18th, 1969 provided that ex officio benchers should continue to be appointed more or less as in the past. However, their status was dramatically altered by a provision withdrawing their right to vote in Convocation or on committees. Only ex-Treasurers remain as benchers ex officio with full voting privileges. This arrangement was carried forward into the legislation as ultimately enacted. In essence, then, control of the Society’s affairs has now passed into the hands of the democratically-elected representatives of the members.

In so far as an effective democratic constitution should afford opportunities for direct membership action, however, the new statute is not beyond reproach.

Other than acknowledging the existence of members of the Society, and providing for an annual meeting the new Act makes no explicit provision for “participatory democracy”. In this sense, the Society’s constitutional progress does reflect the inability of our national polity to translate this ideal into workable instit-

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93 Law Society Act, supra, footnote 90, s. 5.
94 See Barristers and Solicitors Act, R.S.N.S., 1967, c. 18, s. 18 (as am. S.N.S., 1969, c. 27); Legal Profession Act, R.S.S., 1969, c. 301, s. 17 (2).
95 S. 11. The draft, however, did terminate future appointments of retired judges to be ex officio benchers and altered the period for long-serving benchers to conform to the new four-year election cycle.
96 S. 11 (2).
97 S. 12.
98 Ss 12 and 14.
99 S. 2 refers to “other members” in contradistinction to the Treasurer and benchers.
100 S. 3.
tions within the framework of representative government. Ironically, it is the fact that the Society is a corporation which may lead to more active membership control over the benchers.

When the new Act was introduced into the legislature, the provisions of the Corporations Act\textsuperscript{101} were made applicable to the Law Society,\textsuperscript{102} thus reversing the explicit exclusion of the Corporations Act contained in the Law Society's own draft.\textsuperscript{103} The Corporations Act contains several important provisions designed to maintain ultimate control in the hands of members, rather than the directors of the organizations ("corporations without share capital") to which it applies.

For example, under the Corporations Act, by-laws passed by the directors involving such important matters as the admission of members, fees, elections and "the conduct in all other particulars of the affairs of the corporation", are subject to confirmation by the general meeting of the members, and are only valid until the next succeeding annual meeting unless so confirmed.\textsuperscript{104} The Corporations Act also permits membership policy initiatives by permitting a small group of members, by requisition, to compel the calling of a general meeting,\textsuperscript{105} to place resolutions on its agenda, or to circulate statements regarding any pending business of the general meeting.\textsuperscript{106} Do these general provisions of the Corporations Act enure to the benefit of members of the Law Society?

The Law Society Act does provide that "in the event of conflict between any provision of this Act and any provision of the Corporations Act, the provision of this Act prevails".\textsuperscript{107} However, the Law Society Act contains no provisions which relate directly to the matters just enumerated, save a general power to make rules and regulations in these areas.\textsuperscript{108} The question then becomes whether regulations made pursuant to this power can claim priority over the provisions of the Corporations Act.

The case can be tested in relation to the critical issue of the power of membership meetings. The new Law Society Act simply stipulates that there shall be an annual membership meeting.\textsuperscript{109} However, rules adopted under a general regulation-making power provide:

Any resolution duly passed at an annual general meeting must be

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  \item \textsuperscript{101} R.S.O., 1960, c. 71.
  \item \textsuperscript{102} S. 6.
  \item \textsuperscript{103} Draft of a Proposed New Law Society Act, as approved by Convocation on April 18th, 1969, s. 4.
  \item \textsuperscript{104} S. 112 (2).
  \item \textsuperscript{105} S. 308.
  \item \textsuperscript{106} S. 309.
  \item \textsuperscript{107} S. 6.
  \item \textsuperscript{108} Ss 54 and 55.
  \item \textsuperscript{109} S. 3 does not establish the constitutional role of this meeting.
\end{itemize}
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considered by Convocation within six months of the meeting but is not binding on Convocation.\(^\text{110}\)

Thus, in one respect the rules envisage a far more limited role for the membership meeting than does the Corporations Act.

On the other hand, in another respect the rules afford even greater opportunity for membership initiatives. If the benchers fail to implement a resolution passed at the annual meeting, on petition of 100 members a mailed referendum must be conducted, and if it produces a two-thirds confirming majority, Convocation is required to implement the resolution “to the extent that it is by law able to do”\(^\text{111}\).

There is no necessary conflict between the provisions of the two statutes in terms of their relative assignment of powers to the members as against the directors (or benchers). The conflict arises only as the result of the way in which the benchers have exercised their power to make rules. That they have chosen to do so in a way which detracts to some degree from rights afforded by the Corporations Act is not, on its face, justified by the “conflict” provision cited above, by their broad power to “govern the affairs of the Society”,\(^\text{112}\) and least of all by a statutory admonition that “the rules . . . shall be interpreted as if they formed part of [the Law Society] Act”\(^\text{113}\). However, more important in the long run than whether the rules are valid or not is the substantive issue of the nature of membership control in the Law Society. This issue will ultimately be decided not by litigation over the effect of the Corporations Act but rather by explicit legislation and rulemaking designed to further democratize the government of the Society.

This last assertion is not intended to denigrate the real importance of organic growth within the parameters set by the existing legislation. For example, the potentially innocuous role of the annual meeting has been alluded to, and a suggestion has been made that the local law associations are emerging as an effective vehicle of “grassroots” opinion. Neither as prescription nor as description do these two developments necessarily flow from the language of the new Law Society Act. Both are the product of the benchers’ exercise of their power to make regulations, and consequently of the benchers’ perceptions and attitudes. Thus, an important factor in further progress towards fuller democratization will be the informal processes by which the benchers’ attitudes are influenced.

The simple demographic facts of life in the profession will no doubt be extremely significant as well. As the number of lawyers

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\(^{110}\) Rules, op. cit., supra, footnote 19, s. 52 (7).

\(^{111}\) Ibid., s. 52 (8).

\(^{112}\) S. 10.

\(^{113}\) S. 54 (2).
has grown rapidly since World War II, the close informal liaisons which may have been possible in an earlier time were bound to give way to feelings of estrangement from the centres of power on the part of many in the profession. To the extent that this growth in size has been accompanied by stratification based on a broader spectrum of legal careers and of ethnic, social, and economic backgrounds, the risk of estrangement was magnified.\(^\text{14}\) Finally, the influx of young people, who constitute an increasing percentage of the profession as a whole, will necessarily import new life styles and philosophies. All of these demographic factors are producing a new constituency of opinion, a new electorate, and ultimately a new breed of bencher.

The infrastructure of professional government will also be important. For example, until May, 1967, with the first appearance of the Law Society Gazette, there was no professional forum for the exchange of views relating to the Society’s policies. Publication of the Treasurer’s annual statement in the Ontario Reports dates only from this period as well. The minutes of Convocation, to be sure, had been published for many years in the Ontario Reports, to which every Ontario lawyer is automatically a subscriber. However, the minutes were (and continue to be) both tardy and summary; they convey basic information about decisions already taken, rather than variety of views about the wisdom of future policies. As the members become better informed, they may well find ways of registering their views with the benchers.

Broader participation in decision-making may also be achieved by the establishment of mixed committees of benchers and non-benchers.\(^\text{15}\) Both through informal working relationships, and through committee reports and recommendations, more rank-and-file members will be able to make significant contributions to the policies of the Society, and the attitudes of the benchers. The

\(^{14}\) To some extent, this point was only brought home to the benchers during the course of legislative consideration of the Act. For example, legislative criticism led to the abandonment of a Law Society proposal that all members of its secretariat be “Canadian citizens or other British subjects”. This rather silly provision, obviously out of keeping with the spirit of contemporary fair employment codes, was vaguely reminiscent of the Test Act requirements of the Stuart Restoration.

\(^{15}\) The new Rules of the Society provide that “each standing committee of the benchers shall be composed of not less than [a specified number of] members” (s. 28). In context, this usage of members might be taken to refer to “members of the benchers”, rather than rank-and-file “members of the Society”, an inference buttressed by the special identification of the Legal Aid Committee as a “standing committee of the Society” with a specific non-bencher membership (s. 47). On the other hand, the Law Society Act requires that “the rules shall be interpreted as if they formed part of this Act” (s. 54(2)) and the Act also defines a “member” as “a member of the Society” (s. 1(c)). There seems, at least, no statutory obstacle to service by non-benchers on all standing committees.
recently-formed committee on legal education would seem to be a prototype for this form of participation.

A third element in a vital infrastructure is the presence of voluntary and special interest groups within the profession. The Canadian Bar Association, of course, has long attracted the membership of most Ontario lawyers. Intensification of its activities, appointment of an Ontario secretary, and its formal representation on the new Law Society Council, indicate that the Association (and perhaps its specialist sub-sections) may become more influential in the formal decision-making process of the Society. The expanded role of the local law associations has likewise been recognized by their representation on the Law Society Council. New groups are also emerging: the Advocates’ Society (restricted to litigation lawyers), the Ontario Law Students’ Association, and the faculties of the law schools. Each of these groups will no doubt be a force to be reckoned with in the formulation of policy, particularly when its own special interests are affected.

Conclusion

In so far as it relates to internal reforms, the new Law Society Act does move the government of the legal profession beyond mere accountability to representative democracy, and perhaps to the threshold of participatory democracy. The stage is set for further organic growth; the responsibility for cultivating a fuller democracy now rests squarely with the members.

In so far as the principle of public accountability is introduced for the first time in the new Act, this must be counted as a major advance as well. However, the public presence is less well-defined than it might be, and may turn out to be illusory. So long as the Society continues to be reasonably responsive to public needs, it is unlikely that there will be strong external pressures for further constitutional change. On the other hand, advisory bodies such as the new Law Society Council tend to follow one of two life cycles: either they atrophy because they do nothing, or they assert themselves and acquire new powers because their members are unwilling to participate in a purely symbolic exercise. Thus, even in relation to public accountability the new arrangements are unlikely to survive for long without significant change.

At a minimum, it can safely be predicted that the government of the legal profession will not again complete a half-century without scrutiny.