"Artificial Conscience": Professional Elites and Professional Discipline from 1920 to 1950

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"Artificial Conscience": Professional Elites and Professional Discipline from 1920 to 1950

Abstract
Recent historical studies of the British and American Bars have identified their professional elites' willingness to define and enforce a concept of legal ethics which restricted less fortunate members' ability to practice and less fortunate individuals' ability to obtain legal assistance. This essay applies the thesis to the Canadian Bar's and especially the Law Society of Upper Canada's use of their increasing control over professional discipline from 1920 to 1950. Identifying similar trends in the Canadian profession's evolution, while emphasizing effects rather than intentions, it makes similar conclusions about the Canadian professional elite's use of such powers during this period.

Keywords
Bar associations--History; Legal ethics--History; Practice of law--History; Canada; Great Britain; United States

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Recent historical studies of the British and American Bars have identified their professional elites' willingness to define and enforce a concept of legal ethics which restricted less fortunate members' ability to practice and less fortunate individuals' ability to obtain legal assistance. This essay applies the thesis to the Canadian Bar's and especially the Law Society of Upper Canada's use of their increasing control over professional discipline from 1920 to 1950. Identifying similar trends in the Canadian profession's evolution, while emphasizing effects rather than intentions, it makes similar conclusions about the Canadian professional elite's use of such powers during this period.
I. INTRODUCTION

Until recently, social thinkers and historians shared a common naïveté toward the concepts of "legal ethics" and professional self-regulation. The former concept, accepted by most, implied a lofty set of idealistic propositions designed to spur aspiring lawyers' self-improvement and help them meet their spiritual "call" to service. It reflected values universally espoused by the profession that existed, as did the regulatory bodies themselves, both for the practitioners' and the public's protection. The predominant view held that only these bodies could properly define and enforce professional conduct, and therefore the public should accept whatever standards the profession deemed necessary for its security.

Contemporary analysis has matured, however, in two important ways. First, the notion of Canadian Law Societies as purely benevolent protectors of public interest has been abandoned. In dealing with recurring issues involving the administration of legal aid services and the profession's disciplinary role, academics and the media have attacked the legitimacy of self-regulation by criticizing professional bodies' ability to further their own self-interest at the public's expense. Furthermore, modern thought recognizes that persons of different backgrounds, interests, and opportunities compose the profession's often stratified membership. In so doing, it questions the notion of universal professional values and reveals the governing elites' willingness to

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1 R. Haliechuk, "Ontario Benchers in Uproar over Favouritism Charge: By the Narrowest of Margins, the Law Society of Upper Canada has Voted to Have its Handling of a Professional Misconduct Complaint Independently Investigated" The Lawyers Weekly (9 February 1990) 10.
manipulate regulatory policies to the detriment of their less fortunate or
less accepted colleagues.

This essay relies on these developing perspectives in exploring
the manner in which Canadian legal elites asserted themselves as the
Bar’s "artificial conscience" from 1920 to 1950. Against the background
of similar patterns in Britain and the United States, it concludes that,
throughout this period, regulatory bodies enforced ethical and political
ideologies which were far from universally beneficial to either their
members or the public at large. In this era of growth, changing society,
changing forms of practice, and the Bar's increasing stratification, the
professional values codified in 1920 and thereafter enforced had a
disparate impact on different classes of practitioners. To the elites
defining ethical conduct, prohibitions on solicitor advertising, fee tariff
undercutting, the "stirring" of litigation, and "alien" political beliefs,
maximized the value of the social and corporate connections which
sustained their professional status and upheld their ideology. To those
who lacked similar contacts or maintained unacceptable views, however,
such policies either restricted their ability to compete in crowded
markets or eliminated that right altogether. Moreover, whether
intentional or not, restrictions on available information, inflexibility of
fee arrangements, and the solicitor's role in organizing claims, inhibited
many poorer individuals' ability or willingness to launch valid causes of
action.

This essay does not, as Arthurs puts it, assign "too great a burden
of guilt" on the elite governing the profession during this period. It
contemplates the racial prejudices and corporate biases that affected the
elite's decisions but, unlike other studies, it emphasizes effects rather
than intentions. In attaching an "artificial" unprofessionalism to
practices and beliefs not in themselves irreconcilable with the practice of
law, the elitist "conscience" further marginalized disenfranchised
members of the Bar and the public. Although, as Arthurs rightly points
out, it neither created social inequities nor held the power for their
remedy, the elite perpetuated such inequities to its own and its clients'
advantage through professional discipline.

3 H.W. Arthurs, Book Review of Unequal Justice: Lawyers and Social Change in Modern
4 Ibid. at 517.
II. THE BRITISH EXPERIENCE

As the source of its professional model, the British Inns of Court and the Law Society provide instructive starting points for analyzing the Canadian Bar’s exercise of disciplinary authority.

A. Inns of Court

Still “an inefficiently organized cottage industry” at the beginning of the twentieth century, the Inns nevertheless prescribed an intricate unwritten code governing barristers’ conduct that promoted the interests of their elites. At the risk of losing the independence which the Inns felt essential to a barrister’s role as a “champion of liberty,” a barrister could not speak to a client without a solicitor’s intervention and could not speak to a solicitor regarding a case unless approached. Any form of advertising, or “touting,” of one’s services to solicitors, as well as fee arrangements contingent on the case’s success, detracted from barristers’ gentlemanly calling and from their primary duty as officers of the Court.

In the stratified British profession, such rules restricted the prospects of junior members without “family and personal connections powerful enough to steer barristers’ work” in their direction. A young barrister could do little to establish the professional relationships necessary for successful practice, especially after Parliament’s expansion of solicitors’ rights to appear before lower courts in the 1850s. Excluded from High Courts by more established senior members and from County Courts by solicitors’ competitive advantages, junior barristers, as Pue points out, chose survival over ethics:

[T]he only viable means of attaining eminence at the bar for individuals who were not well connected lay in precisely those sorts of “commercial” practices—direct client contact, fee cutting, conditional fee arrangements, special commercial arrangements with clients or attorneys—which were condemned in the dominant model of barristering.8

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8 “Moral Panic,” supra note 6 at 101.
Throughout the 1850s, as Pue relates elsewhere, “rebels at the bar” challenged the artificial nature of barristerial etiquette. Many of them established “commercial” practices and, in 1852, many more petitioned the Inns “to sweep aside important traditions of professional conduct” inhibiting their further success.

As described by Cocks, the Inns’ reliance on social pressures to enforce legal ethics originally rendered most deviants immune from censure. But when the Benchers decided to flex their disciplinary authority, they applied it selectively against “a miscellaneous collection of marginalized” individuals with political or professional ideologies alien to those of the conservative elites. The disbarments of Edwin James and Digby Seymour, for example, reflect not simply the Bar’s public concern but “political victimization by a conservative professional aristocracy.” As Liberal members of Parliament—the former about to become Attorney-General before his hearing—James and Seymour proved to be gratifying subjects of the predominantly Tory Benchers’ disciplinary review.

Seymour, moreover, like Charles Claydon and Charles Rann Kennedy, was one of the rebels engaged in “unprofessional” practices tacitly accepted in the 1850s. By bringing prominent exemplars of such practices to professional justice, the Inns publicly reinforced the concepts which ensured their elites’ continued prosperity. While Claydon was unknown, Seymour had become Queen’s Counsel (Q.C.), despite his documented breaches of etiquette. Kennedy had earned both fame and the Inns’ further contempt by “openly challenging the integrity of leading barristers and judges” in the “Great Swinfen Case” of 1856. At the highly publicized trial, Kennedy not only questioned the barrister’s right to settle a will against a client’s wishes, he confronted the very fabric of barristerial elitism with a “commercial” ideology of practice. Subjecting him and others to the Inns’ reproach rendered

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10 “Moral Panic,” supra note 6 at 56-57.
12 “Moral Panic,” supra note 6 at 116.
13 Ibid. at 84.
15 “Exorcising Professional Demons,” supra note 7 at 160-61.
final judgement on the practices such “rebels” adopted. Previously unenforced etiquette acquired a new vigour and thus reinforced professional concepts more attuned to the elites’ competitive strengths.

Not until the advent of the Bar Council in the 1880s and the Inns’ increasing democratization did the junior Bar acquire the “strong moral authority” necessary to further its members’ financial interests. Rather than overhauling professional codes, however, the Bar Council merely extended ethical restrictions to accommodate the junior members’ often disadvantaged positions. In 1890, the Bar Council decided “that it was a generally recognized rule of etiquette that a Q.C. could not appear at a trial without a junior,” and that the 2/3 fee-splitting ratio for such arrangements was a “long established and well-settled custom.”

To protect junior members’ market on the Assizes, the Council established the propriety of London barristers’ demands for a “special” fee for services performed outside the metropolis.

Amendments to barristerial etiquette may have remedied some disparities between senior and junior members of the Bar but, as Abel-Smith and Stevens reveal, the profession’s “leaders made fortunes, while the average barrister in 1939 did not earn very much.” The Bar Council, moreover, refused to re-examine rules which condemned the “commercial” practices necessary for some of its members’ success. It perpetuated the Bar’s stratification by adding, not reducing, rules which rewarded social connections with success. A junior without links to senior barristers would remain unaffected by the alterations, while the potential for advancement of juniors who had limited connections with solicitors was similarly limited.

B. Law Society

The Law Society used its disciplinary powers in the same manner. After consolidating its authority over professional discipline through the Solicitors Act, 1888 and subsequent amendments in 1919,
the Law Society embarked on an ethical crusade to eliminate competitive practices among its members. In 1934, it prohibited "the acceptance by a solicitor of remuneration at less than the statutory or customary rate with the object or result of attracting ... business." By turning originally maximum fee schedules into ethical minimums, the Law Society inflated the price of legal services to the benefit of its established elite. The rule precluded lower fees even if a client's financial position so warranted and stifled young solicitors' ability to undercut their competitors through lower prices and greater industry.

The Law Society's attitude toward contingency fees was equally restrictive in its effects. As Abel-Smith and Stevens relate, the Society responded to "trade protection" and the prosecution of personal injury claims during the 1920s and 1930s, by outlawing their methods of practice:

[R]ules were made under the Solicitors Act of 1933 which prohibited a solicitor from "prosecuting claims arising in consequence of death or personal injury for a client whose introduction to him is consequent upon solicitation or is made as a matter of business and in expectation of reward." The rule was directly aimed at "ambulance chasing." By using "pamphlets, circulars and touts" and adopting fee arrangements contingent on the claims' success, these ambulance-chasing solicitors secured a livelihood in inhospitable markets for services. Such practices were deemed unacceptable, however, because they attracted retainers away from the Society's more established membership. Like the Inns, the Society justified its abhorrence of advertising and contingency fees on the basis of protecting the solicitor's independence as a public servant. Yet it too failed to offer alternatives to solicitors who, without such practices, might not have had anyone to serve.

Furthermore, the cumulative effect of the Inns' and the Law Society's ethical policies was hardly in the public interest. Restrictions on advertising, for example, might have prevented persons from realizing the availability of legal redress. Claimants who had such knowledge still had to pay a solicitor's, a junior barrister's, and a senior barrister's fees at prices artificially inflated by fee tariff or convention. Those without the immediate means to pay could not enter into contingency contracts, and thus many claims were either uneconomical or impossible for wronged parties to pursue. Marginalized barristers

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23 Ibid. at 204.
24 Ibid. at 196 [footnotes omitted].
25 Ibid. at 139.
and solicitors were available for such work, but the British Bar subordinated the interests of both its less-connected members and those of the vulnerable classes to a professional ideology which sustained the governing elites’ elevated status.

III. THE AMERICAN EXPERIENCE

Auerbach constructs a different model of the American Bar, but his conclusions with respect to the elite’s manipulation of its disciplinary influence are similar. The American Bar’s stratification, he explains, was based on the corporate, not the aristocratic connection. At the century’s turn, powerful commercial interests, which “required the preventive techniques of the counselor who spoke to the future,” altered the traditional role of the lawyer as an advocate “who litigated the mistakes of the past.”\textsuperscript{26} The corporate law firms that arose to accommodate these interests were “edging to the pinnacle of professional aspiration and power”\textsuperscript{27} during this period and, together with corporate directors, formed a symbiotic elite which consolidated institutional control for their mutual benefit. The doors to such career opportunities, Auerbach maintains, “required keys that were distributed according to race, religion, sex, and ethnicity.”\textsuperscript{28} Jewish, Black, and other ethnic minority lawyers “sank to the bottom”\textsuperscript{29} of the profession and formed an underclass excluded by the corporate elite. This substratum absorbed much of the profession’s tremendous growth in this period,\textsuperscript{30} and extensive competition ensued for the limited personal injury, probate and wills, and simple conveyancing work on which these marginalized practitioners relied.

As in the case of the British Inns and the Law Society, the American Bar’s elite promulgated an ethical ideology that promoted its own interests over those of its underclass. Around the turn of the century, expressions of “unease” began to emerge involving two

\textsuperscript{26} J.S. Auerbach, \textit{Unequal Justice: Lawyers and Social Change in Modern America} (New York: Oxford University Press, 1976) at 23.

\textsuperscript{27} Ibid. at 22.

\textsuperscript{28} Ibid.

\textsuperscript{29} Ibid. at 26.

concerns over the profession's increasing commercialization. One line of criticism concentrated on the elite's abandonment of its traditionally immutable independence in favour of corporate subservience. It foresaw the undesirable consequences of championing money rather than justice and urged attorneys to develop their professional identities beyond the narrow scope of corporate interests. The other source of disapproval was the urban underclass. According to Auerbach, censure focused on the "commercial" practices which its competitive market necessitated and "demonstrated antagonism toward lawyers from ethnic minority groups" who formed much of the membership of the urban underclass.

As concerns over declining professional standards gathered momentum, so did the Bar's desire to codify an ethical ideology. Yet the media through which it did so, the American and state Bar Associations, misrepresented the Bar's increasing heterogeneity. Auerbach describes the corporate elite's stronghold on these institutions of professional policy:

[B]ar associations, in which they wielded power disproportionate to their professional numbers, provided an organizational base for their interests, a forum for their views, and leverage for the implementation of their programs.

The American Bar Association (ABA), formed as an exclusive body in 1878 to further the interests of its elite members, provided the model for similarly composed state organizations. With the adoption of canons of ethics in 1908, therefore, their leaders "shifted the onus" of professional concern from corporate lawyers' activities to those of the underclass, and promoted values which restricted the latter's ability to cope with their competitive environment.

Auerbach supports his thesis by analyzing three standards of conduct. The first, Canon 27, declared the "most worthy and effective advertisement possible ... is the establishment of a well-merited reputation for professional capacity and fidelity to trust." Yet in

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31 Auerbach, supra note 26 at 40.
32 Ibid.
33 Ibid. at 36.
34 Ibid. at 41.
35 Opinions of the Committee on Professional Ethics and Grievances with the Canons of Professional Ethics Annotated and the Canons of Judicial Ethics Annotated (American Bar Association, 1936) 14 [hereinafter Canons]; see also "American Bar Association Canons of Ethics" (1919) 4 CBA Papers 14.
heralding “character and conduct” over circulars, personal communication, or self-praise as the most effective means for solicitors to achieve success, the Canon ignored the fact that many practitioners required such methods in order to survive. As a consequence, Auerbach contends, the rule disparately affected the stratified profession:

It ... rewarded the lawyer whose law-firm partners and social contacts made advertising unnecessary at the same time that it attributed inferior character and unethical behaviour to attorneys who could not afford to sit passively in their offices awaiting clients.

Two canons, aimed specifically at “ambulance-chasing” lawyers, had similarly negative implications for those without the connections necessary to sustain a practice. The first prescribed that contingent fees, “where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.” As such arrangements had been legalized by the United States Supreme Court in 1877, prohibiting contingent fees was impossible. But in merely accepting them where “sanctioned” and in specifically subjecting them to judicial review, the rule rendered the contracts on which marginalized lawyers relied something less than professional.

Canon 28 reflected a more explicit attack on aggressive solicitors. In barring “stirring up strife and litigation,” it specifically contemplated the type of practice which engaged lawyers marginalized by the corporate elite:

It is disreputable ... to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients.

The profession’s outrage at “ambulance chasers,” intensified by prejudices toward minorities attracting that title, inspired the ABA’s forceful denunciation of such practices. And while a prohibition on the hiring of agents, police personnel, and hospital staff to solicit possible claimants might have been in the public interest, the ABA ignored the realities of a competitive environment which necessitated and justified aggressive solicitation. By classifying such activities as “stirring,” an ethical infraction punishable by disbarment, the Canon further

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36 Canons, ibid.
37 Auerbach, supra note 26 at 43.
38 Canon 13, supra note 26 at 43.
40 Canons, supra note 35 at 16.
41 Ibid.
reinforced the position of elites whose connections rendered the problem of securing retainers irrelevant.

The ABA's power to enforce its ethical ideology was limited but not ineffective. Through the state bar associations which adopted its canons and compensated for its lack of authority, the ABA's elite ensured that, as in Britain, disciplinary actions focused on alien individuals or those with political ideologies contrary to the elite's own. An "ambulance-chasing" investigation conducted in New York in 1929 clearly reveals the administrators' ethnic intolerance in their recommendations to disbar seventy-four lawyers:

[The chief counsel pointedly observed that some attorneys who had testified "could not speak the King's English correctly ... These men by character, by background, by environment, by education were unfitted to be lawyers."\(^{42}\)]

Expulsion of uneducated lawyers, whose negligence could only cause further legal problems, was clearly in the public interest. Additional ethnic prejudices, however, eradicated the discipline procedure's neutrality. During and after World War I, Auerbach relates, "professional leaders waged a crusade against radicals, aliens, foreign-born citizens, and native-born members of ethnic minority groups."\(^{43}\) Two lawyers in Pennsylvania and Idaho, for example, were disbarred after organizing opposition to the draft. A Washington lawyer was similarly disciplined when he was discovered speaking for a radical political organization, the Industrial Workers of the World, at a public rally.\(^{44}\) In each case, the bar punished persons for criticizing the values espoused by its elite. The bar allowed bigotry and ideology to dominate its concepts of professionalism and thereby revealed its governing members' willingness to define ethical conduct by standards unrelated to the practice of law.

The bar associations' policies marginalized vulnerable individuals as well as vulnerable practitioners. By restricting dissemination of available information and more aggressive solicitation, the canons may well have prevented potential claimants from discovering actionable wrongs and obtaining legal assistance. With contingency contracts tolerated and the profession joined, poorer individuals could perhaps more readily pursue a claim in the United States than in Britain. Yet, as Auerbach points out, the American Bar had a greater stake in restricting access to legal services than did its

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\(^{42}\) Auerbach, supra note 26 at 49.

\(^{43}\) Ibid. at 102.

\(^{44}\) Ibid. at 104.
British counterpart. Since the bulk of personal injury work involved claims against corporations, the Associations’ restrictive measures protected the commercial interests which in turn supported the Bar’s governing elites. As a result, the policies were rigourously, if selectively, applied to deny both the struggling attorneys the tools to compete and the less fortunate individuals the means of redress.

IV. THE CANADIAN MODEL

A. Consolidation of Disciplinary Authority

The first step in comparing American and British experiences with those of the Canadian Bar involves a review of its Law Societies’ developing powers from the 1870s to 1920s. Throughout the nineteenth century, the courts dominated disciplinary review of both solicitors and barristers. Their jurisdiction was limited to the former, but because distinctions were nominal and bodies such as the Law Society of Upper Canada were reluctant to condemn the latter “in the absence of previous action on the part of the courts,” they effectively held the authority to define and apply appropriate standards of conduct to all practitioners.

In the 1870s, however, the Law Societies began to expand their independent disciplinary roles. The Law Society of Upper Canada assumed concurrent jurisdiction over the rules and regulations governing its members, whether solicitors or barristers, by Ontario statutes in 1876 and 1881. The Society appointed a standing Discipline Committee in 1877 and, in subsequent years, developed a thorough procedure to deal with complaints of misconduct. While originally reluctant to abandon their power in such matters, Ontario courts became increasingly deferential to the Law Society’s authority. They retained their right to review the Society’s decisions on appeal, but after 1923 demanded that disciplinary applications be heard by the Society’s own discipline committee.

Other provincial Societies carried out similar consolidations. By its charter in 1877, the Law Society of Manitoba acquired a limited
degree of power over its members which, subject to court appeal, became absolute in 1926. The Law Society of Alberta, formed in 1907 after the province's incorporation, successfully lobbied for a greater disciplinary role in 1921. And while a less-developed complaint procedure attracted the courts' review throughout the 1920s, judicial decisions respected the Society's definitions of unprofessional conduct. The Law Society of British Columbia's similar jurisdiction stemmed from provincial statutes in 1874 and 1877 and, as with the other bodies, was subject merely to an appellate court's procedural review.

In his study of the Law Society of Upper Canada during this period, Cole attributes the governing bodies' accumulation of power to their growing professional self-consciousness. Establishing complaint mechanisms, defining misconduct, and expelling offenders from their ranks, Cole explains, allowed law societies "to purge the profession of those who bring disgrace upon their brethren" and thus legitimize their autonomous control of its membership. At the same time that it ensured law societies' role as public protectors, however, consolidation raised the possibility that their disciplinary authority could be used to the detriment of certain professional and public elements it was intended to serve. Courts could ensure that their procedures were fair and legislatures could always revoke their powers, but until the latter occurred the societies could impose whatever ethical ideology they chose on the Canadian legal profession.

B. The Changing Society, Practice, and the Professional Elites

Assessing the manner in which Law Societies used their power requires consideration of the pressures which transformed Canadian society, the nature of Canadian legal practice, and the composition of its leadership in the first half of the twentieth century. The Societies' first


52 Professionalization of the Ontario Bar, supra note 30 at 263.

53 Ibid. at 227.
concerns must have been with the growth and concentration of their membership. As Cole indicates, the Ontario Bar’s anxiety about the rapid growth of the profession dated from the 1840s:

In 1846, potential lawyers were warned, “Lawyers are not wanted: Canada swarms with them; and they multiply in the province so fast, that the demand is not by any means equal to the supply.”

From 1,201 lawyers in 1881, the Bar grew at a rate sometimes 1.25 percent greater than the annual population growth and reached 2,556 lawyers by 1936. Sibenik documents an even more dramatic influx in Alberta, as its Bar bloated from 166 practitioners in 1908 to 562 in 1915. As it expanded, moreover, the profession became increasingly concentrated in urban settings. Elizabeth Bloomfield describes such a pattern in Ontario:

The numbers of communities in which lawyers practised dropped from the high of 217 centres in 1900 to 192 in 1912 and 182 in 1920. Only in Toronto and Hamilton did the numbers of lawyers grow steadily.

Expansion and concentration created two problems. First, a larger Bar made regulation more difficult and, as Sibenik indicates, was another reason for the societies’ assumption of disciplinary power. More important, however, increasing numbers in limited territories led to escalating competition, which both inspired protectionist policies from the Bar’s elite and pressured struggling lawyers to breach those policies in order to survive.

The type, as well as the number of legal practices was changing during this period as Canada asserted itself as an industrial nation. By 1921, according to Newman, “cities had grown drastically” and had absorbed over one-half of the nation’s formerly rural population. Canada experienced a “parallel expansion in industry, commerce and


55 Ibid. at 232.

56 Sibenik, supra note 50 at 112.


Capital investment in manufacturing increased from $165,302,623 in 1880 to $2,923,667,011 in 1920, and the gross value of manufacturing output grew from $469,847,886 to $3,706,544,997 during the same period. Railways, utility services, the “construction industry, iron and steel, electrical industries, [and] automobiles” were subject to increasing investment and corporate concentration in the first decades of the twentieth century. And to supply needed capital, chartered banks, “mortgage and loan, insurance, and trust companies” expanded their operations, while “fledgling stock markets developed in Toronto and Montreal.”

Wilton describes how this economic expansion triggered demands for new forms of legal services:

The expansion of industry demanded several changes: incorporation to form limited-liability companies; more complex contracts with employees and business associates; a more varied array of securities instruments at a time when capital imports were increasing; the elaboration of defences against greater government regulation; and the ability of firms to function in more than one jurisdiction. All of these changes placed increasing demands on the lawyers.

As Auerbach observes with respect to the American Bar, economic growth spawned the “newly emerging corporate lawyer whose strength was drawing up agreements and conducting negotiations” rather than litigating past errors. Employed by commercial powers, whether in a preventive capacity or as advocates for their interests, Canadian corporate lawyers rose to similar professional heights similar to their American counterparts. In analyzing the motives for their partnership in the late nineteenth century, Cole finds that the “best known Canadian lawyers” at that time, D’Alton McCarthy and Britton Bath Osler, joined forces in 1882 in order to lay the foundation for a “lucrative

59 Ibid.
60 Ibid.
62 Ibid. at 16.
63 Ibid.
64 Ibid. at 18.
65 Ibid. at 17.
corporate practice"67 serving railways, banks, and insurance companies. Such famous lawyers as Toronto's Zebulon A. Lash and Alexander Mackenzie, the Halifax firm of Harris, Henry, and Cahan, and Alberta's R.B. Bennett, similarly catered to utility companies and railways, and likewise exemplified the rewards of satisfying corporate needs for legal services.68

With their increasing fame and financial success, corporate lawyers acquired greater roles as leaders of the profession. Despite more democratic election procedures than those of the early nineteenth century, the professional elite continued to dominate the law societies' convocations. And while asserting that corporate lawyers dominated the elite might be inaccurate, such practitioners did assume important roles in the regulation of the profession. John Hoskin, partner in McCarthy and Osler's Toronto law firm, was the first chairman of the Law Society of Upper Canada's Discipline Committee, was instrumental in developing and expanding its hearing procedures,69 and became the Society's Treasurer in 1914. Joining his father's firm in 1895,70 McCarthy's son D'Alton Lally succeeded Hoskin as Discipline Committee chair, held the post into the late 1930s, and served as Treasurer from 1939 to 1944.

C. Stratification of the Profession in Canada

As in Britain and the United States, the bodies governing Canadian lawyers had always been controlled by their elites. Like the British Inns and the Law Society, therefore, such bodies had the potential to enforce an ethical ideology detrimental to practitioners excluded from the elite. But as the aristocratic elite of the early nineteenth century was gradually replaced by a new class of lawyers serving big business, professional discipline may also have been used to protect the corporate interests which supported that ruling class. According to Wilton, attorneys meeting new demands for legal services shared their clients' values, "interests and difficulties":

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67 Ibid. at 155.
70 "Building a Practice," supra note 66 at 163.
By assuming corporate concerns and the positions from which to voice those concerns, the emerging legal elite in Canada gained the power to uphold its interests against a professional underclass in the same manner described in Auerbach’s study of the American Bar.

The doors to the Canadian legal profession seemed to be locked to certain classes of qualified lawyers. As Clara Brett Martin’s experience in Ontario demonstrates, even if a woman could persuade either the Legislature or the Law Society to admit her to the Bar, she would be looked upon as “an interloper, if not a curiosity” and would have to limit the scope of her practice “to escape criticism and censure from the public and from other members of the legal profession.”

Bora Laskin’s inability to obtain employment after completing his LL.M. at Harvard in 1937 indicates the Ontario Bar’s similar prejudice against Jews. As Bickenbach relates, none of Laskin’s supporters “thought it particularly exceptional that a Jew would find it extremely difficult to find employment as a lawyer in Toronto” and thus were happy to find the future Chief Justice of Canada a job writing headnotes for the Canadian Abridgement.

Two brief passages in E. Fabre Surveyer’s otherwise blissful recitation on the Bench and Bar of Montreal in 1907 suggest French-Canadian lawyers’ exclusion from lucrative practice:

And further:

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71 “Beyond the Law,” supra note 61 at 32.

72 C.B. Backhouse, “To Open the Way for Others of my Sex: Clara Brett Martin’s Career as Canada’s First Woman Lawyer” (1985) 1 Can. J. Women & L. 1 at 22.


It must also be said that the Montreal Bar has seldom received from the powers, its fair share in the distribution of legal work. In matters of general interest our lawyers are too often ignored.  

Whether Surveyer's "powers" were members of the Bar's elite or the large, presumably corporate or commercial, interests they served, it seems clear that many French-Canadian lawyers were excluded from certain careers by their "more prosperous brothers."

A short history of Black lawyers' experiences in Ontario offers further evidence of stratification. Talbot indicates that Blacks could only article with other Black or Jewish lawyers and "were not welcomed into traditional partnerships with whites" until well into the 1960s. Such marginalization, he explains, impaired their ability to develop a profitable practice:

The opportunity for Blacks however, was made all the more difficult for several reasons. During the period as it is today, the most lucrative form of practice was that dealing with real estate transactions and commercial or corporate representation. Since Blacks did not have ready access to such clients the ability to earn a prosperous living was greatly diminished.

While Blacks represented a minute percentage of the Ontario Bar, their experience, combined with those of female, Jewish, and French-Canadian lawyers, implies a pattern of stratification similar to that found by Auerbach. And as the profession probably absorbed portions of the immigration boom at the century's turn, the possibility that elites used disciplinary codes and procedures to further marginalize "alien" lawyers existed in the same manner as it did in the United States.

V. CBA CANONS AND PROFESSIONAL IDEOLOGY

A. Formation of the CBA and its Canons of Legal Ethics

The formation of the Canadian Bar Association (CBA) in 1914 and its adoption of Canons of Ethics in 1920 provide some indication that the Bar's elite used professional discipline to perpetuate inequities in the profession. As the impetus for its formation stemmed from a

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76 Ibid. at 31.
78 Ibid.
79 "Beyond the Law," supra note 61 at 14.
speech Viscount Haldane delivered at an ABA meeting in Montreal in 1913, the CBA maintained close British and American ties from its inception. Its proposed federation with “the four Inns of Court and the Law Society of England ... [and] the American Bar Association” in 1922 confirmed its affinity with those regulatory bodies. Furthermore, the men forming the CBA, whom the Canadian Law Times described as “[p]robably the most distinguished gathering of Canadian lawyers that ever met together at one time,” exemplified the type of professional elites forming the Inns’, the Law Societies’, and the ABA’s leadership from their conception.

The ABA, however, had by far the greatest influence on the CBA. As Coleman points out, the CBA developed objectives “similar to the purposes of the American Bar Association,” and ABA leaders attended its first and subsequent meetings. When concerns regarding the profession’s increasing commercialization arose in Canada, the CBA, not surprisingly, based its response on the ABA’s treatment of similar issues. J.A.M. Aikins, the CBA’s first president, expressed the founding elite’s concern for the profession in 1915:

[Law] is not a calling or instrumentality suited to that purpose [of making money] as is the business of the merchant, manufacturer or miner. Persons who have thus sought to commercialize it, to prostitute it to such an end in itself have lowered the professional tone and so lost the respect and esteem of their fellow-practitioners and of the people.

According to Auerbach, professional unease originally focused on two forms of legal “prostitution.” The first involved lawyers’ catering to corporate interests, while the second focused on unconnected practitioners’ efforts to compete in tight markets. Yet Aikins’ comments imply that, as in the United States, only the latter deserved professional condemnation. It did not fall on esteemed CBA leaders like John Hoskin—who became wealthy by serving commercial interests of the “merchant, manufacturer or miner”—but on the professional underclass whose quest for survival necessitated such commercial practices.

The CBA addressed such concerns by codifying professional concepts derived almost exclusively from the ABA’s Canons of Ethics. Organized under five duties—to the state, the court, the client, the

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81 “Personal” (March 1914) Can. L.T. 244 at 252.
82 Coleman, supra note 80 at 4.
84 Coleman, supra note 80 at 7.
fellow lawyer, and to her or himself—the practitioner's guide reiterated the restrictive principles with respect to advertising, fee tariffs, and "stirring" held by the British and American Bar. Such standards, adopted by the Law Societies as their disciplinary regulations, limited a struggling attorney's ability to compete in a crowded sector. In his description of the Canons' objectives, furthermore, the Convener of the CBA Committee on Legal Ethics, Angus MacMurchy, made it clear that the code was aimed at a specific class of lawyers:

In view of the changed and changing conditions of this country, and the large number of students now admitted to the practice, many of whom come from various countries whose traditions and surroundings have not been similar to those of our own and the Motherland, the time may be considered as having arrived when it is necessary to reduce to writing for the information of the members of the Bar and the guidance of our law students some of the most important general principles governing the conduct of the profession.85

On one level, MacMurchy's paternalistic tone is typical of a Bar's senior member addressing aspiring colleagues. His singling out of immigrant lawyers, however, adds a racial dimension to the code's purposes. Considering such lawyers' marginalized position in an increasingly competitive market, it raises the possibility that the Canons' inhibiting measures sustained not only the professional but also an ethnic stratification among the practitioners they governed.

B. Solicitor Advertising

The canon prohibiting solicitor advertising, for example, limited lawyers' ability to cope with problems of client attraction. In preaching that the "best advertisement for a lawyer is the establishment of a well merited reputation for personal capacity and fidelity to trust,"86 the CBA standard echoed ABA's Canon 27. A prohibition on circulars, personal communication, agents, or self-praise as a means of obtaining retainers was irrelevant to a legal elite whose social or corporate connections supplied their clientele. To struggling lawyers, however, the duty "to themselves" not to advertise was crucial. By virtue of prohibition on circulating information, such lawyers were prevented from acquiring the professional and ethical reputation essential to a successful practice.

The Law Society of Upper Canada's enforcement of the Canon reveals its disparate effects. As the Society's records show, the pressure

86 Canon 5(3), "Canons of Ethics" (1920) 5 CBA Papers 261 at 264.
to advertise dated from the late nineteenth century. In Convocation and in legal periodicals, solicitors complained both of advertising and, as this 1890 Canadian Law Times editorial reflects, the Law Society’s inaction in dealing with offenders:

Sensational advertising is a growing evil and not without a baneful effect upon the whole profession; here is ground for action; but though many instances are brought directly to the notice of the Benchers they pass without observation.

In what Cole describes as two decades of tremendous growth in the profession, advertising was a “growing evil” only to those it threatened. Non-advertisers complained about those who advertised because of the “baneful effects” not on their integrity, but on their practices’ viability. In smaller markets for services outside Toronto, where the majority of complaints originated, and in the metropolitan underclass, practitioners faced obstacles from which the Toronto elite were immune. But because the elite controlled the Discipline Committee, practitioners’ complaints were dismissed by a body with no stake in enforcing such ethical restrictions. Issues of solicitor advertising raised in 1876 and 1884, for example, warranted neither action nor more than a passing mention in the Convocation Minutes. And when a complaint regarding a patent-solicitor’s similar activities arose in 1896, the Law Society claimed its Discipline Committee had no power to deal with the matter.

The Society reacted very differently when concerns over solicitor advertising re-emerged in the 1930s. After hearing a complaint regarding two solicitors who published their “card” under a telephone book heading designating their specialty, the Discipline Committee issued this statement in November 1938:

These advertisements, in the opinion of Convocation, constitute a departure from the traditions of the Society and tend to lower the tone of the lawyer’s high calling and, in the

89 “A Developmental Market,” supra note 54 at 233.
90 “Professionalization of the Ontario Bar,” supra note 30 at 238.
91 Minutes (8 December 1876), supra note 87; and Proceedings (12 September 1884), supra note 87.
92 Ibid.; and Minutes (17 November 1896), supra note 87.
opinion of Convocation, the same should not be tolerated; and in the event of the practice being continued Convocation will take the necessary steps to discipline those solicitors who, in the opinion of Convocation, are guilty of unprofessional conduct in the matter of advertising, contrary to the well established standard of the Society. Convocation’s stern response to a seemingly minor violation indicates its changing attitude toward solicitor advertising. Previously, the “well established standard of the Society” had not been enforced by the Discipline Committee, which claimed that such complaints were beyond its review. In the late 1930s, however, the Society not only asserted its authority over such matters, but prescribed stringent standards for its members’ practices.

The statement certainly surprised the Bar when it was published. That practitioners and firms, unsure of the proper standard, repeatedly entreated the Law Society to assess their advertising practices in 1938 and 1939, confirms the artificial nature of the prohibition. The definitions framed to fit the prohibition clearly favoured the Society’s elite as they generally forbade any means by which a lawyer or a firm might set themselves apart from other lawyers or firms. As the complaint which inspired its action illustrates, the Society prohibited a lawyer’s declaration of his specialty in non-legal publications such as telephone books or newspapers. It allowed patent and admiralty lawyers to declare their practices’ limited scope, but prohibited statements like “litigation, conveyancing, insurance, investments” in a published legal card. The Society further condemned solicitors advertising “private funds for mortgages,” “planned economy service,” and “money to loan.” It even “expressed disapproval” of those using bold type in telephone books without going “so far to say it was not proper.” A solicitor could state both his specialty and large

93 Law Society of Upper Canada Archives, Series 5-03, Discipline Committee—General Files, [hereinafter “Discipline Committee—General Files”], “Solicitor’s Advertising,” File No. 05-03-25 (6 October 1938).
94 Ibid.
95 “Discipline Committee—General Files” (9 February 1939).
96 “Discipline Committee—General Files” (31 March 1939).
97 “Discipline Committee—General Files” (27 January 1939).
98 “Discipline Committee—General Files” (17 May 1939).
99 “Discipline Committee—General Files” (19 February 1940).
100 Ibid.
"representative clients" in legal lists and directories, but that remained a specific exception to the Society's general prohibition.

Such limitations debilitated a struggling lawyer's capacity to establish a professional reputation. The clients that a less-connected lawyer might acquire would probably consult a telephone book or newspaper before a law list. The relaxation of the rule pertaining to the latter source aided firms which were retained by mentionable clients such as banks, insurance companies, and municipalities, but was irrelevant to a lawyer without similar retainers. What such a lawyer needed was a means to make infrequent users of legal services choose his or her practice over those of the many competitors. Persons consulting a telephone book to obtain a divorce lawyer would probably choose a lawyer listed under "Lawyers—Divorce," rather than one with no such designation. Such persons might even consult a lawyer whose name appeared in bold print first or be attracted, unlike wealthier individuals or corporations, by the prospect of obtaining a small loan or mortgage.

The Society, however, forbade the assertion of competitive advantage. In a complaint coming before it in 1939, and apparently involving the same patent-solicitor with whom it dealt in 1896, the Discipline Committee condemned his assertions in a circular that his was Ontario's oldest patent firm, that he had special skills as a mechanical engineer, that the firm preferred settlement over litigation, and that "there is not an infringement case contemplated ... which has not been won." This form of "puffing," the Committee held, was "entirely contrary not only to the ethics of the Society but to the rules of Convocation." Yet, as the impugned solicitor's response to the Committee's holding confirms, such puffing was not unreasonable in a competitive environment. In responding to the Committee's inquiry as to whether his "circular calls attention to [his] qualifications as a lawyer in patent cases," the solicitor answered, "Of course it does." His response to the Committee's recitation of the circular's details reflects only grudging acceptance of their policy:

101 "Discipline Committee—General Files" (30 January 1947).
102 "Discipline Committee—General Files" (14 April 1939).
103 Ibid.
104 Ibid.
105 Ibid.
I think that is all true. Of course I may be wrong, but I do not think there is any untruth in that as far as I am aware ... but it may be unduly puffing.\textsuperscript{106}

To the solicitor, asserting one's qualifications would only be wrong if untrue. Since his statements were accurate, therefore, he could not understand the Committee's concern to which he, like many others, ultimately deferred.

The exchange reveals the divergence between the elite's and other lawyers' conceptions of acceptable conduct as the Society asserted its disciplinary authority in the 1930s. As in the 1890s, the elite ignored the competitive pressures which rendered some advertising practices not only reasonable but necessary. They did not, however, ignore the practices themselves.

Several patterns might explain the elite's new "stake" in the issue and unprecedented vigour in dealing with offenders. First, it might simply have been a function of its consolidated power and elevated professional self-esteem. With codified standards of conduct after 1920 and unabridged authority after 1923, the Law Society acquired a new sense of public legitimacy and professionalism which may have inspired the Canon's active enforcement. The elite's interests, furthermore, might not have been as free from competition as they were in the 1890s. The number of lawyers had doubled since that period and, as the examples of the British Inns and Law Society indicate, the elite may have wished to keep a depression market for legal services on a plane which would maximize the value of their connected positions.

Auerbach's conclusions with respect to the American Bar's emerging corporate elite might also be relevant. It is clear that limitations on advertising restricted public knowledge of available legal services. They likewise impeded lawyers' ability to obtain retainers and might have precluded persons with potential claims from realizing that both redress and assistance in obtaining it were available. As some such claims, especially in personal injury cases, would have been directed against the wealthy interests the elite began to serve in the twentieth century, limiting potential claimants' access to information about remedies would protect those interests and enhance the elite's social and professional esteem.

Whether ethnic prejudice influenced the Canon's enforcement is less clear. The Society did, in 1939, order a solicitor to cease emphasizing his Ukrainian heritage in his advertisements:

\textsuperscript{106} \textit{Ibid.}
While it may be an advantage to the ignorant Ukrainian in the ... District to know that there was a solicitor of his own race, and who doubtless speaks his own language, available, should he require a lawyer, on the other hand it does not seem fair to other struggling solicitors in the same District that an attempt should be made by advertising to emphasize race or religion or any other affiliation.107

On one level, the order reiterates the Society’s steadfast refusal to recognize competitive advantage. “Alien” lawyers’ major asset was their ability to communicate with clientele from similar ethnic backgrounds. By forbidding advertising of this kind, therefore, the Law Society impaired such lawyers’ ability to establish reputations within the communities on which their practices largely depended. But the prohibition, whether intentionally or not, may also have inhibited ethnic minorities from asserting legitimate claims. Gaining access to a lawyer who spoke the same language and shared the same heritage might alleviate an immigrant’s unease with unfamiliar and imposing legal procedures. Without such assistance, however, an immigrant might abandon the claim and thereby sacrifice both the right to recover damages and a solicitor’s opportunity for much needed employment.

C. Fee Tariffs

The canon which attributed ethical status to fee tariffs had similarly negative effects on marginalized practitioners and individuals. Under a lawyer’s duty to the client, the fee tariff rule paralleled the ABA’s Canon 12:

[A lawyer] is entitled to reasonable compensation for his services but he should avoid charges which either over-estimate or under-value the service rendered. When possible he should adhere to established tariffs. The client’s ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge or even none at all.108

Prohibiting over-estimation and promoting pro bono work suggest the CBA’s support of universal access to legal services. Making fee tariffs an ethical minimum rather than maximum, however, contradicts the inference that public interest was the Association’s sole concern. As described with respect to the British Law Society, the tariff rule constituted a type of fee-fixing which prevented competition from negatively affecting the whole profession’s charges. It maintained artificially high rates set by Bar Associations and Law Societies and, in

107 “Discipline Committee—General Files” (13 May 1939).
108 Canons, supra note 35 at 7-8.
so doing, legitimized the professional elite’s even higher fees while rendering poorer claimants dependent on generous practitioners for assistance such claimants otherwise could not afford.

The rule further limited practitioners’ ability to establish a professional reputation. Tariff schedules arose not to prevent overcharging, but because undercutting established lawyers’ rates was an effective means for struggling lawyers to compensate for their competitive disadvantages. And while attempts at fixing minimums failed in local organizations such as the Carleton Law Association in the 1890s,\textsuperscript{109} such associations had more success as they gained greater legitimacy after the century’s turn. The Carleton and Hamilton Law Associations implemented effective fee tariffs by 1910,\textsuperscript{110} and the Manitoba Law Society published a schedule of “suggested solicitor’s fees”\textsuperscript{111} for its members in 1920. With the Canon’s infusion of ethical dimensions into rate minimums, therefore, lawyers lost an important means of compensating for their lack of social and corporate connections. They could perhaps charge their poorer clients less or not at all, but the rule significantly limited their ability to obtain other work by declaring their most important competitive tool “unprofessional.”

D. “Stirring” and Contingency Fees

The CBA’S prohibition of “stirring” imposed the greatest impediment on struggling lawyers and individuals. The rule that those who “stir up strife or litigation”\textsuperscript{112} violate their duty “to the state” incorporated both the ABA’S Canon 28 and Lord Abinger’s description of the common law of maintenance in \textit{Findon v. Parker}:\textsuperscript{113}

\begin{quote}
The law of maintenance ... is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make.\textsuperscript{114}
\end{quote}

\textsuperscript{109} Professionalization of the Ontario Bar, supra note 30 at 299-300.
\textsuperscript{110} \textit{Ibid.} at 300-01.
\textsuperscript{111} Gibson & Gibson, supra note 49 at 252.
\textsuperscript{112} \textit{Supra} note 86 at 261.
\textsuperscript{113} (1843) 11 M. & W. 675 (Ex.D.) [hereinafter \textit{Findon}].
\textsuperscript{114} \textit{Ibid.} at 682.
Maintenance, and with it the "greater atrocity"\textsuperscript{115} of champerty, applied not only to lawyers but to all persons at common law. Any meddling with a claim, or entering into fee arrangements contingent on a claim's success, subjected the offender to a fine and the claim to dismissal. The effect of such a doctrine was to reinforce the ethical ideology underlying the Canons' prohibition of advertising and tariff undercutting. Assessing as illegal the means by which a solicitor might secure clients and assist them in obtaining legal remedies, the rule perpetuated professional and social stratification. It denied the underclass opportunities to establish their reputations and challenge the governing elite's leadership. At the same time, it ensured that poorer individuals wronged by wealthier or commercial interests remained underprivileged and uncompensated.

The Law Society of Upper Canada's disciplining of a lawyer for "improper solicitation" in 1939 illustrates the rule's disparate impact. After an elderly immigrant woman was injured while alighting from a Toronto streetcar, a practitioner present at the scene made notes, obtained witnesses' names and addresses, and took statements. Subsequently, after learning of the family's poverty, he agreed to take on the case for a percentage of the damages award to be determined "after the case was clear."\textsuperscript{116} Without the lawyer's efforts, the information supporting the claim might not have been gathered and the woman might not have obtained legal assistance. Without the fee arrangement, moreover, available information and aid was irrelevant. Yet, to the solicitor's and the woman's disappointment, the Law Society declared both practices "improper."

As the lawyer's activities constituted common law offences, jurisprudence mitigated the Law Society's responsibility to a certain degree. Abinger's \textit{dicta} in \textit{Findon}, however, identified the room available for the Society and the \textit{CBA} to support more aggressive solicitation and contingency arrangements:

\begin{quote}
If a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife.\textsuperscript{117}
\end{quote}

Abinger's statement confirmed that litigation and strife are not necessarily synonymous. As renowned commentators such as Riddell

\begin{footnotes}
\item \textsuperscript{115} \textit{Goodman v. R.}, [1939] S.C.R. 446 at 448.
\item \textsuperscript{116} Law Society of Upper Canada Archives, Series 1-01, Minutes of Convocation, "Discipline Committee Report," vol. 21 (19 October 1939) 71 [hereinafter Minutes (19 October 1939)].
\item \textsuperscript{117} \textit{Supra} note 113 at 682.
\end{footnotes}
admitted, prohibiting contingency contracts was “artificial”\textsuperscript{118} and, as need justified their use, the CBA could have sidestepped unfavourable jurisprudence with a “poverty” exemption similar to that in the fee tariff Canon. A 1938 Quebec decision in \textit{R. v. Bordoff}\textsuperscript{119} did hold any acceptance of fees to violate the charity requirement and perhaps indicated such a provision’s unacceptability. Yet had the CBA liberalized the means of serving those “without the means of obtaining redress” in 1920, it might have justified the exception’s later expansion on the basis of public policy.

The greater influence on the outcome, it seems, was the governing elite’s stake in the prohibitions. By reinforcing common law doctrines of maintenance and champerty, the legal elite restricted many claimants’ ability to recover damages from the corporate interests which sustained the elite’s professional esteem. Law Society Benchers and Discipline Committee members represented powerful entities like the Toronto Transit Commission. Their concern for limiting corporate liability prevailed over any consideration of an elderly immigrant’s access to legal services, and thus they strictly enforced rather than relaxed the Canon’s standard. The few examples of disciplined practitioners in Ontario\textsuperscript{120} and British Columbia\textsuperscript{121} are a misleading indication of what was likely a multitude of unacknowledged or abandoned claims which, without the restrictions, might have proceeded. Denying solicitors much-needed employment and needy persons the means of redress, the Canon perpetuated inequities within and beyond the profession and, in combination with restrictions on advertising and tariff undercutting, formed an “artificial” ideology which subordinated contrary interests to those of the governing “conscience.”

\textbf{VI. ENFORCING POLITICAL IDEOLOGY}

The Law Societies enforced political ideology in a similar manner. While instances of its use for such purposes are infrequent,

\textsuperscript{118} Supra note 2 at 142.

\textsuperscript{119} (1938), 70 C.C.C. 35 (Que. Ct. Sess. P.).


\textsuperscript{121} Watts, supra note 51 at 80-82.
Canadian regulatory bodies expelled radical elements from their ranks in the same way as did the British and American Bars. Sibenik’s study of the Alberta Bar describes its disciplinary action against Gilbert LaRue for his involvement in a United Farmers of Alberta (uFA) protest. In 1922, the group issued a circular condemning a St. Paul de Métis firm’s “overly zealous”122 methods of debt collection:

This Sunday Meeting will bring forth those who really defend the poor farmer instead of encumbering them.

Now is the time for these hypocrites [St. Paul de Métis firm’s lawyers] to make an appearance and defend themselves before the public ... It is about time that someone should get up and speak in the name of the poor farmer, shouting to these crooks, halt, you have gone far enough.123

Accusations that the lawyers were “hypocrites” and “crooks” border on defamation, but do not in themselves seem to warrant LaRue’s disbarment. Additionally, the uFA published the circular under its local president’s name and the Law Society of Alberta had no proof that LaRue was the author of the statements. It rather appears that the Society punished LaRue not for the circular, but for his affiliation with the radical group’s protest against two lawyers respected by the Bar. LaRue and the uFA challenged practices probably adopted by many of the Alberta professional elite and confronted the ideological bases on which these practices rested. By striking LaRue from its rolls, therefore, the Law Society demonstrated its ability and willingness to declare certain beliefs “unprofessional” for a lawyer to promulgate.

The case of Martin v. Law Society of British Columbia124 provides a better example of the enforcement of political ideology. In July 1948, William John Martin applied to the Society’s Benchers for call to the Bar. Even though his application met the requirements, it was denied under the Society’s discretionary authority to refuse an applicant who “has not satisfied them that he is a person of good repute.”125 Martin was a declared Communist and member of the Labour Progressive (Communist) Party of Canada. He came to that position “after many years of thought, study and practice [as a] man of mature years”126 and

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122 Sibenik, supra note 50 at 125.
123 Ibid. at 126.
125 Ibid. at 174.
126 Ibid. at 186.
renounced any activity but "education and social organization"\textsuperscript{127} as means of achieving a Communist state. He had previously served in the Royal Canadian Air Force and was prepared to declare his continuing allegiance to Canada and the Crown through the barrister's oath. Such assurances did not alleviate the Society's concerns, however, as they found that Martin's questionable affiliations eradicated his "good repute" and rendered him unfit for practice.

After unsuccessfully applying to invalidate the Society's refusal, Martin turned to the British Columbia Court of Appeal for remedy. In affirming the trial decision, however, O'Halloran J. upheld the Law Society's position that Marxist morality was wholly inconsistent with the values the profession promoted. To Communists, he stated, "anything is right that advances the world revolution, and everything else is wrong and must be ruthlessly destroyed."\textsuperscript{128} He cited a legitimate, if extreme, Marxist source to support his contention and made a similarly legitimate argument that persons conspiring to violently overthrow the ruling classes could not accept the barrister's oath of "duty to the State to maintain its integrity and its law and not to aid, counsel or assist any man to act in any way contrary to those laws."\textsuperscript{129} Yet O'Halloran J.'s judgment went beyond merely condemning Communist activities and declared Marxist ideological principles to be "repugnant to the ancient and honourable profession of law."\textsuperscript{130} According to O'Halloran J., those accepting "common-law theory and practice confess to a belief in inherent rights of the individual diametrically opposed to the Hegelian and Marxist concepts of the state."\textsuperscript{131} Even if Communists did renounce violence, the Society and the Court decided, their questioning of the values of individualism and free enterprise would still render them unfit to practice a system of law which supports those values.

The Society justified its refusal to admit Martin into its ranks on the basis of public protection. The case arose shortly after Canada's spy trials and the establishment of a Royal Commission on Communist

\textsuperscript{127} Ibid. at 196.
\textsuperscript{128} Ibid. at 180.
\textsuperscript{129} Ibid. at 180 and at 190; and E. Meredith, "Communism and the British Columbia Bar" (1950) 28 Can. Bar Rev. 893 at 899.
\textsuperscript{130} Martin, supra note 124 at 187.
\textsuperscript{131} Ibid.
Espionage in 1946, which found that a "fifth column" had spread among Canada's public servants. And while the Law Society's decision reflected common patterns of suppression during this period, O'Halloran J.'s description of the purpose of disciplinary powers illustrates their role as an "artificial conscience":

It sometimes happens that men of unmoral and amoral outlook or unstable character, or of little integrity, or whose object is to use the law solely to make money find their way into the profession of law ... It is the duty of the Benchers to protect the public by refusing admission to the practice of law, not only the type of person who will prey upon the public for his own selfish ends, but also the type of person who professes a political philosophy alien to our free society, and who in a time of "cold war" is little else than a fifth columnist.

On both the professional and the political levels, the Society's duty was to persecute "alien" influences. Like the British Inns' expulsion of nineteenth-century radicals, the American and Canadian Bars' denunciation of Communist lawyers indicates the manner in which regulatory bodies used similar authority and justifications to dispose of twentieth-century radicals. Radical ideologies, like the so-called commercial practices, were not inherently evil. But because such ideologies were "alien" to the empowered elite, the societies and associations deemed their proponents "unethical" and morally unfit to be members of the elite-governed profession.

VII. CONCLUSION

In his 1977 review of Auerbach's Unequal Justice, Arthurs cautions against limiting historical analysis of the profession to the self-interested motivations of its elite. He admits that modern criticisms of the profession apply to the Canadian context, but demands that scholarship encompass the many factors inspiring the Bar's policies and practices:

[The professional elite, like the profession itself, responds, not to a single predominant influence, but to many. Its leaders understand and sympathize with the groups from which they have come and which they primarily serve. But they also may, and doubtless

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133 Martin, supra note 124 at 189-90.
do, respond to the historical circumstances in which they work, to abstractions such as 
noblesse oblige and “the public interest.”

Arthurs correctly discourages the separation of the elite’s actions from 
their historical context. The professional elite was by no means unique 
in its disdain of “alien” elements such as Jews or Communists during this 
period, and its responses should be measured against that historical 
fabric. In many ways, moreover, the elite did indeed act in the “public 
interest.” In Ontario, for example, the overwhelming majority of 
disbarments and suspensions were for misappropriation of clients’ 
monies. Sibenik finds the same pattern with respect to the Alberta 
Bar, as does Watts in his description of the Law Society of British 
Columbia. The Law Societies’ adoption of accounting rules and 
compensation schemes after the 1930s likewise supports Arthurs’ 
conclusion that the Bar elite’s “moral ledgers likely contain both debits 
and credits,” and that legitimate public considerations often rendered 
the profession’s “artificial conscience” a genuine protector of the 
interests its members served.

But while these perspectives are valid concerns for future 
scholarship, they do not mitigate the clearly negative, and perhaps 
intentional, effect that the elite’s enforcement of ethical and political 
ideologies had on marginalized members of the profession and society. 
To a practitioner excluded from lucrative corporate careers by virtue of 
race, gender, religion, or language, the cBA’s prohibitions on advertising, 
fee tariff undercutting, and more active solicitation limited the ability to 
establish the reputation necessary for professional success. In addition, 
the policies of restricting available information, inflating prices, and 
banning contingency arrangements, discouraged poorer classes from 
pursuing meritorious claims. Without such restrictions, disadvantaged 
lawyers and individuals might have aided one another in remedying their 
peripheral status. However, the corporate elite’s use of regulatory 
resources’ disciplinary powers to declare otherwise legitimate practices and 
beliefs “unprofessional,” fabricated an “artificial conscience” which 
perpetuated professional and social stratification. While it is true, as 
Arthurs points out, that the elites neither created inequities nor held the

134 Arthurs, supra note 3 at 518.
135 Law Society of Upper Canada Archives, Series 5-03, Discipline Committee—General 
Files, “Lists of Members Disbarred/Suspended” File No. 05-03-17.
136 Sibenik, supra note 50 at 124.
137 Watts, supra note 51 at 84-86.
138 Supra note 3 at 518.
ultimate key for their elimination, they still bear a "burden of guilt"\textsuperscript{139} for adopting policies which foreclosed practitioners' and the public's opportunities for advancement.

\textsuperscript{139} \textit{Ibid.} at 516.