Dismantling or Fortifying Professional Monopolies? On *Regulating Professions and Occupations*

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I. INTRODUCTION

THE MANITOBA LAW REFORM COMMISSION has made a substantial and insightful contribution to re-thinking the economic privilege granted by governments to some occupations,[1] at the expense of others. It is clear that the Commission sees the potential to dismantle most, or perhaps all, occupational monopolies. A necessary aspect of this reorganization is an increase in government supervision over self-regulating organizations (SROs).[2] What is unclear is whether that intention would be the actual effect of implementing the Report. How well will paralegals and notaries fare in their "turf battles" with lawyers? How well will midwives and other health care professionals fare against doctors? Will traditionally exclusionary professions become more accessible to those who were formally, and then more informally, excluded from their ranks? Unintended consequences are the fabric of policy proposals, so these questions are not necessarily a criticism of the Commission's Report.

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1 The Commission rejects the distinction between occupation and profession, because the qualities of professionalism cannot be equated with a form of regulation (self regulation), even though the former has been used historically to justify the latter. This association may "serve to obscure rather than enlighten" (at 9).

2 At a time of government downsizing and deregulation it is interesting to note that many of the provinces share the Law Reform Commission of Manitoba's concern with both the legislated monopolies created for some occupations and their ability to regulate themselves. The Commission justifies its approach by the fact that the government already regulates occupations in an *ad hoc* fashion under several government departments, and that a consolidation of these efforts will not add as much extra expense as one might initially think (at 97).

This commentary will focus on three aspects of the Report: (*i*) the task-based model to define the scope of practice of occupations; (*ii*) entry standards; and (*iii*) the prohibition against a grandparent clause. Implications for the dismantling or fortification of professional monopolies will be addressed using Anne Witz's model of occupational closure. In her model, dominant groups use *exclusionary strategies* "which aim for intra-occupational control over the internal affairs of and access to the ranks of a particular occupational group," and *demarcationary strategies* "which aim for inter-occupational control over the affairs of related or adjacent occupations."[3] Many of the demarcationary strategies are gendered, in that they do not exclude women, but rather depend upon "the encirclement of women within a related but distinct sphere of competence in an occupational division of labour ... and their possible (indeed probable) subordination to male dominated occupations."[4] This is clearly seen in the working relationship that doctors and lawyers (still male dominated occupations) have with members of female dominated occupations such as paralegals, nurses and midwives. Even after women enter the professions, studies have found that they are segregated within the profession, face discrimination, and often find themselves in distinct spheres, subordinate to men.[5]

In response, subordinate groups use *inclusionary strategies* (to seek membership in the group that is excluding them) or *dual closure strategy* in which they both contest the demarcation strategies of the dominant group, but also try to "consolidate their own position within a division of labour by employing exclusionary strategies themselves."[6] For example, midwives might both resist demarcation by doctors and employ demarcationary strategies to prevent nurses from practising midwifery.

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3 A. Witz, *Professions and Patriarchy* (London: Routledge, 1992) at 44. Witz's work provides a convenient summary of much of the work that she relies on: E. Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago: University of Chicago Press, 1986); T.J. Johnson, *Professions and Power* (London: The Macmillan Press Ltd., 1972); and M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (London: University of California Press, 1977).

4 Witz, *supra* note 3 at 47. Witz writes, "The necessity for grounding gendered professional projects within the structural parameters of patriarchal capitalism is established by the fact that these institutional sites for the mobilisation of the means of professional closure were simultaneously structured by patriarchy as well as by capitalism" (at 65).

5 See B. Wilson, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993). The report and its appendices contain research commissioned by the Task Force in addition to summaries of studies conducted by and for law societies across Canada on women in the legal profession and the judiciary. More recently, see J. Hagan & F. Kay, *Gender in Practice: A Study of Lawyers' Lives* (New York: Oxford University Press, 1995) and J. Brockman, "Leaving the Practice of Law: The Wherefores and the Whys" (1994) 32 Alta. L. Rev. 116.

6 Witz, *supra* note 3 at 48.

Occupational closure is achieved through *legalistic* tactics which are *heteronomous*, in the sense they are defined through other institutions such as the state, and *credentialist* tactics which are *autonomous*, in the sense they are defined by the occupational groups through the modern university and professional associations.[7] Professional monopolies are usually more successful at excluding potential members through credentialist tactics than through legalistic tactics.[8]

II. A Task-Based Model for Defining Scope of Practice

LICENSED SERVICES ARE GENERALLY DEFINED (albeit somewhat vaguely in some cases) in legislation, which also creates an offence of providing these services without the required licence. For example, section 26 of the *Legal Profession Act*, S.B.C. 1987 c.25 states that "no person, other than a member of the society in good standing, shall engage in the practice of law." Section 96 creates an offence for violating section 26, and the maximum penalties are set out in section 4 of the *Offence Act* — "a fine of not more than $2,000 or to imprisonment for not more than 6 months, or to both."[9] "Practice of law" is defined in section 1 of the *Legal Profession Act* to include, among more specific acts, "appearing as counsel or advocate" and "giving legal advice." Exceptions to this monopoly are also set out. For example, the practice of law in British Columbia and Alberta does not include practising as a notary public, as defined by legislation. These state-backed monopo-

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7 *Ibid.* at 58–59 and 64–65.

8 *Ibid.* at 194–96. Witz points out how the medical profession in England was successful in excluding women through increasing credentials, whereas women were able to open the doors of the profession through legalistic tactics. Similarly, women gained entry to the legal profession in Canada through legalistic tactics. 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 C.J.W.L. 1; J. Brockman, "Exclusionary Tactics: The History of Women and Minorities in the Legal Profession in British Columbia" in J.P.S. McLaren & H. Foster, eds., *Essays in the History of Canadian Law*, Volume VI — British Columbia and the Yukon (Osgoode Society, 1995) chapter 14; M. Kinnear, " 'That There Woman Lawyer': Women Lawyers in Manitoba 1915–1970" (1992) 5 C.J.W.L. 411 at 419; M.J. Mossman, "Women Lawyers in Twentieth Century Canada: Rethinking the Image of Portia" in R. Graycar, ed., *Dissenting Opinions* (Boston: Allen & Unwin, 1990) 80; and L.K. Yorke, "Mabel Penery French (1881–1955): A Life Re-Created" (1993) 42 U.N.B. L.J. 3 at 45.

9 The penalties set in the Alberta *Legal Profession Act*, chapter L-9.1 are graduated and include possible imprisonment. Section 106 provides for a maximum fine of $4000 for the first offence, $8000 for the second offence, and $12,000 or a term of imprisonment not more than six months for the third offence.

lies are then enforced by the occupational organization, through the criminal process or civil injunctions.[10]

These all encompassing and vague definitions allow SROs to prevent other occupations from providing services, and also to expand their scope of practice through the generous interpretation of these phrases. This occupational approach to regulation allows occupational groups to use the state to create a monopoly for whatever fits within the expanding scope of their professional practice. As the Commission notes, this is done with little or no public input, and legislation is easily passed, unless the demarcationary strategy threatens another group (at 6).

As Witz sets out, many of the demarcationary strategies are gendered. The male dominated occupation will often encircle the subordinate female dominated occupation, such that the latter can work only under the supervision of the former. Examples of this are abundant in the legal profession. In 1979, the Law Society of Upper Canada wrote, "The Law Society's position is that paraprofessionals should function only as employees of lawyers and meet the public only under the direct control and instruction of a lawyer. ... The Law Society agrees that there is no need to grant statutory powers to any paralegal group associated with the practice of law".[11] Similarly, following the Ianni Report in 1990,[12] which recommended that independent paralegals be required to take a two year training course and register with a government Registrar of Independent Paralegals, the Law Society of Upper Canada's Special Committee on Paralegals and Access to Legal Services asked Michael Stevenson, the Dean of the Faculty of Arts, York University to comment on the "quality and reliability of the approach and conclusions" of a report by W.A. Bogart, a Professor of Law at the University of Windsor, and Neil Vidmar, a professor of Social Science and Law, Duke University School of Law entitled "An Empirical Profile of Independent Paralegals in the Province of Ontario." In 1992, the Special Committee issued a Supplement to their Interim Report in which they make repeated reference to "unsupervised paralegals," rather than independent paralegals, and suggest a number of approaches that the Law Society could take including the "increased use of supervised paralegals ... encouraging the legal profession to provide routine legal services at specified rates; and [the] use of independent paralegals where they have gained acceptance by the public and the

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[10] Section 100 of the British Columbia legislation allows for the society to apply to the Supreme Court for an injunction restraining a person from contravening the *Act*. Section 108 of the Alberta legislation allows the society to apply to the Court of Queen's Bench for an injunction.

[11] Law Society of Upper Canada, *Submission of The Professional Organizations Committee by The Law Society of Upper Canada* (30 April 1979). I would like to thank W. Wesley Pue for providing me with a copy of this document.

[12] *Report of the Task Force on Paralegals* (Ianni) (Prepared for the Ontario Ministry of the Attorney General, 1990).

courts, and where the services they provide have been abandoned for the most part by lawyers".[13] This resistance to paralegals is perhaps more subtle than the comment in 1987 by the Law Society of Upper Canada's treasurer Arthur Scace that the Law Society would "prosecute the hell" out of independent paralegals.[14] Similar "turf wars" occur between doctors and midwives. Theoretically, they could also occur between doctors and nurses, given the numerous anecdotes nurses and patients can tell about the doctor who arrive just minutes before (or after) the baby is born. However, such disputes are less likely to occur in the later instance, because of the success of the medical profession in keeping nurses in a subordinate, supporting role.[15] Likewise, many legal secretaries do all but sign the letter to the client when it comes to, for example, real estate transactions and wills.

Will the Manitoba Law Reform Commission's task-based model for licensing or certifying services have any impact on these "turf wars" and the gendered division of labour? The task-based model is a definite change from the present system of licensing or certifying practitioners who belong to an occupational organization. Rather than defining what an occupation does in vague terms, and excluding others from providing such services, the Commission recommends that qualified people be licensed or certified to perform specific services, whether or not they belong to a particular occupational group.

The Commission recommends that a government supervisory body (GSB) overseeing the new regime follow three principles in determining which services would be regulated, and who would be allowed to provide them. First, a common sense approach should be taken to breaking down services into components to determine which, if any, need to be regulated. A service would be licensed only if its improper performance posed "a serious risk of harm to the public and ... entry and practice standards [could] be designed which significantly reduce that threat to acceptable levels" (at 30). This approach would do away with the "useless fiction" of prohibiting someone from performing a service simply because it is within the scope of what a licensed practitioner does. Second, "vague descriptions should be avoided but definitions should be sufficiently general to take into account future developments" (at 27). Third, practitioners would be allowed to specialize in a service without mastering all of the services presently required by many professional bodies prior to delivering any services. "To require that a practitioner be licensed

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[13] Law Society of Upper Canada, *Supplement to the Interim Report of the Special Committee on Paralegals and Access to Legal Services* (June 1992) at 3.

[14] P. Pevato, "Should Law Societies 'Prosecute the Hell' out of Independent Paralegal Firms?" (1991) 7 J.L. & Social Pol'y 215 at 215.

[15] This may be changing. Recently, a senior's advocate and two nurses argued that nurses, not doctors, should be the first person to see a patient and decide a course of action. R. Wigod, "Nurses Seek Bigger Role with Patients" *Vancouver Sun* (19 September 1995) B12.

(or certified) in additional tasks serves only to raise costs to consumers unnecessarily because it forces the practitioner to obtain knowledge and training which is not necessary to providing a particular service to the public competently or ethically" (at 28). This approach would allow practitioners in some occupations to provide the services traditionally provided by other occupations, without gaining entry to these other occupations. The result would be increased competition among occupations and greater choice for the consumer.

In addition, the Commission recommends that practitioners licensed to perform specific services not be allowed to delegated this work (except for mechanical and ancillary aspects) to unlicensed persons. To allow such delegation would mean "either the service should not be licensed (the service does not, in fact, pose a serious threat to the public if performed improperly) or the standards for the regime have been set inappropriately (the unlicensed person is able to perform the service competently and ethically and should be given a licence to do so" (at 30). This approach, if carried out in practice, would have a substantial impact not only on the work presently conducted by paralegals and midwives, but also by secretaries and nurses who presently "practice law," and "practice medicine," respectively. This holds the potential to dismantle professional monopolies and some of their more gendered dimensions.[16] As such, it will be strongly resisted by existing professional monopolies. However, professional monopolies must rely on heteronomous means (through the state) to maintain these monopolies and as such these state-backed monopolies are more vulnerable to invasion than the more autonomous means of occupational closure, such as increasing educational requirements and entry standards.

III. EDUCATION AND ENTRY STANDARDS

THE HISTORY OF THE PROFESSIONS is one of exclusion, and education and entry standards are the pillars for this exclusionary process.[17] The present model usually involves some co-operation between a university and a professional body. The professional body requires a university degree from an accredited university (i.e. one that the professional body has recognized) to enter its occupation, and the

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[16] However, little attention is paid to the fact that the division of labour and the work required of women in what is often referred to as the "private sphere" is a major factor in keeping women in more subordinate roles in the "public sphere."

[17] According to Witz, *supra* note 3 at 56, "Larson identifies the core of the professional project as the attempt to secure a structural linkage between *education* and *occupation*; between *knowledge* in the form of negotiation of cognitive exclusiveness, and *power* in terms of market monopoly... . Professionalization is essentially about market power and the construction of a formal knowledge base."

university listens to the professional body in its advisory capacity for what the latter would like to see in the university curriculum.[18] In most cases, the professional body will require an apprenticeship and additional examinations prior to entry into the occupation. These autonomous means are more resistant to change than heteronomous means which rely on state action or support.[19]

The Commission's recommendations in the area of entry standards are far more radical than the multi-occupational licensing of services which they recommend through their task-based model. The Commission endorses the McRuer Report's statement that the goal of entry standards is "not only to see that persons licensed are qualified, but that all qualified applicants are licensed" (at 34). As such, educational requirements or entry standards "must not be excessive and superfluous" (at 33).[20]

The Commission recommends four principles for designing entry and practice standards:

1. Entry and practice standards should fully address the causes of harm to the public ...
2. Standards should not contain superfluous requirements ...
3. Testing should be carefully designed to correspond to the qualities needed to provide a service properly ...
4. Anti-competitive elements in practice standards should be discouraged.[21]

Perhaps the most controversial aspect of the Commission's Report is that it proposes that the GSB set the entry and practice standards (at 42). This proposal

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18 This is an overly simplified version of the relationship between universities and professional bodies. See Freidson, *supra* note 3 at Chapter 4. Freidson writes, "[t]he formal system merely sets the boundaries of the competition, within which an informal credential system, frequently employing discriminatory criteria like gender, race, religion, ethnicity and class culture, then operates to structure the course of work careers and create the profession's internal system of stratification." For an in-depth analysis of this relationship and the question of whether law professors can engage in critical analysis in their teaching see, M. Maloney & J. Cassels, "Critical Legal Education: Paralysis with a Purpose" (1989) 4 Can. J. L. & Soc'y 99; and I. Duncanson, "Legal Education and the Possibility of Critique: An Australian Perspective" (1993) 8 Can. J. L. & Soc'y 59.

19 In a work in progress, I argue that the distinction between autonomous and heteronomous means is not clear, and that a continuum is a more accurate model for the examination of some occupations: J. Brockman, " 'Do Not Pass Go': The Historical Game of Monopoly Between Lawyers and Notaries in British Columbia" (Paper presented at the Canadian Law and Society Meetings, 13 June 1994) [unpublished]. Witz's model also ignores the more cultural and other structural barriers to entry and success in the professions.

20 The Commission supports this position by research findings that suggest higher education does not necessarily mean better service (at 9). Freidson writes, "[w]hether the knowledge constructed ... is employed ... by those who perform the daily work ... is rarely investigated, let alone demonstrated" *supra* note 3 at x.

21 At 34–38.

"generated some negative response" (at 42). However, the Commission took a firm position. Since entry and practice standards were "critical to the success of the [proposed] regime" (at 42), and practitioners were "not disinterested parties in this process" (at 43), the Commission did not back down: "Entry and practice standards will affect the level of competition for a service and the price for performing the service ... . Allowing [practitioners] to set these standards unilaterally would therefore place them in a conflict of interest" (at 43). According to the Commission, the GSB should set entry and practice standards of all occupations, and "when practicable, [they] should take into account the views and proposal put forward by the practitioners" (at 43).

Resistance to this aspect of the Commission's report will be very strong, especially among established professions, since entry standards are key to professional projects.[22] Some of this resistance is evidenced in the Law Society of Manitoba's response to the earlier Discussion Paper by the Commission.[23] The Law Society explains its "special and unique position," in that "lawyers play a special role in representing individuals and groups whose interests may be in conflict with that of the government."[24] It writes, "[o]ne of the hallmarks of a democratic society is a legal profession which is independent and free of state control."[25] Not surprisingly, the Law Society is prepared to impose "some rational method" for "determining whether new groups should be granted a certification or licensing regime"; and it is quick to point out that "it is expected that only a small number of groups from clearly identifiable professions and occupations would be deemed appropriate for

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22 *Supra* note 3.

23 Law Society of Manitoba, *Submission of the Law Society of Manitoba in Response to the Law Reform Commission of Manitoba Discussion Paper on the Future of Occupational Regulation in Manitoba* (March 1994). I would like to thank W. Wesley Pue for providing me with a copy of this document.

24 *Ibid* at 3–4. It also argues that government regulation would "erode the confidentiality and legal privilege that have long been part of our legal tradition and our system of law." For an engaging and insightful analysis of the history of the independence of the bar, as well as self-regulation and public service, see W.W. Pue, "In Pursuit of Better Myths: Lawyers' Histories and Histories of Lawyers" (1995) 33 Alta. L. Rev. 730. The Law Society also points out that "[n]o tax dollars whatsoever are spent" on self-regulation of lawyers (at 3). This is a rather narrow view of taxation. One could just as easily argue that the Law Society's $3 million budget is covered by tax revenues. Members of the Law Society pay the tax to the Law Society, and pass on the expense to their clients. Theoretically, the government could collect the $3 million in the same way, rather than taking it out of general revenue. The Commission recognizes this as a possible model, but declines to make a recommendation with respect to funding their proposed new regime (at 98). Professor Pue notes in his article that the social costs of monopoly far outweigh the "cost savings" of self-government.

25 *Ibid* at 4. The "hallmarks of a free society" phrase is borrowed from Mr. Justice Estey in *Attorney General of Canada* v. *Law Society of British Columbia* (1982), 37 B.C.L.R. 145 (S.C.C.).

self-government."[26] This type of system, which would make it very difficult for new groups to carve out or invade another occupation's defined scope of practice, would be very beneficial to existing SROs. With regard to entry standards, the Law Society makes the argument that "all of the major self-governing professions, including lawyers, already have very clear and rigorous standards," and "there appears to be no need to have greater government control over entry standards to the legal profession in Manitoba."[27]

The task based model of licensing, that allows for multiple licensing of services and the setting of entry standards by the GSB, is the key to dismantling professional monopolies in favour of lower cost and more choice for the consumer. However, if the model applies only to occupations newly seeking self-regulatory status, the result will be the fortification of existing professional monopolies. The key to the Commission's new regime is its application to the established professions.

IV. The Prohibition Against a Grandparent Clause

THE GENERAL APPROACH to increasing educational and entry requirements for an occupation is to exempt those who have already passed the less stringent standards at an earlier time. Those who are to be exempted through such a "grandfather" clause (or grandparent clause, in the words of the Commission) have many arguments in favour of this approach. The Commission, to its credit, and in face of strong opposition, recognizes that its proposed system will not work (in favour of the consumer) if the established professions are exempt from review. The Commission recommends that all professions be reviewed by the GSB.

One of the problems associated with established monopolies is that the monopoly allows the occupation and surrounding institutional structures to complicate the simplest of tasks with the effect of generating more revenue for its members. On a recent visit to Saskatchewan, I was asked to assist my nephew in adopting his fiancee's son. Since the birth father was dead, the process ought to have been sufficiently simple for them to do it themselves rather than to pay the legal fees they had been quoted (and could not afford). I called the provincial adoption number only to be told that I needed a lawyer for an adoption. I explained to the person that I could not believe that lawyers had a monopoly on adoption in Saskatchewan. Since you could draft your own will, do your own divorce, represent yourself in court, etc., it had to be possible to do your own adoption. Unable to dissuade me, she referred me to someone with more authority, who told me the same thing — you need a lawyer to do an adoption. Again, I expressed disbelief. I was referred

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[26] *Ibid.* at 7–8.

[27] *Ibid.* at 10–12.

again to someone with more authority, who said, yes it was actually possible to do your own adoption, but most people used lawyers. There were no pre-printed forms, but I could find the necessary forms in the Saskatchewan Gazette. Undeterred, I travelled to the local courthouse. After I explained that I was looking for the courthouse library (not the library down the street, which probably did not subscribe to the Gazette), I was told that this was the lawyers' library, and I was asked whether I had the lawyers' permission to use it. Jumping this hurdle, I discovered that the most recent revisions of the legislation were not in the library. The assistant retrieved the volume from the judge's chambers, and proceeded to look for copies of the Gazette which I had requested. Initially, they could not be found. After I explained that maybe it was in another location, since it contained the regulations on adoption, it was found (having been "placed in the wrong pile"). I managed to copy sections of the Act and the regulations for $.50 a page (with apologies for the expensive charge from the assistant who had to collect it). My father watched as I skimmed the material for what I needed. Neither he nor my nephew were convinced that this was a "user-friendly" process. The purpose of this "how I spent my summer vacation" story is simply to illustrate that the simplest of tasks can be daunting, even if you have a couple of law degrees and are called to two bars. The question remains, should the law be so inaccessible to the general public? What is even more puzzling is, what does this adoption have to do with the "hallmarks of a free society" and need for a "legal profession which is independent and free of state control?" To exempt existing professions from the framework proposed by the Commission would result in the fortification of existing occupational monopolies.

V. CONCLUSIONS

THE MANITOBA LAW REFORM COMMISSION faced a daunting task — the review and critique of how professions and occupation are regulated, with a view to proposing a system that would be more compatible with the public interest. Theoretically, the implementation of their proposal should be a dismantling of professional monopolies in favour of multiple licensing and certifying of services, an increase in competition among various occupational groups, and more choice for the consumer. There will, however, be great resistance from the established profession, especially in terms of scope of practice and entry standards. If they do not succeed in receiving exemption from review, it is highly likely that they may succeed in maintaining their monopoly through the review process. To the extent that they succeed, the effect of the new regime will simply make it more difficult for other occupational groups to invade their coveted territory — a fortification of existing monopolies.