Foxes, Henhouses, Unfathomable Mysteries, and the Sufferance of the People: A Review of *Regulating Professions and Occupations*

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... a monopoly that has been entrusted to a certain group of people such as the legal profession, the only ones that are entitled to do certain things with respect to matters that the public are so much concerned with. It's a monopoly that must be exercised with an eye upon filling that particular need and doing what the legislature thought they could safely entrust them to look after. Now ... unless that responsibility is lived up to and performed to the satisfaction of the public — a reasonable satisfaction of the public — there is going to be a protest and the legislature which gave this monopoly to a certain group of people in a certain profession, they can turn around tomorrow and take it from them. These are the things that should be kept in mind.

— Judge James Moses Coady, 1979[1]

I. MANITOBA'S CRISES OF PROFESSIONALISM

THERE ARE, THROUGHOUT CANADA, periodic upwellings of popular discontent with the behavior of organized professional bodies. Typically, these are focussed on medicine and law — the oldest, highest status, wealthiest, most powerful of professions: the models of "professionalism" towards which other groups aspire — the most presumptuous — the "paradigm" professions.

So it was in Manitoba in 1990. The *Winnipeg Free Press* in that year had carried a number of articles questioning the ability or will of physicians, dentists, and lawyers to regulate themselves in the public interest.[2] Also in that year the provin

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1 J.M. Coady, *University of Victoria Aural History Transcripts*, interviewed by A. Watts, 27 June 1979 [DOB 1885] at 81–82.

2 The *Winnipeg Free Press* carried a series of articles in 1990. These included "Secrecy laws impede charges against lawyer" (27 January 1990, 1); "Ex- lawyer charged in fraud" (27 January 1990, 1); "Political masters in dark on professions" (24 January, 1990, 8); "Self-government rooted in guilds of Middle Ages" (24 January, 1990, 8); "Lawyers, MDs study open hearings" (20 January 1990, 1);

cial Minister of Justice had shepherded amendments through the legislature which permitted a tiny encroachment on the statute-created monopoly enjoyed by lawyers — within narrow limits paralegals were authorized to provide inexpensive legal assistance in Manitoba as they had done for several years in Ontario and elsewhere.[3] Predictably, perhaps, the Minister encountered criticism and sustained opposition from Manitoba lawyers. The Law Society went berserk. The professions, it seems, are touchy about their turf.

It was out of these circumstances that, "In November of 1990, the Minister of Justice and Attorney General referred to the Manitoba Law Reform Commission the question of the regulation of professions and occupations in the province."[4] The mandate was broad. The Commissioners were asked to prepare an overall assessment of the effectiveness of existing professional regulation within Manitoba, the extent to which professional or occupational associations should be given delegated powers of governance, the desirability of creating some "structure within government to deal with issues pertaining to the governing of professional and occupational associations" and other related matters.[5] Three years after the question was put to them the Manitoba Law Reform Commission released a Discussion Paper on *The Future of Occupational Regulation in Manitoba* in November 1993. Late the next year the Commissions' final report emerged.

The Manitoba Law Reform Commission's *Report on Regulating Professions and Occupations* is by far and away the most important such document to emerge from English Canada in a very long time.[6] It ranks with the very best English language

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"Policing methods fair, lay watchdogs say" (20 January 1990, 24); "Complainant just another witness" (21 January 1990, 11); "Lawyer disbarred, another suspended" (21 January 1990, 1); "Open lawyer probes hinted" (22 January 1990, 1); "College horror stories — Woman wins suit against doctor after filing unsuccessful complaint with College of Physicians and Surgeons" (21 January 1990, 3); "Charter pushes at locked doors" (21 January 1990, 3); "Secret probes of dentists lack enabling law" (23 January 1990); "Secrecy on trial — Clients lodge 400 legal beefs" (22 January 1990). I am grateful to Professor Esau for making his clippings file available to me.

3 *The Law Society Amendment Act* (2), assented to 8 March 1990, amended the *Law Society Act* by adding section 57.1. This section created the outlines of a new profession of "agents" who were newly authorized to "provide legal advice to another person" [57.1(2)] "with respect to summary conviction offences under *The Highway Traffic Act* in Provincial Court." Agents cannot act in cases in which bodily injury resulted from the alleged offence or in cases in which conviction might lead to imprisonment.

4 Law Reform Commission of Manitoba, *The Future of Occupational Regulation in Manitoba* (Winnipeg, November 1993, Discussion Paper) at 1.

5 *Ibid.*

6 René Laperriere, whose commentary also appears in this issue of the *Manitoba Law Journal*, thinks the report compares favourably with similar documents emerging from Quebec — usually a trend-setter in matters of professional regulation in Canada.

literature in the field. This document deserves to be widely read by the international community of scholars, by policy makers and by professionals whose work touches on contemporary professional governance.

Manitoba's Law Reform Commissioners are a genuinely distinguished group of individuals (Professor Clifford Edwards, Q.C., Professor John Irvine, Mr. Justice Gerald Jewers, Eleanor Dawson, Q.C., and the Honorable Pearl McGonigal). They and the professional staff who report to them (Jeffrey Schnoor, Q.C., Harold Dick, Gary Dolovich, and others) deserve tremendous credit for what they have achieved. The report is of the highest quality. It is also bold in that it calls for a radical reformulation of the structure of professional regulation. The Commissioners are to be commended for their considerable integrity, honesty, and fortitude. They have put forth a series of proposals which transcend by far the quagmire of inconsequential tinkering reforms and uninspired pap which characterizes twentieth century law reform at its worst. This report approaches the ideal of institutionalized law reform: fundamental, thoughtful review of an area of law and significant public policy proposals all geared toward the public interest.

Although the report emerged from a peculiar, local, and specific history of concerns about professional regulation, the report has considerable relevance elsewhere. Manitoba's history in these respects is not entirely idiosyncratic. The concerns (crisis?) which motivated the government of the day to put "the question of the regulation of professions and occupations"[7] before the provincial law reform commission, to greater or lesser degree, reflected a series of persistent problems recognizable in many places and with respect to many, many professions and occupations. Governments everywhere are routinely lobbied, in their various departments, by occupational groups seeking either to secure professional (or semi-professional) status or to find some other means of obtaining a statutory monopoly for their members. Professions, like cable tv providers, railway monopolists, and telephone companies, prefer to live without competition! In Manitoba, as elsewhere, bureaucrats and ministers have experienced the frustration of not knowing where to turn to find principles by which to adjudicate amongst the plethora of occupations which "line up" at their door seeking professional status, powers of self-regulation and the privilege of a state-protected monopoly that go with it.

An important, countervailing, pressure also formed part of the context from which this report emerged. It too reflects a larger story played out with minor variations across North America and, perhaps, around the world. Periodic "scandals" and a deepening mood of suspicion and distrust have caused many members of the public to doubt the efficacy of professional self- governance in protecting the

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[7] Manitoba Law Reform Commission, *Report on Regulating Professions and Occupations* (Winnipeg: Law Reform Commission of Manitoba, Report #84) at 1.

public interest. Well publicized tales of abusive or incompetent physicians, over-priced or unethical lawyers and the puffed-up arrogance of professional spokespersons in many fields have all taken their toll on professional images in the province. From time to time issues such as these raise concern about the professions near to the level of fully-fledged "moral panic."[8] So it was in November 1990 when Jim McCrae, Manitoba's Minister of Justice, referred the entire unmanageable mess to the Manitoba Law Reform Commission.

II. THE LAW REFORM COMMISSION OF MANITOBA'S REPORT

THE REPORT PROVIDES A VALUABLE REVIEW of important current issues relating to occupational regulation and a blue-print for future developments. It will be welcomed in Manitoba's corridors of power if only because it provides something not previously available: a principled, coherent approach to matters of professional regulation bound in a single, slim, easy-to-read volume. The Report is much more than this however. It clearly emerges from a truly massive research project and its analysis of public policy issues relating to licensing and certification of occupations is easily the most important public document issued on the subject in common law Canada during the past decade or more.

Well summarized elsewhere in this volume, it seems unnecessary to recover that ground in this commentary. I would instead like to emphasize two points which may be missed or over-looked by many readers. The first is simply to note the admirable research, logical consistency in the pursuit of public interest, and literary quality of the Report. These features carry the Manitoba Law Reform Commissioners further than others have yet dared to go in a number of directions. The second point is thus really a sub-category of the first. This is a radical document in the dictionary sense. Its' radicalness derives neither from commitment to a particular ideological agenda nor from capture by particular interest groups. Rather, its radical quality emerges as a direct result of its relentless logic. It goes to the root (the dictionary definition of radical) of the problems surrounding professional regulation. The Report's importance goes far beyond the particular proposals which emerge from its chapters.

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[8] The classic treatment of "moral panic" is S. Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Oxford: Martin Robertson, 1980). The notion has been much explored in criminology writings. See, for example, I. Taylor, "Moral Enterprise, Moral Panic, and Law-and-Order Campaigns," in M.M. Rosenberg, R.S. Stebbins, and A. Turowitz, eds., *The Sociology of Deviance* (New York: St. Martins Press, 1982) at 123–149; a brief but useful review of the literature is to be found in A. Brannigan's "Crimes from Comics: Social and Political Determinants of Reform of the Victorian Obscenity Law, 1938–1954" (March 1986) Australian and New Zealand Journal of Criminology 23 at 23–24.

III. THINGS I LIKE ABOUT THIS REPORT

A. Costs and Benefits

Though admirable in artificial intelligence research, "fuzzy" logic is not helpful in law reform. And yet, over-abundance of fuzzy thinking characterizes much of the writing relating to professional regulation in Canada. The leadership of my own profession, for example, solemnly adopts the illogical, self-contradictory (call it "voodoo-regulation") approaches to these matters whenever their backs are against the wall.[9] The tremendous merit of *Regulating Professions and Occupations* is its *relentless logical consistency* in pursuit of the public interest.

The conceptual pivot around which the report turns is well stated by the Commissioners in Chapter 2:

> ... government activity, including the regulation of occupational services, involves both benefits and costs. Prior to acting, government should consider whether a particular form of regulation will produce the desired benefits, whether or not these benefits will outweigh the costs of the regulation and whether another form of regulation or taking no action will produce greater net benefits.[10]

It is particularly noteworthy that the Manitoba Law Reform Commission adopts an approach to the costs of regulation much more comprehensive than that generally taken in the day to day operation of governments. Government officials — who have budgets to live within and expenditures to justify — are too often inclined to assume that the creation (or continuance) of a self-regulating profession is cost-free to the public provided only that the costs of running the necessary administrative machinery are covered by members of the occupational/professional group itself.

This, of course, is nonsense. Administrative costs ("expenses involved in operating an office, developing entry and practice standards, testing applicants, receiving and hearing complaints, conducting practice audits and holding disciplinary hearings"[11]) pale by comparison with the costs imposed on society at large from the disruption of market principles. The purpose of creating a fully self-regulating profession is to secure an artificial monopoly in the provision of services and to back this monopoly with legislative sanction. This, the Manitoba Law Reform Commission believes, is harmful to the public in many ways. The total public cost of "professional control" needs to be considered and the Commissioners quote

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9 See W.W. Pue, "In Pursuit of a Better Myth: Lawyers' Histories and Histories of Lawyers" (1995) 33 Alberta L. Rev. 730.

10 *Regulating Professions*, *supra* note 7 at 11.

11 *Ibid.* at 15.

approvingly the words of L. Benham and A. Benham who suggest that the larger cost of certification or licensing schemes is "higher prices to consumers, less specialization, reduced efficiency and lower levels of innovation."[12] The very extensive research of the Commission has found overwhelming evidence that licensing schemes significantly increase the price of services to consumers.[13] Moreover, artificially restricting the number of individuals providing any particular service visits a number of other ill-effects on the general public: "a scarcity of practitioners can mean a complete lack of access for some potential consumers (especially in remote areas), delays in service for other consumers and lower levels of quality when the service takes place because the practitioner is rushed and overworked."[14] Even if it were granted that admission standards and competence policing do indeed combine to ensure that licensed practitioners provide a consistently high standard of service (the Commission does not in fact grant this[15]), the overall effect of interference with free market principles may nonetheless be detrimental to the public interest:

> Consumers who are denied access to a service (whether because of high prices or due to an inadequate supply or distribution of practitioners) are left with a choice between three unpalatable options: performing the service themselves (which may be illegal and dangerous), obtaining the service illegally (which may expose the consumer and others to danger) or going without the service entirely. Whichever option consumers select, they are unlikely to obtain the necessary service at acceptable levels of performance. In this case, ironically, although regulation may have succeeded in raising the quality of service offered by licensed practitioners, it may not have raised the quality of service actually received by the public as a whole and may have diminished it. *To the extent that high entry and practice standards erect a barrier to the service, then, they undermine the purpose of a licensing regime and may in fact be counterproductive.*[16]

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12 *Ibid.* at 15 (note 17), quoting L. Benham and A. Benham, "Prospects for Increasing Competition in the Professions" in P. Slayton and M.J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978) 41 at 42.

13 *Regulating Professions*, *supra* note 7 at 16.

14 *Ibid.* at 17.

15 The Report is quite clear in its recognition that standards of competence are extremely difficult to enforce. The Commission's thinking has evolved considerably in this respect since the Discussion Paper on *The Future of Occupational Regulation in Manitoba* was released in 1993. That paper confused sanction with surveillance (at 36–37). The notorious failing of the paradigm professions is with respect to surveillance — which is so expensive and so intrusive that it can never be done effectively. The inadequacy of professional surveillance is clearly acknowledged in the final report (at 10). The fact that unenforced standards are ignored and full enforcement is impossible (perhaps not even desirable), provides a powerful argument against self- regulation — a point the final Report recognizes.

16 *Regulating Professions*, *supra* note 7 at 17 (emphasis added).

In the result, the Law Reform Commission comes to a startling conclusion: "no form of occupational regulation should be implemented unless its benefits outweigh its costs."[17] This conclusion is startling not because it is illogical or inappropriate for a public body to think this way. One would hope that a public body would put public benefit, not private advantage, front and centre in such matters. It is startling, rather, because this simple statement of principle contradicts entirely the ways in which these matters have commonly been approached in the past. Very few if any of the established and most prestigious professions would enjoy their present extensive and ill-defined economic monopolies if elementary principles of cost-benefit analysis were to be applied uniformly across the board. One wonders, for example, if physicians would enjoy a monopoly over prescribing drugs, dentists a monopoly over cleaning teeth [the Report indicates that research reveals "dental auxiliaries" to have "performed as well or better than dentists"], or lawyers a monopoly over real estate conveyancing if the principles of cost-benefit analysis were to be applied in an independent-minded fashion. Certainly, the Manitoba Law Reform Commission has clearly flagged its commitment not to be bamboozled by irrelevant arguments for economic monopoly which are based on status, education, or claims of superior moral standards. It is somewhat surprising that all respondents to the Commission's previous discussion paper agreed with its assertion of the primacy of the public interest[18] if only because many currently privileged occupa

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[17] *Ibid.* at 18.

[18] *Ibid.* at 19. It may be that many professional organizations making submissions in response to the preceding Discussion Paper, *The Future of Occupational Regulation in Manitoba* (Winnipeg, Law Reform Commission of Manitoba, 1993) did not fully understand what they were doing. Because the only legitimate consideration in shaping state policy in this area is the public interest, the Law Reform Commission has, unequivocally, adopted the position that no interference with free-market relations should be tolerated (whether by licensing, certification or, exceptionally, by conferral of powers of self-governance) in the absence of clear and convincing evidence of the necessity for such actions when viewed from the perspective of the public interest.

All occupational groups seeking economic advancement, restriction on competition, or status enhancement can be expected to claim that structures which serve their interest will also advance the public interest. The Law Reform Commission has, however, recommended a level of scrutiny here which encourages policy-makers to pierce the deliberately mystifying claims of those who currently enjoy or who seek monopolistic powers and privileges. It is particularly noteworthy that the final Report (in strong contrast with the preceding Discussion Paper) does not limit itself to the position that regulation should occur wherever "market failure" can be found. The Law Reform Commission apparently recognizes that a "test" which is confined to the proposition that self-regulatory professions should be created wherever there is danger of "market failure" is sufficiently vague as to permit virtually any occupational group to develop plausible arguments in support of their own claims to monopoly. The reality of the operation of free markets is that there are always, in fact, problems of imperfect information, neighborhood effects, free-loaders, transaction costs, and so on. The Commissioners clearly recognize that market imperfections of one sort or another are tolerated in our society because of the value and benefits thought to flow from free competition, freedom of contract and individual self-determination. An "imperfect market" is not

tions seem very vulnerable by the standards of this touch-stone test, consistently applied:

> In analyzing costs and benefits, care should be taken by decision-makers to avoid the inclusion of irrelevant factors. For example, it is not particularly relevant that an occupational group is university educated, has been in existence for some time, has developed its own code of ethics or that similar groups have obtained occupational regulation in other provinces. These facts are peripheral to the central questions decision-makers should address: Is there a manifest need on the part of the public from protection from the improper performance of this service? If so, will licensing or certification provide an adequate level of protection from this harm and will it do so at a cost which is less than the benefits of protection? In short, we propose that the purpose of occupational regulation should be to protect consumers and third parties from harm. It should not be used to reward or recognize practitioners for their educational and ethical achievements. Indeed, its purpose should not be to serve the interests of practitioners at all but should only be implemented when it is in the public interest to do so.[19]

From this philosophical starting point [the legitimacy of which could only be denied by a profession composed entirely of either principled socialists or entirely unprincipled, selfish monopolists] the Commissioner's move to a number of interesting conclusions — each one of which fundamentally calls into question the existing privileges of many professions. For the sake of brevity and of clarity a brief account of some of the most interesting of these positions will suffice.

B. Professional "Traits"

First, and perhaps most notably, the Manitoba report adopts a rigorously logical approach to determining the criteria by which professional licensing schemes should be created and barriers imposed on individuals who wish to provide services in particular areas. The functionalist sociology, which characterized a previous generation, attempted to define "professions" in terms of their "traits." Typically these were said to involve extensive training in practical matters, education in abstract knowledge, an ethical code, a collective identity and a spirit of public service.[20] Over time the descriptive models of sociologists became transformed in the world of work into ideals to be pursued; government decision-makers transformed them again into a sort of handy check-list by which to evaluate one or another group's claim to the combined grand prizes of legislated monopoly and self-regulatory powers! In the result, the small province of Manitoba has some 156

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the same as "market failure" — perfect markets exist only in abstract models and introductory economics textbooks.

19 *Regualting Professions*, *supra* note 7 at 19.

20 A useful review of various understandings of "profession" is found in A.D. Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1988). The classic critique of functionalist approaches is still T.J. Johnson, *Professions and Power* (London: Macmillan, 1972).

regulated occupations (approximately one regulated occupation for every six and a half thousand residents!) of which fully 36 are "self-governing."[21] Self-governing professions include agrologists, architects, chiropodists, chiropractors, engineers, lawyers, land surveyors, licensed practical nurses, naturopaths, physicians or surgeons, psychiatric nurses, registered nurses, veterinarians, accountants (five sorts), chartered pianio tuners, and professional home economists! The larger category of regulated but not self-regulating occupations includes beekeepers, cemetery operators, day care providers, barbers, hairdressers, door-to-door salespersons, and so on.

The principles which over time consigned "dentists" and "home economists" to the self-governing category but left dental hygienists or teachers merely regulated are mysterious. The Law Reform Commission strongly suggests that the "check-list" approach to professionalization is to blame. The remedy it proposes flows from the philosophy which undergirds the report: licensing, certification, and self-regulation should only be granted if the public good requires it. "Irrelevant" factors should be ignored. The result departs markedly from established governmental practice:

> Traditionally, several ... factors have influenced legislators when deciding whether or not to extend powers of self-government. These include the existence of a standardized body of knowledge (usually contained in a university curriculum), the affiliation of the local group of practitioners with national or international bodies and the presence of a code of ethics to which practitioners are bound. *Our approach would largely dismiss these factors as irrelevant to the issue of self-government.*[22]

They would substitute task-based licensing for wide, status-defined monopolies. Lawyers, for example, presently enjoy an expansive and ill-defined monopoly based on extraordinary status-attainment (two degrees, seven years of post-secondary education) but little in the way of skills testing to assess individual competence for the *particular* tasks of the world of work. Many professions today certify individuals

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[21] *Regulating Professions*, *supra* note 7 at 117–123.

[22] *Ibid.* at 52. Other irrelevant factors identified by the Commissioners include: university education, ("graduation should never be established as the sole path into a regime", at 38) and all the other professional "traits" of mid-century sociology (at 19). It is noteworthy that they reject the rather abstract and ill-defined "traits" approach in favour of a new more pragmatic set of criteria to be employed before creating public licensor or certification relating to the performance of specific tasks. The focus on tasks actually performed is very important and has the effect of cutting through a good deal of mystifying rhetoric produced by professions. The Commissioners observe that "Where entry standards have little predictive connection to the performance of the task or service and where practice standards are ineffective in addressing the source of the improper service, certification is not an appropriate form of regulation" (at 22).

as competent to *do things* when all that has ever been tested is the individual's ability to *do tests*![23]

The Commissioners do not set out in detail how their proposals might impact on any particular established profession. It is easy however to project the direction in which their proposals lead. Task-based licensing in legal services would most likely produce a proliferation of legal professions. Some new profession might qualify practitioners to undertake real estate conveyances only (England already has created a new profession of "licensed conveyancers" who are not lawyers), another might license for work in divorce and separation, and another still to undertake the routine work of corporate filings and small business partnerships. There might be specialist licenses for debt collections, defense of summary conviction offenses, tax advice, representation before labour tribunals, planning applications, or anything else lawyers presently do. The barriers to obtaining these licenses would be set at the minimum level consistent with protecting the public and it is noteworthy that licenses would not be restricted to individuals currently eligible for membership in the legal profession. Like trade tickets, there would be nothing to stop any individual from qualifying for as many task-based licenses as she might wish. Hundreds of legal secretaries, legal assistants and other law office employees might, if the proposals contained in the Report were implemented, find themselves eligible to strike out on their own. They would provide services directly to the public which they now provide (usually without meaningful supervision notwithstanding rules to the contrary[24]) only as employees of lawyers — who, as employers, skim some surplus value off the differential between their billing rate and the pay scales for subordinate labour. New micro-businesses servicing niche markets would spring up, overhead would drop, fees would be cut and consumers of legal services would pay less.

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[23] The Report says that "decision-makers should emphasize the use of practical tests. There is a tendency to prefer written theoretical examinations to practical tests because of their use in educational and academic settings. These examinations can be useful in testing an individual's knowledge and should be used for that purpose. However, they may fail to reveal an individual's ability to relate that knowledge to practice and may also ignore less tangible but equally important qualities which are required for good practice. While difficult, an assessment of a practitioner or applicant in practice may provide a more accurate picture of his or her abilities than an examination written in a classroom setting" (at 36).

[24] A recognition of the prevalence of this sort of delegation is indicated in the Law Reform Commission's observation that their "recommendations logically preclude the delegation of licensed services to a person who is not licensed to perform them." (30) Consistently acted upon, this insight suggest there should be no category of workers caught in a nether world of regulation and subordination where on-the-job supervision by dominant professionals is more often myth than reality — as is the case with employed paralegals, dental hygienists, and many others.

If this sounds like a lawyer's nightmare, it is of no concern to the Commissioners. They reject the notion that professional self-interest should dictate public policy (see discussion under heading "F," below).

C. The Unfathomable Mysteries of Professional Work

A second noteworthy point is the Commissioners' resounding repudiation of the absurd notion that only physicians can understand issues relating to regulation of the medical profession, that only lawyers can understand matters relating to the legal profession, and so on. The logical outcome of any such assumption would be that there could be no legitimate governance at all — for, as philosophers tell us, we can never fully "understand" or "know" another. Manitoba's Law Reform Commissioners know the absurdity of turning any such philosophical speculation into government policy and have firmly declared themselves on the matter: "we have come to the view that the position that only professionals can govern professionals is untenable."[25] Much impressed by their own presience if not infallibility, many professionals are inclined to adopt just this "untenable" position. The reasons given by the Commission for rejecting it are powerful and persuasive. "Governments," they say,

> ... currently regulate a huge variety of activities; the regulators of these activities, whether departmental employees or independent boards and agencies, are not invariably educated and trained in the same way as the individuals they regulate. Where special training is required, these bodies are able to hire or retain individuals with this training to provide advice. Moreover, we believe that non-practitioners, while they may be ignorant concerning technical aspects of a particular occupational service, are not incapable of considering expert evidence and coming to a reasonable conclusion.[26]

D. What the State Giveth the State Can Take Away

Third, and very importantly, the Commission very appropriately is at pains to point out that "[a] self-governing body is not a private organization; it exercises powers granted to it by the Province of Manitoba ... ."[27] This much should be obvious to anyone. It is not.

Self-governing professions enjoy market monopoly backed by the coercive power of the state. They make rules which are legally binding on their members and which prohibit citizens at large from undertaking certain kinds of work. They run disciplinary tribunals and often enjoy extraordinary powers to punish (including

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[25] *Regulating Professions*, *supra* note 7 at 9.

[26] *Ibid.*

[27] *Ibid.* at 61. Also, at 46: "The classic model of self-government represents a delegation by the Legislature of administrative authority to an organization whose officers and directors are elected by practitioners rather than being appointed by government."

the power to permanently deprive a person of the opportunity to earn an income from their chosen occupation). These are not the sorts of powers which any decent post-feudal society permits just any individual or group to appropriate to themselves willy-nilly. The only legitimate source of such authority in a democratic country is by delegation from the legislature.

Unfortunately, not all privileged professional groups recognize this. The organized legal profession in particular can be counted on, from time to time, to make specious arguments to the effect that it (perhaps it alone) is mysteriously entirely exempt from the normal requirements of constitutional legitimacy.[28] One would hope that a powerful assertion of the source of powers of self-governance by the distinguished lawyers who serve on the Manitoba Law Reform Commission would, once and for all, put an end to the meaningless and self-serving twaddle which lawyers are sometimes drawn to in this respect. The Law Reform Commission's extremely clear statement on this point will, it is to be hoped, permit rational argument and democratic principle to displace metaphysics, mysteries and myths in discussion of these matters.

E. Foxes in the Henhouse

Fourth, and closely related, the Commission has very valuably pointed out the lack of logical connection between a decision to restrict entry to an occupation (monopoly) and the quite distinct matter of whether the privileged individuals allowed to carry out certain tasks should *in addition* be given authority to make the rules by which they will be governed. The Commission refers to this as a conceptual distinction "between a regulatory regime (licensing, certification or another form of regulation) and its administration (self-government or administration by government)."[29] Indeed, it may be said that there is a logical inconsistency in *ever* giving self-governing powers to an occupational group which enjoys a state-created monopoly. One important rationale for creating regulatory structures in the first place is precisely because of a perceived need to remedy failures in the efficient or just functioning of a market economy. There is no more suspect situation than one in which economic monopoly combines with imperfect consumer information — as is commonly the case with professions. In such situations an additional grant of self-regulatory powers becomes all too reminiscent of the proverbial selection of a fox as keeper of the chickens. While "reports, policies and legislation in other jurisdictions seem to have assumed that a decision to implement a certification or licensing regime meant that the regime would be self-governing," the Manitoba Law Reform Commissioners at least recognize the possibility that it might not always

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[28] See Pue, *supra* note 9.

[29] *Regulating Professions*, *supra* note 7 at 47.

be good to expose foxes to temptation. The Commission quotes with approval the author of a 1978 Manitoba government study of the professions who, with studied understatement, observed simply that "there may, from time to time, be situations in which the self-serving interests of a particular profession may not coincide with the public interest."[30] The assumption that self-governance should accompany licensing or certification is, for this reason, amongst others, "incorrect; administration of licensing and certification regimes by self-governing bodies is neither a logical nor a practical necessity."[31]

F. If It Ain't Broke — Maybe It Is!

Fifth, it is noteworthy that the Manitoba Law Reform Commission did not adopt a blinkered approach to the problems presented by the proliferation of new professions.

It would have been easy and very comfortable for the Commissioners to simply assume that all was well with powerful, established professions, while nonetheless expressing considerable hostility towards the professionalizing aspirations of new groups who might seek "professional" shielding from both the rigours of the free market and direct government regulation. Bold to the point of brazeness, this position was apparently urged upon the Law Reform Commission by some of Manitoba's established professions:

> Some respondents to our Discussion Paper argued that services which are currently regulated should be allowed to remain undisturbed unless serious problems are identified in their regulation or administration.[32]

The Commission was apparently somewhat tempted by the argument that they should not "make recommendations which are aimed at repairing something which has not been shown to be broken."[33]

Fortunately, they have concluded that such an "argument cannot be sustained."[34] In part this conclusion reflects a sensitivity to the fact that occupations do not operate in sealed boxes but rather participate in complex *systems* of service provision. A change to the "jurisdiction" of one occupation[35] will necessarily impact

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30 *Ibid.* at 47, quoting S.M. Cherniak, "Governing Professional Bodies" *Winnipeg Free Press* (4 May 1979) 6.

31 *Regulating Professions*, *supra* note 7 at 47.

32 *Ibid.* at 88.

33 *Ibid.* at 88.

34 *Ibid.* at 88.

35 See Abbott, *supra* note 20.

on others. Nurse-practitioners, paralegals or dental hygienists, for example, cannot practically seek either an expanded role in the market place or powers of self-governance without encroaching on the protected turf that physicians, lawyers or dentists have enjoyed for much of this century.[36] To adopt a two-tier system which would immunize existing professions from review might well have the effect of preventing *expansions* of self-government in directions which are manifestly in the public interest (parenthetically, it is interesting to note that highly feminized occupations may have the most to gain from future changes). The Commissioners were, appropriately, reluctant to draw "an artificial and arbitrary distinction between currently regulated and unregulated services. This distinction is entirely based on historical accident and not on any material difference between occupations."[37]

There is another point however which persuaded the Manitoba Law Reform Commissioners to reject any attempt to "grandparent" established professions into a permanently privileged status. There is a hidden bombshell buried deep in the report which deserves recognition. Quietly, without dramatic flair, but quite unequivocally, the Commissioners have committed themselves to what may well be the most thoroughly "de-professionalizing" position ever adopted by any authoritative Canadian body:

> ... we are not convinced of the value of the traditional approach to occupational regulation and have substantial doubts that the regulatory regimes it has produced are in all circumstances serving the public as well as possible. These doubts go beyond whether current regimes are working well and encompass concerns about the adequacy of the consideration which has gone into determining the need for the regimes at all.[38]

Everything, it seems, is up for grabs. No presently existing professional monopoly should be shielded from the most penetrating public scrutiny (an arms-length review body reporting to the Ministry responsible for consumer affairs is proposed to carry out this task[39]) for the Commissioners believe that "the traditional thinking about

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[36] *Nursing Notes* (1894) at 95 complained of the subordination of ancillary health care professions to physicians. The result was said to be that the medical profession would "govern and control a body of women whose interests have been said to clash with their own; it is a little as if the spider undertook to legislate for the fly" (as cited in A. Witz, *Professions and Patricarchy* (London: Routledge, 1992) at 124).

[37] *Regulating Professions*, *supra* note 7 at 89.

[38] *Ibid.*

[39] *Ibid.* at 95.

about occupational regulation ... does not withstand scrutiny."[40] The "current approach ... has failed to serve the public interest."[41]

There is no ambiguity in the Commissioners' treatment of this issue. It is quite clear that the fundamental claims of even the most well-established professions are called into question. The words of the Report are clear enough. Lest there be any doubt, however, their words are given added power and clarity when contrasted with treatment of the paradigm professions in the Law Reform Commission's 1993 Discussion Paper. This publication, *The Future of Occupational Regulation in Manitoba*,[42] was curiously silent as to whether its principles should be extended to existing, well-established and powerful "professions." It is as if the Commissioners were then afraid to pursue the logic of their analysis to its fullest for that paper suffered from an unfortunate "stop in the mind" which pervasively distorted their analysis as it approached the turf of the "paradigm professions." This was a *major* failing in the Law Reform Commission's first bash at making sense of occupational regulation. The desire not to assess paradigm professions from *any* perspective gave a very peculiar tone — especially curious perhaps given the immediate pre-history of this study in Manitoba!

Given this background it is apparent that the Law Reform Commissioners' thinking evolved very substantially indeed in the year between the release of their preliminary thoughts on the subject and the printing of their final Report.

IV. THINGS I DISLIKE ABOUT THIS REPORT

I DO HAVE A FEW CRITICISMS of the Report. These, however, are relatively minor, even picayune, points which do not seriously detract from the Commission's achievement. The Report is extraordinarily good.

The first criticism is simply that, at the level of fairly fine-grained detail, the Report gets some aspects of the history of professions wrong. It tends, for example, to read the notion of "skill" far too narrowly[43] into the past and in so doing obscures the cultural, integrative, or class-projects of professionals.[44] It goes wrong in matters

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[40] *Ibid.* at 90.

[41] *Ibid.*

[42] *Supra* note 4.

[43] *Regulating Professions*, *supra* note 7 at 3.

[44] See for example Pue, "Common Law Legal Education in Canada's Age of Light, Soap and Water" (1996) 23 Man. L.J. 654; "Revolution by Legal Means" in Patrick Glenn, ed., *Contemporary Law 1994 Droit contemporain* (Montreal: Editions Yvons Blais, 1994) 1; "Trajectories of Professionalism: Legal Professionalism after Abel" in A. Esau, ed., Manitoba Law Annual, 1989–1990 (Winnipeg: Legal Research Institute, 1991) 57; "Becoming 'Ethical': Lawyers' Professional Ethics in Early

of even finer detail too, reading several features of professional pasts anachronistically through lenses that are distinctly of late twentieth-century design.[45] While all of this is of interest to me as a legal historian none of it — as far as I can tell — makes a milligram of difference in evaluating what should be done about occupational regulation today. That, after all, is the purpose of a Law Reform Commission report.

For all practical purposes, there is only one serious criticism to be made. At one or two points — perhaps out of a desire to strike an accommodating tone — the Commissioners make dangerous concessions. Thus, for example, they qualify a portion of what they say as follows:

> We do not intend by this recommendation to suggest that a formal economic cost-benefit analysis be required before occupational regulation can be introduced. Nor are we recommending that only economic factors ought to be taken into account.[46]

It is strange that the Commissioners would make such a concession, having nowhere indicated precisely what sorts of "non-economic" factors they consider to be potential "trump-cards." It is potentially dangerous for just this sort of language might become a linguistic opening through which the legal profession, for example, might charge fully armed with its traditional brew of mysticism, horror stories,

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Twentieth Century Canada" (1991) 20 Man. L.J. 227; "A Profession in Defense of Capital?" (1992) 7:2 Can. J.L. & Soc'y 267; *Law School: The Story of Legal Education in British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia, 1995).

[45] At page three, for example, the Report treats early professional "ethical" codes as disciplinary mechanisms. In fact there could be no punishment for breach of earliest Canadian Bar Association or American Bar Association codes of professional conduct because these associations were non-regulatory, voluntary professional associations. The English Inns of Court — often thought to be a model for professional disciplinary regimes — in fact had no discipline for breach of ethics as such as late as 1919 and no disciplinary mechanisms to speak of at all prior to the mid-nineteenth century (see Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada", *supra* note 44; W.W. Pue, "Moral Panic at the English Bar: Paternal vs. Commercial Ideologies of Legal Practice in the 1860s" (1990) 15 Law and Social Inquiry [formerly American Bar Foundation Research Journal] 49).

Similarly, contrary to the interpretation presented by the Manitoba Law Reform Commissioners (at 4), professional leaders of the early twentieth century were not in fact motivated by a vision of service which assigned first priority to the best interest of clients. Rather client control in the interests of state and of the social order at large pervaded the early twentieth century ethos of professionalizing teachers, physicians, priests, lawyers and, probably, others. For a discussion of some relevant literatures as they touch upon the professionalization projects of lawyers in western Canada see Pue, "Becoming 'Ethical' ", *supra*; and W.W. Pue, "Lawyers and the Constitution of Political Society: Containing Radicalism and Maintaining Order in Prairie Canada, 1900–1930" (Winnipeg: Canadian Legal History Project Working Paper, 1993–94).

[46] *Regulating Professions*, *supra*note 7 at 18.

ghosts, vampires, bogey-men, and witches tales. Similarly, the concession that "in some cases" and with appropriate safeguards (which the Commission specifies) self regulation "can serve as a cost-effective and beneficial form of administration"[47] seems to be almost entirely denied by the Commissioners' own logic.

Even this criticism is not as substantial as it may at first seem however. The report is carefully constructed and it would virtually require a deliberate misreading to make much of partial qualifications such as these. It would also, frankly, be entirely inappropriate for such a body to offer the sweeping conclusion that all forms of occupational self-regulation are now and must ever be contrary to the public interest. The Commission sensibly recommends a method of proceeding which calls for detailed, case-by-case, task-by-task appraisal of the social costs and benefits of conferring economic monopolies or self-regulatory powers. Any unqualified, total repudiation of self-regulation in advance of these studies would have been rash and unhelpful.

The one major drawback of the Report in truth does not lie within it. Rather, the problem seems to be one commonly encountered in the field of law reform: it has yet to be seen whether the Manitoba government will take any concrete action in furtherance of these recommendations. The particular crisis which provoked a goverment five years ago to seek advice on these matters is long passed. Public interest is low, and the Minister who commissioned it has long ago moved on to other responsibilities. The principal problem, in short, is simply that nothing seems to be happening as a result of this Report. One can guess that somewhere in Winnipeg government offices it is from time to time waved in front of anyone seeking extended professional status in newly emerging fields (perhaps such as dental hygiene, paralegalism or others?). It is probably a safe guess that physicians, lawyers, dentists, and other powerful professions are not currently encouraging the ministries with whom they deal to commence a public process of the sort the report advocates ("undergo ... fundamental review and be opened to scrutiny in all areas of its current regulation"[48]). Nor is it likely that bureaucrats or politicians find the prospect of messing with powerful groups such as these — and many simultaneously at that — particularly attractive.

There is some danger, given the ways large and small scale politics play themselves out, that the Report might be deployed to an effect exactly contrary to its spirit, intent, and explicit positions — cutting off new occupations at their knees while buttressing the power and monopoly of established "professions." Despite its' logic and forthrightness, the Report, has not sparked any initiative in government

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[47] *Ibid.* at 50.

[48] *Ibid.* at 92.

to re-evaluate the structures of regulation or monopolies affecting pre-existing licensing or certification regimes in the province.

Professional regulation daily affects all of us in many ways, but is not the stuff media sound-bites are made of.

Pity.