GOVERNANCE GONE WRONG:

EXAMINING SELF-REGULATION OF THE LEGAL PROFESSION

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ABSTRACT

England and Australia have abandoned self-regulation of the legal profession yet Canadian law societies continue to function on this basis. This article argues that the self-regulatory model on which the Law Society of Ontario (the “LSO”) operates represents an inadequate form of governance in terms of the accountability it yields. When compared to other organizations, including law societies in other common law jurisdictions as well as corporations, the weaknesses in the LSO’s governance model are conspicuous. This article advocates replacing self-regulation in Ontario’s legal profession with a co-regulatory regime. In the absence of such an extensive reform, this article puts forward recommendations for changes to the current bencher model of governance on which the LSO is based including the implementation of bencher expertise requirements and a duty of loyalty and a duty of care to the public.

**Keywords:** governance; independence; legal regulation; co-regulation; Ontario; law societies; public interest; self-regulation; consumer protection
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1. Introduction

In the practice of law, as in many professions, information asymmetries between the client and service provider can have a negative impact on the quality of service. When a client goes to a lawyer for legal assistance, the client relies on that lawyer, not only to provide a legal service but also to determine the scope of legal services warranted by the matter. If the course of action that will maximize the lawyer's profits differs from the best course of action for the client, the lawyer may be inclined to give the client faulty advice, and the client, being comparatively ignorant about the law, may not know that the advice is flawed.¹

Inherent in self-regulation is the potential for similar conflicts of interest on a larger scale: lawyers governing themselves may, in making rules for the profession, pass rules that benefit themselves as opposed to the public at large, who may not be equipped to protect their own interests.²

As a result of such concerns, self-regulation of the legal profession is an institution of the past in England and Australia. Yet, Canadian law societies continue to function on this basis. For example, the Law Society of Ontario (LSO) regulates legal education, promulgates codes of conduct, and enforces professional standards for lawyers. The LSO is run by a large board of directors – called “benchers” – comprised of lawyers, paralegals and lay persons.³

¹ For example, Stephen examines the effects of information asymmetries on conflicts of interest regarding fee structures: Frank Stephen, Lawyers, Markets and Regulation (Cheltenham: Edward Elgar Publishing, 2013) at 31-34.
Under statute, the LSO is bound to advance the cause of justice and rule of law, facilitate access to justice, protect the public interest, and act in a timely, open and efficient manner while ensuring that its members meet standards of professional competence. Under the Law Society Act, benchers are not bound by a statutory duty of loyalty to act in good faith and with reasonable care. The Act simply states that, “benchers shall govern the affairs of the Society” but does not specify duties for benchers. Furthermore, the Act contains no procedures regarding benchers’ obligations to disclose conflicts, seek recusal, and refrain from voting on matters relating to conflicts. These provisions presumably could be incorporated by reference from the Corporations Act to govern Bencher behaviour.

By contrast, public corporations are subject to multiple requirements relating to their governance. They must disclose various documents, including the text of the board’s written mandate, position descriptions, the methods by which new board members are oriented, ethical codes of conduct, the board nomination process, and compensation, among

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5 LSA, supra note 4, s 10.
6 Ibid
7 The Corporations Act applies to the LSO as a corporation without share capital and does contain a fiduciary duty for boards of directors Ontario’s Corporations Act, RSO 1990, c C-38, s 127.1 [Corporations Act] which states, “Every director and officer, in exercising his or her powers and discharging his or her duties to the corporation, shall,

- act honestly and in good faith with a view to the best interests of the corporation; and
- exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. 2017, c. 20, Sched. 7, s. 36 (1).”

See also Canada Business Corporations Act, RSC 1985, c C-44, s 122 [CBCA].

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many other requirements. In addition, securities law contains guidelines regarding board composition, board mandates, position descriptions, orientation, education, nominations and compensation.\(^9\)

Not being bound by these sorts of rules but all the while being self-regulated, the LSO falls short with respect to governance. Its decision-making structure is based on a loose governance system with limited accountability.\(^10\) The question naturally arises as to whether this system is effective in protecting the public interest. Even if it is effective in this respect, inherent in this structure is the possibility of conflicts. Governance should not only be fair, but also seen to be fair.

This article is about the intricacies of law society governance, a subject with which the LSO has relatively recently become more engaged.\(^11\) It argues that a “co-regulatory model” should be introduced, creating a division of government that oversees the LSO. Regardless of whether reform of this magnitude is introduced, benchers should be subject to an explicit two-fold statutory duty contained in the Law Society Act to act in the best interests of the public at large and to exercise reasonable care, diligence and skill when doing so.

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\(^10\) W. Wesley Pue documented this pressure to reform legal governance throughout the history of the profession in Canada. See W. Wesley Pue, “Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada” (1991) 20 Man L J 227 (“A deep cynicism about the exercise of professional disciplinary powers is pervasive in the 1990’s” at 232).

\(^11\) See e.g. Law Society of Ontario, Governance Task Force 2016, “Report to Convocation” (29 June 2017), online: <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-June2017-Governance-Task-Force-Report.pdf> (“reviewing how Convocation, the Treasurer’s Office and committees are constituted and do their work, the potential for more fundamental election reforms … and other broader governance initiatives.” at 2). See also Law Society of Ontario, “Call for Comment: Options for Enhanced Governance Effectiveness”, online: <lsoc.ca/with.aspx?id=2147503514>. 
Furthermore, the process of choosing benchers should be reformed and benchers should be required to meet minimum levels of expertise. One may legitimately question the scope and enforceability of a duty to act in the best interests of the public at large, but the point is that benchers at present have no specific duties in the *Law Society Act*. It is certainly possible to add more specificity to the current nebulous (or non-existent) duty owed by benchers of the LSO to the public.

Prior to beginning, a word about empirical evidence. In an article of this sort, one may claim that there is no “proof” that the current governance system is failing or that conflicts of interest do indeed exist. Empirical evidence, if it exists on this topic, is not the focus of this article. Rather, given conflicts of interest that are discussed below, the article is a theoretical exercise in conceptualizing alternative governance models for the legal profession. And it begins by asking, why is Canada one of the only countries with self-regulation of the legal profession still in place?

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12 While the Supreme Court of Canada has suggested that there can be no fiduciary duty to act in the best interests of the public at large, academic writing has pushed the concept that it is indeed possible to impose such a duty. Cf *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 48; Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (Oxford: Oxford Scholarship Online, 2012), online: <10.1093/acprof:oso/9780199698318.001.0001>.

13 There does not seem to be any empirical study addressing the effect of legal professional regulation on the quality of legal services or the competitiveness of the legal market. There are statistics on discipline (mostly on the number of complaints and how they are addressed), but these are limited to a single jurisdiction, and form too small a sample size to disentangle the effect of professional regulation from a myriad of other effects. Nevertheless, even these limited comparators generally show that almost all other jurisdictions receive fewer complaints about lawyers and hand out more sanctions than Ontario, relative to the size of the profession in each. See e.g. Austl, New South Wales, Office of the Legal Services Commissioner, *Annual Report 2016-2017* (Sydney: The Office of the Legal Services Commissioner, 2017) at 23, 27-28, online: <http://www.olsc.nsw.gov.au/Documents/2016%202017%20OLSC%20AnnRep.pdf>.
This article unfolds as follows. Part 2 outlines the concept of self-regulation and discusses reforms to this model that occurred in England, Australia, and the United States. Part 3 compares LSO governance with the Quebec model of professional regulation, the regulation of capital markets by the Ontario Securities Commission, and the regulation of medical practice in Ontario. Part 4 examines reform possibilities for the LSO and makes recommendations for enhancing its governance in the absence of dismantling self-regulation. Part 5 offers concluding thoughts on the issue of law society governance.

2. **Law Society Governance Models**

i) **Self-Regulation**

Self-regulation of the legal profession has a long history, with its substance and structure evolving over time. As Upper Canada (the previous name for the Province of Ontario) was being founded in the late eighteenth century, three groups oversaw the legal profession: Chief Justices of the various courts, who decided disciplinary matters, the Inns of Court, which housed the practicing barristers, and universities, which provided and set standards for legal education. These institutions derived their powers from the inherent jurisdiction of courts to control their own process and the customs of time. New lawyers were admitted to the profession by lawyers and judges, on terms set by lawyers and judges. They acted as instructed by existing lawyers and judges, because no other institution had ever been given authority to regulate the legal profession. This type of regulation will be termed “American self-regulation” in this article, for reasons explained below.
In 1797, lawyers in Upper Canada attempted to emulate England and Wales, but having no institutions equivalent to the Inns of Court, they resorted to creating the Law Society of Upper Canada (LSUC) – now the LSO – by statute. Upper Canadian lawyers happily believed that theirs was just another Inn of Court,\(^\text{14}\) but “any good Inns of Court barrister should have been offended by the suggestion that a colonial legislature could conjure Inns of Court and barristers out of thin air.”\(^\text{15}\) This was the first law society created by statute anywhere in the common law world,\(^\text{16}\) a model that would eventually be adopted across Canada, and even back in England itself, albeit almost half a century later. This was a recognition that the government had the power to regulate lawyers, in particular by requiring written rules of conduct – also ahead of its time in the common law world\(^\text{17}\) – but that it would delegate the power to write and enforce those rules of conduct to lawyers and judges themselves. This type of regulation will be termed “Ontarian self-regulation” in this article.

The main alternative to self-regulation in the modern era is co-regulation, which is currently in place in England and Wales and most Australian states. “Coregulation” implies the existence of two or more bodies that share oversight of an organization. In a co-regulatory model, government would bear the responsibility for appointing members of the board – who may or may not be lawyers – to enforce disciplinary rules and standards. But all control over the regulation of the legal profession is not in the hands of government appointees; the law society would retain certain responsibilities with regard to the profession. In the UK,


\(^{15}\) Ibid at 26-27.


\(^{17}\) Moore, *supra* note 14 at 43-45.
for instance, eight regulatory bodies with government-appointed members discipline legal professionals, but legal education is still overseen by the Inns of Court (for barristers), the Law Society of England and Wales (for solicitors), and other industry-specific bodies, all of which are run by lawyers, for lawyers, without significant government involvement.

England and Wales abandoned self-regulation in favour of a co-regulatory model in 2007, after decades of scandals and reports which showed that the Law Society of England and Wales prioritized the interests of its members over the public interest. This experience highlights the inherent conflict of interest in giving lawyers control over regulation of themselves and their peers. Australian states also adopted co-regulation in response to evidence that self-regulatory systems had failed to protect the public interest. Co-regulation was the obvious solution to slow responses to client complaints and a general distrust of the legal system by Australians in the 1990s and 2000s. Scholars have seen these co-

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19 Some argue that in the case of Ontario, that conflict of interest has historically been pronounced. For example, Moore, supra note 14 at 28-31 states that a primary purpose in creating the LSO was to guarantee a monopoly over the legal profession for the children of the wealthy elite.

regulatory systems as satisfactory compromises between professional autonomy and protection of the public interest.\textsuperscript{21}

This reference to England, Wales, and Australia should preempt one of the main arguments sustaining self-regulation: that autonomy is necessary for the independence and efficacy of courts – a safeguard for constitutional separation of powers. This rationale finds its greatest expression in US constitutional law, which has embraced the principle that “abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”\textsuperscript{22} Thus, the “inherent powers doctrine” gives courts power to regulate bar admission, set professional standards, and discipline lawyers.\textsuperscript{23} In turn, American courts tend to delegate these powers to state bar associations.\textsuperscript{24}

To the extent that U.S. legislators are allowed to regulate the legal profession, they have done so. For instance, the Sarbanes-Oxley Act of 2002 requires the Securities and Exchange Commission to set “minimum standards of professional conduct” for lawyers which appear before it.\textsuperscript{25} Thus, government’s restraint in regulating the legal profession, and self-regulation itself, is largely a product of constitutional limitations.\textsuperscript{26} As suggested above,

\begin{footnotesize}
\begin{enumerate}
\item See Deborah Rhode, \textit{The Trouble with Lawyers} (Oxford: Oxford University Press, 2015) at 118-120.
\item The American Bar Association, \textit{ABA Model Code of Professional Responsibility}, Chicago: ABA, 1980, online: \texttt{<www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcrp.authcheckdam.pdf>}.\textsuperscript{23}
\item Paton, “Between a Rock and Hard Place”, \textit{supra} note 20 at 94.
\item See Deborah L Rhode, \textit{In the Interests of Justice: Reforming the Legal Profession} (Oxford: Oxford University Press, 2000) at 145 [Rhode, \textit{In the Interests of Justice}]. Examples of such delegated authorities can be found in the Constitution and Bylaws of the American Bar Association, available online at: \texttt{<www.americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2017-2018.authcheckdam.pdf>}.\textsuperscript{24}
\item Gillian Hadfield, for example, describes the negative externalities flowing from the American legal regulatory model’s emphasis on constitutional doctrine and its absence of clear policy guidance. One such
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Ontario does not face these constitutional limitations, as the LSO was created by statute and operates under delegated legislative authority.\textsuperscript{27}

ii) \textit{The Bencher Model of Governance}

The \textit{Law Society Act} and its antecedents have governed the LSO since 1797. Throughout that period, it has declared, simply, “The benchers shall govern the affairs of the Society.”\textsuperscript{28} These benchers include forty elected lawyers representing specific geographic regions, five elected paralegals, up to eight lay members appointed by the Lieutenant Governor, and at least four ex officio benchers – the Minister of Justice for Canada, the Attorney General for Canada, the Solicitor General for Canada, and the Attorney General for Ontario.\textsuperscript{29} One of the elected benchers is then elected Treasurer: the name for the leader of the LSO.\textsuperscript{30}

Elected benchers need have no specific skills. To run in a bencher election, benchers must merely practice law in the region they seek to represent, not have been a bencher for more than twelve years, and be nominated by five licensees whose licenses are not suspended.\textsuperscript{31}

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\textsuperscript{28} LSA, supra note 4, s 10.
\textsuperscript{29} \textit{Ibid}, ss 12(1), 12(2), 15, 16(1), 23(1). Past Attorneys General of Ontario and those who have been elected benchers for 16 years are also ex officio benchers, but are only allowed to vote in committees, not at the general meeting, known as Convocation: \textit{ibid}, s 12. The Minister of Justice, Attorney General, and Solicitor General for Canada have no voting rights: \textit{ibid}. Past Treasurers are also ex officio benchers, with voting rights: \textit{Ibid}, s 14. There are also honorary benchers, who are not involved in governance: \textit{Ibid}, ss 1, 10, 11. See Law Society of Ontario, “Appointed, Ex-Officio and Honorary Benchers” (\textit{The Law Society of Ontario}, 2016), online: <http://lso.ca/with.aspx?id=788>.
\textsuperscript{30} \textit{Ibid}, s 25.
\textsuperscript{31} Law Society of Ontario, By-Law No. 3, \textit{Benchers, Convocation and Committees} (26 April 2018), ss 7(2), 8(2), online: <https://www.lsuc.on.ca/uploadedFiles/By-Law-3-Benchers-Convocation-Committees-04-26-18.pdf> [LSO, Bylaw 3].
\end{flushright}
There are no requirements to be appointed as a lay bencher. Nevertheless, lay benchers participate in the decision-making relating to all aspects of legal regulation including on the LSO’s standing committees which include: audit and finance, government and public affairs, access to justice, litigation, professional development and competence, professional regulation, equity and indigenous affairs, inter-jurisdictional mobility, and tribunal. Once again, participation on these committees does not require any specific competence.

iii) **Conflicts**

As noted above, the fundamental disadvantage inherent in a system of self-regulation is the potential for conflict of interest: lawyers governing themselves may, in making rules for the profession, pass rules that benefit themselves and the members of their profession rather than the public at large. It is therefore be worthwhile to scrutinize the LSO's governance model and consider whether that body emulates a design that is effective in protecting the public interest. There is evidence of Canadian law societies, including the LSO, having put, or having the potential to put, the interests of lawyers over those of the public. Although some of these issues have been remedied, there is no legal mechanism preventing their recurrence.

First, as law firms began to appear and expand in the 1970s and 1980s, their lawyers came to dominate the LSO. As a result, when a lawyer from a law firm was caught having engaged...
in professional misconduct, the cases were often addressed on a confidential basis, rather than through formal disciplinary procedures.\textsuperscript{34} This procedure benefitted law firms, especially large firms, by avoiding negative publicity, even though publicizing those failures may have deterred egregious conduct by preventing future clients from being taken in by the same malfeasance.

Second, also in the 1970s, Canadian law societies regulated legal advertisements in an arguably anticompetitive manner. The Supreme Court of Canada upheld such restrictions, finding that the \textit{Combines Investigations Act} did not apply to law societies.\textsuperscript{35} Many of these specific restrictions have nevertheless been removed as law societies are attuned to the need to protect the “consumer.” Yet the regulated conduct doctrine continues to exempt much law society practices from the \textit{Competition Act},\textsuperscript{36} leaving the possibility that anticompetitive restrictions may be imposed again.\textsuperscript{37} The possibility of anti-competitive behavior within the legal profession remains.

Third, in 1998, the LSUC (now the LSO) became responsible for regulating multidisciplinary practices that integrated legal work with accounting and other professional services. In the subsequent debate over how best to regulate this new area, the LSUC resisted

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\item Harry W Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?” (1995) 33:4 Alberta L Rev 800, 806-807.\textsuperscript{34}
\item Robert Mysicka, \textit{Who Watches the Watchmen? The Role of the Self-Regulator}, (Toronto: C.D. Howe Institute, 2014) at 16-17, online: <www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_416.pdf>.\textsuperscript{35}
\item \textit{Competition Act}, RSC 1985, c C-34, s 45(7).\textsuperscript{36}
\item The LSO has removed some of these specific restrictions, but continues to introduce new potentially-anticompetitive advertising rules in the name of "public protection". See Law Society of Ontario, "Law Society Strengthens Advertising Rules in the Public Interest", \textit{Law Society Gazette} (23 February 2017), online: <http://www.lawsocietygazette.ca/news/advertising-rule-changes/>.\textsuperscript{37}
\end{enumerate}
\end{footnotesize}
pressure to accommodate these nontraditional practices, effectively preventing them from being able to operate in Ontario. Paton persuasively argues that the LSO’s campaign against change in this case served “to insulate the legal profession in Canada from external influences,” retaining lawyer control without serving the public interest.\textsuperscript{38}

Fourth, the LSO took a restrained stance in response to the American \textit{Sarbanes-Oxley Act of 2002}, enacted in the aftermath of the Enron scandal.\textsuperscript{39} Amidst calls for significant reforms to the legal and other professions, the LSO did not implement the “noisy withdrawal” rule that the SEC instituted. This rule required lawyers to withdraw from acting for a client and report misconduct to regulators if its client were engaged in illegal conduct and refused to curtail it even after the lawyer had reported up the ladder.\textsuperscript{40} The LSO did amend its Rules of Professional Conduct to include up-the-ladder reporting but without mandatory withdrawal, seeking to strike a balance between client protection on the one hand and the risk of disclosure of confidential client information on the other.\textsuperscript{41}

Turning to the present, the OECD has found that the price of Canadian professional services are artificially increased by self-regulation, with restrictions “used by the professions to

\textsuperscript{38} Paton, “In the Public Interest”, \textit{supra} note 18 at 41-46.
\textsuperscript{39} \textit{Ibid} at 11-13.

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obtain and safeguard economic rents”.

Although the OECD did not single out the legal profession, it is not hard to find evidence of barriers to entry producing high fees in the legal profession, indicative of economic rents. For example, the LSO requires about eight years of education (undergraduate degree, law school, and articling) for a domestic student to become a lawyer, and has implemented barriers to entry to foreign-educated graduates entering the market for legal services. By contrast, other countries allow shorter qualification periods. Some barriers to entry are required to maintain standards, but it is at least plausible that the LSO’s current barriers are excessive and are examples of the LSO’s artificially raising the price of legal services to the detriment of the public.

The Competition Bureau has made the point more explicitly, finding with respect to legal services that “entry requirements may have been set, in some instances, at a higher than necessary level”.

The Bureau also noted that “a conflict of interest arises from having the Law Society of Upper Canada regulate paralegals, given that they have an incentive to restrain the range of legal activities paralegals may offer.”

Anti-competitive effects can also be seen in the practice of hourly billing, which can reward inefficiency and incompetence, as well as encourage duplicity. As the Ontario Court of Appeal recently noted, “[t]here is something inherently troubling about a billing system that

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43 Ibid at 15.

44 Canada, Competition Bureau, Self-Regulated Professions: Balancing Competition and Regulation (Gatineau: Competition Bureau, 2007) at 65.

45 Ibid at 69-72, 74-75.
pits a lawyer’s financial interest against that of its client and that has built–in incentives for inefficiency. The billable hour model has both of these undesirable features.”\(^{46}\) The LSO has shown little interest in investigating suspect billing practices\(^{47}\) and one could argue that more transparency is warranted.\(^{48}\)

Even if these examples do not demonstrate a history of conflicts of interest, two further historical points highlight shortcomings in the LSO governance model. First, benchers may understandably be sensitive to their colleagues’ situations and make decisions that favour their friends or family, a bias termed “lawyer-centricity”.\(^{49}\) This outcome is not necessarily a result of lawyers’ self-interestedness but reflects the essential difficulty of understanding something complex, with which one has personal experience, from someone else’s point of view.\(^{50}\) Second, there is a distinction between legal “clients” – anyone who depends on legal services – and legal “consumers” – clients with sufficient economic freedom to choose between legal services and particularly lawyers.\(^{51}\) To the extent that they are involved as


\(^{50}\) Ibid.

\(^{51}\) To explain the difference in freedom of choice between “consumers” and other “clients”, Semple offers the example of a “consumer” of legal services who seeks a real estate lawyer to finalize a sale of a house, compared to a death-row prisoner with a *pro bono* lawyer, who is merely a “client”. Semple proposes that the regulatory model should shift towards proactive, “client-centric” regulation that addresses specific licensee needs and maximizes the client’s ability to choose among varied, innovative providers. See *Ibid* at 244-261.
lawyers in attracting the business of consumers, benchers may be more familiar with, and so more receptive to the interests of the latter.

iv) **Summary**

The LSO has evolved in an *ad hoc* manner largely as an imitation of historical models in other jurisdictions, which have since moved away from self-regulation. The question that arises is whether it is time to rethink that usefulness and the adequacy of self-regulation. Does this governance model adequately ensure that lawyers are competent and that the legal profession as a whole is organized for the public benefit? The pressure for greater accountability of and within the LSO is mounting. Indeed, Arthurs envisions regulation “being exercised by or under the supervision of an umbrella body whose mandate extends to all members of multi-professional or multi-disciplinary practices.”52 This is a proposal akin to the idea of co-regulation discussed below. The remainder of this article examines alternative models of governance. It also examines the possibility of enhancing LSO governance even in the absence of completely replacing self-regulation.

3. **Professional Regulation in Other Spheres**

In retaining a high degree of autonomy, the LSO is somewhat unique among other administrative bodies in Canada. This section outlines the regulation of comparable professional industries and examines how their co-regulatory frameworks contrast with the LSO’s self-regulatory model. It highlights the importance of considering other models of governance for the legal profession in Ontario.

i) Professional Regulation in Quebec

The Province of Quebec allows for professional autonomy in a number of fields, including the legal profession, subject to review by the Office des professions. In fact, Quebec’s *Code des professions* \(^\text{53}\) governs 46 professional orders including lawyers, optometrists, pharmacists, engineers, and others. \(^\text{54}\) Quebec’s National Assembly grants powers to the provincial Minister of Justice to oversee the Office des professions. In turn, the Office oversees these 46 professional “Ordres”. \(^\text{55}\) Each of the ordres creates a governing Administrative Council with its own Executive Committee. The executive committee oversees various offices dealing with unionised labour, discipline, professional standards, and other factors. These organizational entities are accountable to a General Assembly consisting of the professional members of the respective profession. \(^\text{56}\) In other words, within each Ordre, there is a sub-hierarchy where an executive committee oversees the various sub-offices dealing with specific concerns. All of these entities remain regulated by the Office des professions.

Given this framework, it is notable that the Office’s mandate is to provide tools for these professions to fulfill their public protection mandate as well as offer a public guarantee of competence and integrity. \(^\text{57}\) While the Office does coordinate regulatory affairs with these

\(^{53}\) art 94 *Professional Code* [QC Prof C].


professional chapters to develop public confidence, the Office maintains its own power to oversee the professions. The *Code des Professions* mandates that professional Ordres can be placed under guardianship in times of financial trouble and that any new regulation put forward by an Ordre must be scrutinised by the government and approved with or without amendments. Notably, the rules governing all regulated Ordres are “common to all professions.” In short, there is government oversight of each Ordre, including the legal profession.

The broad powers enumerated under the *Code des professions* create a system of co-regulation: while the profession is able to exercise considerable control over its own affairs, the provincial government exercises an oversight role. This model is less intrusive than the co-regulatory models used for the legal profession in the UK and Australian states, as the government body does not take direct control over professional discipline. Nevertheless it still shows a greater focus on protecting the public interest through state intervention than Ontarian self-regulation. As Bédard notes with regard to the public accounting profession “government regulations [such as the *Code des professions*] and public participation may restrain the role of private interest and encourage the role played by the public interest….”

The uniform applicability of the *Code des professions* over all Ordres extends the capacity

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58 Ibid.
59 art 14.5 QC Prof C.
60 art 95 QC Prof C.
63 Bédard, supra note 61 at 431.
and authority of government intervention where necessary to protect the public interest. It also creates consistency across regulated professions which presumably also has some benefit for the public. While the term “public interest” is difficult to define, it seems reasonable to expect that professionals will owe similar types of duties to the public that they serve.

ii) Capital Markets Regulation in Ontario

The Ontario Securities Commission’s (OSC) governance model is another comparator against which we can analyze LSO governance. At first glance, the OSC’s governance model is similar to the LSO. They are both multifunctional, arm’s-length organizations with a public interest mandate. While the LSO’s public interest mandate relates to ensuring that standards of learning and professional competence are met, the OSC has a broader public interest mandate subject to a detailed, legislatively-mandated governance structure.

The OSC is a self-funded Crown corporation that regulates the capital markets in Ontario. Its board of directors, comprised of between eight and 16 commissioners, is significantly smaller than the LSO’s, which has upwards of 45 elected benchers (including lawyer and paralegal benchers elected to Convocation). The OSC’s public interest mandate is contained in an explicit statutory provision, which states that the OSC shall seek to protect investors, foster fair and efficient capital markets, and contribute to the stability of the financial system. The OSC has a regulatory role in making policy as well as an adjudicative

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64 Bédard notes that in Quebec’s regulatory model, “general societal obligations are more formal than those characterizing professions in Anglo-Saxon countries.” Ibid at 400.

65 LSA, supra note 4, s 4.1.

66 Securities Act, RSO 1990, c S.5, s 1.1 [OSA].
function. It makes decisions in cases brought by staff and in some case by interested parties. It can make orders in the public interest even if there is no violation of a specific section of the securities act.\(^{67}\)

The OSC Chair is both Chair of the Board and Chief Executive Officer, as set out in the *Securities Act* (Ontario).\(^{68}\) One part-time member is elected by other part-time members to act as Lead Director, whose duties include overseeing the operations of the Board and its committees.\(^{69}\) The Chair, each vice-chair and each member are appointed for a fixed term by the Lieutenant Governor in Council and these appointments are made according to the procedures of the Public Appointments Secretariat of the Government of Ontario.\(^{70}\)

According to the OSC’s *Commission Charter of Governance: Roles and Responsibilities*, which is publicly available, each member must “devote as much time as necessary to perform their duties.”\(^{71}\)

Unlike the LSO, there are no elections for the positions of Chair, Vice-chair or commissioners of the OSC. The OSC’s *Statement of Governance Practices 2017* notes that the processes for filling vacant membership positions are as follows: “The Chair notifies the Minister of an upcoming vacancy on the Commission and recommends *qualified candidates*

\(^{67}\) Ibid, s 127. See also Anita Anand, “Carving the Public Interest Jurisdiction in Securities Regulation” (2007) 57:2 UTLJ 293.

\(^{68}\) OSA, supra note 66, s 3(7).

\(^{69}\) Ibid.

\(^{70}\) The OSC is an arm’s length, self-funded Crown Corporation comprised of commissioners who constitute a 16-member board of directors. See also Ontario, Public Appointments Secretariat, “Public Appointments”, online: <https://www.ontario.ca/page/public-appointments>.

for the position. Candidates are selected by the Chair following an extensive recruitment process conducted by the Governance and Nominating Committee of the Board." 72

Furthermore, the mandate of the OSC’s Governance and Nominating Committee emphasises that recommendations to the Lieutenant Governor about possible candidates to the Board should have “skills, attributes, qualifications and experience … appropriate for the effective oversight of the Commission and the discharge of their duties relating to policy and adjudicative matters.” 73 These criteria inform the Commission’s composition and ensure that there are competent individuals with appropriate expertise who will steer the direction of the province’s securities regulator.

The OSC, like Quebec's Office des professions, is an example of what can be called “co-regulation” given the joint responsibilities of the government and the profession itself. But OSC model differs, as it has authority over other regulatory organizations. Under Part VIII of the Securities Act, the Commission can choose to recognise self-regulatory organizations and stock exchanges. 74 For example, the Investment Industry Regulatory Organization of Canada (IIROC) is Canada’s national self-regulatory organization which oversees all investment dealers and trading activity in the debt and equity marketplaces and sets investment industry standards. 75 IIROC carries out its regulatory responsibilities through


74 OSA, supra note 66, s 21.

75 Investment Industry Regulatory Organization of Canada, “Our Role & Mandate”, online: <www.iiroc.ca/about/ourroleandmandate/Pages/default.aspx>.
setting and enforcing rules regarding trading activity on Canadian equity marketplaces.\textsuperscript{76} The Toronto Stock Exchange (TSX) is also a self-regulating entity recognised by the OSC. The TSX is Canada’s largest stock exchange by market capitalization.\textsuperscript{77} It offers listing, trading, and information services in addition to providing market liquidity for Ontario’s capital markets, with a mandate to maintain market integrity.\textsuperscript{78} The TSX coordinates its regulatory initiatives with IIROC across the various TSX exchanges, including the TSX, TSX Venture, and TSX Alpha.\textsuperscript{79} These individual exchanges govern certain sectors of the market and are subject to ultimate OSC oversight.

In other words, there are multiple coordinated regulators serving the public interest in the capital markets. Dividing regulatory functions in this way broadens the protective framework for the public while ensuring joint oversight over important functions. The OSC maintains oversight over the self-regulatory organization but is itself accountable to the Province of Ontario, which can amend the OSC’s governing statute at any time and refuse legislation that the OSC has proposed and seeks to implement.\textsuperscript{80}

The OSC’s governance model has not been free from criticism. Over the years, a debate has arisen regarding whether there could be a conflict of interest between the OSC’s adjudicative tribunal and its policy-making function. These two aspects of the OSC can give rise to a

\textsuperscript{76} Investment Industry Regulatory Organization of Canada, “IIROC History & FAQ”, online: <www.iiroc.ca/about/Pages/IIROC-History-FAQ.aspx#1>.


\textsuperscript{80} \textit{OSA}, supra note 66, s 143(1)–(4).
perception of bias.\textsuperscript{81} This same criticism can be made against the LSO, which also has both policy-making and adjudicative functions. But the problem seems more severe in the LSO for a number of reasons. First, benchers are neither “independent” nor experts in the way that OSC Commissioners are. Second, the OSC Chair does not sit on adjudicative hearings and commissioners who participate in an investigation cannot adjudicate the matter, while the LSO has no such rules. Third, the OSC’s charter requires its Commissioners to be knowledgeable about the capital markets,\textsuperscript{82} the LSO simply operates on the assumption that benchers will understand how to regulate lawyers and serve the public interest. Anyone is eligible for election as a bencher as long as they are not suspended at the time of election.\textsuperscript{83}

iii) \textit{Medical Regulation in Ontario}

As in the securities field, Ontario’s regulatory approach to the medical profession leaves room for professional self-government while placing ultimate power in a provincially-appointed regulator. The largest self-regulatory body of Ontario’s medical profession is the College of Physicians and Surgeons of Ontario (CPSO).\textsuperscript{84} It derives its power from the \textit{Medicine Act}\textsuperscript{85} and the \textit{Regulated Health Professions Act (RHPA)}.\textsuperscript{86} These statutes


\textsuperscript{82} See OSC, \textit{Charter of Governance}, supra note 71; or OSC, “Governance Practices”, supra note 73.

\textsuperscript{83} See LSO, \textit{Bylaw 3}, supra note 31, s 12.

\textsuperscript{84} The CPSO is the largest medical regulatory body in Ontario. It is the regulator of physicians and surgeons; however, other medical regulatory colleges exist which allow for self-governance over 25 other medical professions.


\textsuperscript{86} \textit{Regulated Health Professions Act}, 1991, SO 1991, c 18 [RHPA], which also includes the \textit{Health Professions Procedural Code}, Sched 2 of the RHPA. Schedule 1 of the RHPA enumerates a total of 26 self-regulating
empower the Minister of Health and Long-Term Care to regulate and coordinate health professions according to the public interest.\textsuperscript{87} The Minister also has powers to investigate the medical profession, to compel CPSO councils to make, amend, or revoke regulations, and to appoint a College supervisor.\textsuperscript{88} The \textit{RHPA} also enables the Minister to advise the Lieutenant Governor to form an Advisory Council which is composed of “at least five and no more than seven persons”\textsuperscript{89} who advise the Minister on matters like the regulation of non-regulated health professions, the quality assurance programs of medical colleges, and “any matter the Minister considers desirable to refer to the Advisory Council relating to the regulation of the health professions.”\textsuperscript{90}

The Minister also has the power to create the Health Professions Appeal and Review Board to “conduct the hearings and reviews and to perform the duties that are assigned to it under the [\textit{RHPA}].”\textsuperscript{91} This Board is composed of “at least 12 members who shall be appointed by the Lieutenant Governor in Council on the recommendation of the Minister of Health and Long-Term Care.”\textsuperscript{92} The Health Professions Review and Appeal Board and the Advisory Council were both established to oversee the work of the professional colleges.\textsuperscript{93} These far-reaching provisions give the Minister ultimate oversight power over the medical profession.

\textsuperscript{87} \textit{RHPA}, supra note 86, s 3.
\textsuperscript{88} \textit{Ibid}, ss 5, 5.1.
\textsuperscript{89} \textit{Ibid}, s 7(2).
\textsuperscript{90} \textit{Ibid}, ss 11(2)(a)-(f).
\textsuperscript{91} \textit{Ministry of Health and Long-Term Care Appeal and Review Boards Act, 1998}, SO 1998, c 18, Sched H, s 2 [\textit{Appeal and Review Boards Act}].
\textsuperscript{92} \textit{Ibid}, s 3(1).
\textsuperscript{93} See \textit{Ibid} (forming the Health Professions Appeal and Review Board); \textit{RHPA}, supra note 86, s 7 (forming the Health Professions Regulatory Advisory Council).
Even though the Minister’s powers are broad, there is still room for the CPSO to exercise some self-governance over its affairs. Notably, the CPSO clearly defines its mandate as follows,

The role of the College of Physicians and Surgeons of Ontario is to regulate the practice of medicine to protect and serve the public interest… This system of medical regulation is based on the premise that the College must act first and foremost in the interest of the public.94

The CPSO performs its regulatory role by issuing licenses for the medical practice in Ontario and undertaking investigatory and disciplinary actions.95 In 2006, the CPSO further clarified how it will operate in dealing with possible physician conflicts of interest pursuant to the Medicine Act.96 This type of co-regulation and has no counterpart in the legal profession.97

As with the CPSO, the LSO’s main purpose is to serve the public interest. Both bodies seek to serve this purpose in part by ensuring that members of each profession meet certain standards of conduct, learning, and competence.98 The CPSO’s self-regulatory function is subject to the statutory oversight powers of the Minister of Health and Long-Term Care, while the LSO’s is subject to the Attorney General for Ontario as Guardian of the public interest.99 What does “oversight” mean in the case of the LSO? Given the broad-based

94 The College of Physicians and Surgeons of Ontario, “About the College”, online: <http://www.cpso.on.ca/About-Us> [CPSO, “About the College”].
95 Ibid.
97 Though, legal market scholars have highlighted the value of learning from the regulation of medical providers as a way of improving legal regulation. See Trebilcock, “Regulating the Market”, supra note 47; Michael J. Trebilcock, “Regulating Legal Competence” (2001) 34:3 Canadian Business L J 444.
99 LSA, supra note 4, s 13(1) simply states
wording of the statute, is it possible to self-regulate in a way that serves their own self-interest rather than the interest of the public?

iv) Summary

Various alternative models balance the independence of self-regulation with democratically accountable oversight to safeguard the public interest. Rather than amend the LSO’s mandate to strengthen protection of the public, the trend has been to extend the LSO’s self-regulatory powers. Paton points to two examples. \(^{100}\) First, in 1998, the Law Society was granted responsibility for regulating multidisciplinary practices that involved legal services, sparking the controversy discussed above. Second, in 2006, the Access to Justice Act (Ontario) expanded the LSO’s self-regulatory authority by giving it the responsibility to regulate paralegals. \(^{101}\) Legislators paid scant attention to the LSO’s role of serving the public interest in developing these amendments, heightening concerns relating to transparency and accountability.

This section has highlighted possibilities for reform of the self-regulatory model on which the LSO is based. In particular, it is possible to have a certain level of oversight of a profession, as in Quebec with the Ordres model. It is also possible to expect expertise on a regulator’s board of directors, as is the case of OSC commissioners. The comparators

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"The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society."

No further provisions indicate how or when this oversight will be exercised or what it in practice entails.


suggest that there is room for improvement in LSO governance, which is the focus of the following section.

4. Reform

In light of the discussion above, and in particular the comparison between the LSO and the OSC, this section considers reforms to the regulation of the legal profession in Ontario.

i) Implement Co-Regulation

The analysis above suggests that a co-regulatory model would enhance the accountability of the LSO. Following the lead of England, Australia, and other administrative bodies in Canada such as the Ontario Securities Commission, the Province of Ontario would benefit from a co-regulatory system with greater oversight of the LSO. To be clear, this reform would interpose a layer of supervision so that the LSO would be overseen by government to a greater extent.\(^{102}\) Without some sort of co-regulatory system with built-in governance mechanisms, one may reasonably conclude that the LSO’s level of accountability is weak. While the LSO is supposedly accountable “to the public”, there is currently no way for the public, or someone who represents the public, to supervise and monitor its activities.

It has become apparent in other countries that self-governance of the legal profession may not effectively serve the public and can spur distrust. As with the regulation of the capital

\(^{102}\) Scholars have suggested even going so far as implementing a national licensing authority for lawyers to ensure oversight removed from the real and potential conflicts which may exist under self-regulatory models. See Gillian Hadfield & Deborah Rhode, “How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering”, (2016) 67:5 Hastings LJ 1191.
markets, the legal profession requires high levels of public confidence to function effectively. The more confidence the public has in the market for legal services, the more vibrant that market will be. Co-regulation is an important reform for the LSO to consider.

ii) **Reform the Bencher System**

Even without a co-regulatory framework, other reforms are nonetheless warranted. The current system of benchers, including the election of multiple benchers, is unwieldy. It makes little sense to elect benchers from various geographical areas in the province who may not know anything about the LSO, its rules, or its purpose in society. Furthermore, these individuals may know nothing about acting as directors of a board or other organization. Like OSC commissioners, benchers should be chosen on the basis of their expertise in leading an organization and acting in the public interest. This subject area of expertise for benchers should be contained in the *Law Society Act* and its objective of serving the general public.\(^\text{103}\)

In short, benchers should be required to meet minimum expertise requirements. Benchers should be well-versed about what it means, and historically has meant, to act in the public interest. At least a specific proportion of benchers should be knowledgeable about financial statements and accounting practices. They should be aware of the importance of adhering to statutory duties of good faith. At present, there is no system in place to ensure that any given bencher possesses any of this knowledge. This lack of basic qualification criteria for

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\(^{103}\) Arthurs notes that social and economic interactions between lawyers and other professions have diversified and redefined an historically exclusive legal knowledge base. This effect challenges the law society’s monopolistic position to self-regulate. These pressures form a “challenge to [law societies’] very existence”: Arthurs, “Bicentenary”, *supra* note 47 at 27.
benchers falls below the standard of governance that the public deserves, especially as improvements in governance in other regulatory spheres have continued to develop at rapid paces.

iii) **Introduce a two-fold duty for Benchers**

Under the current location-based system for Bencher qualification, benchers drawn from various parts of the province do indeed provide different points of focus on the LSO’s board. But the focus on geography likely does not serve the public interest overall: why is geography the determining qualifying factor for one’s candidacy and selection to be a bencher?  

Alternatively, benchers may make decisions that are in the best interests of their own area of practice without considering the interests of the public as a whole. They may, at times, be conflicted in the execution of their duties as benchers. In order to deter this behavior, benchers should have an explicit duty of loyalty together with a duty to take reasonable care in the exercise of their role as benchers under the *Law Society Act*.

One could argue that the *Law Society Act* incorporates by reference the fiduciary duty of directors under the *Corporations Act*, a statute that pertains to not-for-profit corporations. Further, the *Law Society Act* implicitly suggests that benchers owe a duty to the profession by referring to the ability to defend against liability and even offers indemnification to benchers.  

But the incorporation by reference of a fundamental duty under which the LSO supposedly functions seems indirect if not opaque. The absence of an explicit duty of loyalty

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105 *LSA*, *supra* note 4, ss 9, 57.2(2). On indemnification, see LSO, Bylaw 3, *supra* note 31.
in the *Law Society Act* is curious. Shouldn’t the duties of benchers be laid out more clearly? A duty of loyalty and a duty of care set out in the *Law Society Act* would provide a baseline, foundational duty that is explicitly articulated and confirms the regulatory mandate of the LSO’s governance model. It would make clear that benchers (not simply the generic term “directors” in the *Corporations Act*) are required to act honestly and in good faith and with the care, diligence and skill of a reasonably prudent person. This explicit statement would serve to deter benchers from making decisions that conflict with the public interest and would specify the type of duty that some may argue is already owed.

At the very least, a specific statutory duty would deter against self-interested conduct, as well as address concerns about the perceived possibility of such conduct. By way of comparison, corporate directors’ basic statutory duty includes a duty of loyalty combined with a statutory duty of care:

> Every director and officer of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.  

In the recent *BCE* decision, the Supreme Court of Canada upheld this statutory provision and explained that “the directors owe their duty to the corporation, not to stakeholders…”

The duty of benchers should resemble directors' obligations with the duty being owed to the general public, as will be discussed in the final section of this article.

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106 *Canadian Business Corporations Act*, supra note Error! Bookmark not defined., ss 122(1)(a), 122(1)(b).
107 *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 66 [*BCE*].
As a matter of practice, the LSO’s benchers may well pursue the (nebulous) “public interest” on a daily basis in their decision-making. But because of the potential for conflict of interest inherent in self-regulation, it is necessary for benchers to be statutorily required to adhere to explicit duties. Furthermore, a two-fold statutory duty brings regulatory requirements in line with public expectations and would inspire greater confidence in the market for legal services. The duty should be clear for all to see, not just for benchers alone but the public at large. It would serve as an explicit basis for the trust which the public places in the legal profession. It would contribute to the integrity of the market for legal services.

iv) **Reduce the Number of Benchers**

The average board size in large Canadian public corporations is eleven board members. By contrast, the LSO has upwards of 45 elected benchers. This large number of elected benchers hampers decision-making. In contrast to a public company board, which is conceived to be the “directing mind” of the corporation, it is seemingly impossible for a board of 45 to reach consensus and make decisions efficiently. While there are limitations on direct analogies between corporate directors and law society benchers, it stands to reason that the larger the board, the more difficult it is to reach consensus and have an efficient but meaningful decision-making process.

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108 The *CBCA* has minimum requirements where public companies must have no fewer than three directors, two of whom must be independent directors: *CBCA, supra* note 7, s 102(2). See Institute for Corporate Directors, “Directors’ Responsibilities in Canada”, online: <https://www.icd.ca/getmedia/581897ca-d69d-4d4f-a2a2-ca6b06ef223b/5467_Osler_Directors_Responsibilities_Canada-FINAL.pdf.aspx>. The LSO has conducted an investigation into the board sizes of 33 comparable regulators, finding that the median board has 21 members: Law Society of Ontario, Governance Task Force 2016, “Report to Convocation” (29 June 2017) at 9, online: <https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-June2017-Governance-Task-Force-Report.pdf>.

A counter-argument is that a larger elected body can be more representative of the divergent interests within the profession, of the different clienteles it serves, and of the different (often conflicting) public interests implicated in its governance functions (e.g. law firms acting for corporations may have differing views on up-the-ladder reporting than those who represent whistleblowers). However, simply having a larger board does not ensure that diversity concerns are met. The nominating process can be an ideal place to ensure that diversity concerns (however such concerns may be identified and defined) are met.

Public companies have recently come under regulatory censure for not having sufficient numbers of women on their boards. Securities commissions across the country have implemented a regulatory scheme to increase the number of women on boards. Under this approach, public corporations must disclose whether they have implemented a written policy relating to the nomination of women directors, and whether they have targets for getting more women on their boards. If the corporation does not consider the representation of women on the board in its nominating process, or has not adopted a target, it must disclose its reasons for not doing so. This regulation in turn impacts the nominations process, as companies consider new nominees for their boards. Of course, not all public companies in

} Despite these examples, a regulatory scheme which encourages a robust nominations process could well benefit the public interest more effectively than the current system.

v) \textit{Choosing Benchers}

How should benchers be chosen? Currently, non-lay benchers are chosen by an electoral process in which every qualified lawyer and/or paralegal can vote. The LSO notes that the election process is meant to help it “govern the legal profession in the public interest. Benchers sit as members of Convocation to fulfill that mandate.”\footnote{Law Society of Ontario, “Bencher Election 2015”, online: <www.lsuc.on.ca/bencher-election-2015>.
} According to the body’s letter to prospective bencher candidates, the aim of the election is to:

\begin{quote}
Deal with matters related to the governance of the Law Society and the regulation of Ontario’s lawyers and paralegals. Benchers dedicate an average of 31 days a year to Law Society business. This includes sitting on hearings as an appointee to the Law Society Tribunal, attending monthly committee and Convocation meetings and attending calls to the Bar. Benchers are remunerated for some of their services and are reimbursed for expenses.\footnote{Law Society of Ontario, “Candidate Letter”, online: <https://www.lsuc.on.ca/uploadedFiles/bencher-election-2015-candidate-letter.pdf>.
} 
\end{quote}
In the most recent elections for LSO benchers, 95 lawyer candidates ran for election to sit as one of 40 lawyer benchers. According to the LSO, a total of 16,040 ballots were cast for lawyer benchers, representing about 34 percent of the profession.115 Similarly, 25 paralegal candidates sought election to sit as one of 5 paralegal benchers; in total 1,200 ballots were cast for paralegal benchers in the 2014 paralegal bencher election, representing 20 percent of the paralegal profession.116 While elected benchers are perhaps qualified individuals by virtue of their respective experiences in legal practice or otherwise, the lack of a formal expertise requirement for serving as a bencher is conspicuous. Is the public interest being served with no duty of loyalty to act in the public interest and a large pool of elected benchers (who may or may not serve the public interest)? Is this low voter turnout further indication of a process that needs fixing?

The system of choosing benchers should be reformed. For non-lay benchers, while elections based on geographical location may serve to represent lawyers from around the province in the LSO, the system is outmoded because it does not account for other important characteristics, such as expertise. The LSO should consider reform of its broad-based electoral process. Public and private corporations have complex governance structures based on statutory fiduciary principles required of board members. In addition, public corporations also have specific rules and guidelines that govern board nominations and board composition.117

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The OSC again serves as a useful comparator. While the mandate of the OSC is to regulate the capital markets through the province, the commissioners are not chosen on the basis of geography or some other general criterion (such as being “lay”). Rather, they are chosen because of their expertise. The OSC and the system in place in corporations are not perfect but there is at least a vetting process that requires some minimal degree of expertise before one is appointed to the board. Benchers should be elected based on a similar expectation.

vi) **Benchers Remuneration**

Historically, benchers were not compensated for their work. In 2005, the LSO introduced remuneration in response to concerns that money from external organizations might be creating conflicts of interest for volunteer benchers.\(^ {118} \) Currently, benchers are remunerated on a per diem basis for their service to the LSO. They are also compensated for “reasonable expenses” incurred in the performance of their duties on behalf of the Society.\(^ {119} \) As of the LSO’s 2018 Budget, the per diem rates remain at $585 per day and $355 per half day, unchanged for two years in a row.\(^ {120} \)


\(^{119}\) LSO, Bylaw 3, supra note 31, ss 49-53.

This system and amount of compensation provides an insufficient incentive to encourage lawyers to act in the best interests of the public. Under this current rate, benchers may be less inclined to attend meetings when there is a conflict between their existing clients’ needs and the LSO Convocation schedule. Furthermore, impecunious lawyers may be disincentivized to run for election to become a bencher due to the lack of steady remuneration from the Bencher role if they do become elected. Heightening bencher compensation could effectively incentivize benchers to serve the interests of the LSO from an economic perspective. A higher stipend would likely diversify the pool of candidates who want to be benchers give benchers greater financial incentive to dedicate their time and energy to LSO works and create a more effective accountability mechanism.

Benchers could be paid per annum stipends or salaries that could be, but need not be, aligned with private sector director compensation. Remuneration reform could be enhanced with target-based incentive structures which reward benchers with additional compensation if they achieve certain LSO targets within a deadline. This does not suggest that this private sector compensation structure is flawless; indeed, concerns regarding executive compensation and “say on pay” should not be ignored. However, paying directors for the work they do often on top of other full-time employment has been an effective incentive structure for private sector directors and should be considered for LSO governance reform.

121 See Lucien Bebchuk, Pay without Performance: The Unfulfilled Promise of Executive Compensation (Harvard University Press, 2004).
5. Conclusion

How should we design the governance of the law profession so that the public interest is afforded clear and uncompromised priority? We must first acknowledge the weaknesses of self-regulation. In proposing a co-regulatory model and offering justifications for it, this article is a first step in that direction. Quite apart from implementing co-regulation broadly speaking, this article makes several proposals for narrower reforms that would improve the efficacy of the LSO governance structure. First, a two-fold statutory duty of loyalty and duty to take reasonable care should govern LSO benchers in the execution of their duties qua benchers. Second, benchers should be required to meet minimum levels of expertise. Third, the number of benchers should be reduced. Fourth, the process of choosing benchers should be reformed. Fifth, benchers should receive greater compensation than they presently do. This reform agenda may not be a panacea for the issues faced by the LSO, but it may offer more accountability and perhaps protection to the public, interposing a layer of accountability between the law society and the general public. It would enhance the governance of the LSO, inspire public confidence in its decision-making and contribute to the integrity of the market for legal services.

122 Paton, “In the Public Interest”, supra note 18 at 210.
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