

## Book Review

### IN THE PUBLIC INTEREST: THE REPORT AND RESEARCH PAPERS OF THE LAW SOCIETY OF UPPER CANADA'S TASK FORCE ON THE RULE OF LAW AND THE INDEPENDENCE OF THE BAR, by the Law Society of Upper Canada<sup>1</sup>

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*IN THE PUBLIC INTEREST* aims to show the important bonds between the rule of law, an independent legal profession, and public protection.<sup>3</sup> Weaving together the historical, constitutional, and practical dimensions of the independence of the bar is particularly timely in the current context.

In 2007, the Supreme Court of Canada unanimously struck down the security certificate provisions of the *Immigration and Refugee Protection Act (IRPA)* in *Charkaoui v. Canada (Charkaoui)*.<sup>4</sup> The Court said that the principle of knowing the case one has to meet had been “gutted” in a context which was “chilling” to detainees.<sup>5</sup> Amendments to the legislation and provisions for special advocates prepared in the wake of the Court’s ruling were introduced in October of 2007.<sup>6</sup> As auspicious as the *Charkaoui* case is in the timing of this book, developments abroad have also underlined the critical importance of the independence of lawyers to the rule of law. Judges and lawyers became targets for political control in Pakistan; the detention of Supreme Court judges and the

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1. (Toronto: Irwin Law, 2007) 236 pages [*In the Public Interest*].
  2. Visiting Professor of Public Interest Law, Osgoode Hall Law School, York University.
  3. The Law Society of Upper Canada, “Protecting the Public through an Independent Bar: The Task Force Report” [LSUC, “Protecting the Public”] in *In the Public Interest*, *supra* note 1, 3 at 3.
  4. S.C. 2001, c. 27 [*IRPA*]; [2007] 1 S.C.R. 350 [*Charkaoui*].
  5. *Charkaoui*, *ibid.* at paras. 25, 64.
  6. Bill C-3, *An Act to Amend the Immigration and Refugee Protection Act*, 2d Sess., 39th Parl., 2007.

arrest of thousands of lawyers drew international attention, including a Canadian gathering in support of the rule of law in Toronto in November, 2007.<sup>7</sup> These events are recent manifestations of the fragility of the rule of law since 11 September 2001 (9/11), as many nations struggle with the law and politics of security. States of emergency to the south, detention in extraterritorial prisons, and notions of “deportation to torture” have become ominous aspects of the early twenty-first century. For the Canadian bar and the people of Canada, the primary message of *In the Public Interest* is that where the independence of the bar and the rule of law are concerned, “complacency should not be an option.”<sup>8</sup>

*In the Public Interest* is the product of collaboration between benchers, judges, senior counsel, and legal academics. Although the primary audience for the report and research is the bench, bar, policymakers, and academics, the work is well placed as a reference for the dissemination of its core ideas to the broader public; it does this by simultaneously challenging and informing the reader. *In the Public Interest* includes a range of scholarly papers, which demonstrate that the independence of the bar is a pivotal concept embedded within the rule of law and the independence of the judiciary. Yet, the authors do not submit that the independence of the bar is an absolute concept, or that it poses a barrier to the achievement of policy goals with implications for the independence of the bar.

*In the Public Interest* begins with the Task Force Report (the Report) in chapter 2, followed by six supporting papers. The papers are divided into sections which consider four elements of an independent bar: the constitutional status of the principle; historical and comparative perspectives; the public’s interest in an independent bar; and, applications of the principle. In its Report, the Task Force gives primacy to the issue of constitutionality. The Report calls for recognition of the “independence of the Bar as a separate underlying principle of the Canadian constitution.”<sup>9</sup> It is a logical starting point before considering the remaining six papers in the collection.

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7. University of Toronto, Judicial Independence Conference, “Looking Back, Looking Forward: Judicial Independence in Canada” (November 2007, Toronto), online: <[http://www.law-lib.utoronto.ca/conferences/judicial\\_independence/index.htm](http://www.law-lib.utoronto.ca/conferences/judicial_independence/index.htm)>. See Adam M. Dodek & Lorne Sossin, *The Future of Judicial Independence* (Toronto: University of Toronto Press, forthcoming).
  8. LSUC, “Protecting the Public,” *supra* note 3 at 38.
  9. *Ibid.* at 13.

Dean Patrick Monahan of Osgoode Hall Law School makes the case for constitutional protection of the principle of independence of the bar. Monahan distinguishes the concept of “independence,” in the sense of being able to advocate without fear on behalf of one’s clients, from the autonomy to be found in a self-governing profession. The current scheme of regulation of the profession by statute—which is subject to amendment by the executive—and other aspects of control is consistent with the core value of independence. However, the concept of an independent legal profession flows from the fact that it is necessarily linked to the related constitutional principles of an independent judiciary and the rule of law. Monahan finds judicial support for an “expansive” application of a constitutional right to effective assistance of independent legal counsel, for example, from the Supreme Court of Canada in *Lavallee, Rackel & Heintz*: “An independent and competent Bar has long been an essential part of our legal system.”<sup>10</sup>

Other decisions since the publication of *In the Public Interest* support these pronouncements. For example, in *Christie*, the Supreme Court of Canada spoke about the importance of the legal profession in considering a claim for a general right to state-funded counsel in all trial and tribunal settings.<sup>11</sup> Similarly, in *Charkaoui*, the Court affirmed the foundational nature of the “unwritten constitutional principle of judicial independence.”<sup>12</sup> Whether an independent bar is a subset of the rule of law, is implied by the constitutional protections accorded to an independent judiciary, or can be regarded as an independent right, Monahan is correct to urge “very careful scrutiny” of attempts to undermine the essential features of the lawyer-client relationship.<sup>13</sup> Although careful to acknowledge the limits on the profession’s ability to self-regulate, Monahan sets a necessary and clear boundary around “direct control by executive government.”<sup>14</sup>

Professor Philip Girard’s historical overview of the independence of the bar in England and Canada takes on the “comforting myth” that Canada

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10. *Ibid.* at 130; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, *White, Ottenheimer & Baker v. Canada (Attorney General)*, *R. v. Fink* [2002] 3 S.C.R. 209 at para. 68.

11. *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873 [*Christie*] at para. 22.

12. *Charkaoui*, *supra* note 4 at paras. 47, 65.

13. *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 57 O.R. (3d) 383 at para. 51; Patrick Monahan, “The Independence of the Bar as a Constitutional Principle in Canada” in *In the Public Interest*, *supra* note 1, 133 at 133.

14. *Ibid.* at 149.

simply inherited an English legacy of independence of the bar. Even the notion of an assertive and independent bar in England is something of a myth. For example, Girard reveals that in eighteenth century England, accused felons had no right to appear by counsel. Their trials were often conducted as private prosecutions, and with both sides bereft of legal training, they amounted to a “clash of amateurs.”<sup>15</sup> The birth of the English adversarial system was more a result of pragmatism than of public outcry or a “crusading bar.”<sup>16</sup> Autonomy within the English legal profession was secured professionally, but there were social and political barriers to asserting independence even within an autonomous framework. From this “rather mixed heritage,” the British North American colonies went on to develop a unique form of self-regulation, beginning with the statutory creation of the Law Society of Upper Canada in 1797.<sup>17</sup> Similar statutory grants of authority eventually took hold across Canada, and are styled by Girard as a “lynch-pin” of independence. Yet, even with Canada’s history of self-regulation by the bar, the evidence of career paths “smoothed” by “conspicuous loyal[ty] to the state”<sup>18</sup> and the rise of law firms in the service of powerful economic actors and business elites in the late nineteenth and early twentieth century lead Girard to conclude that present day notions of independence are evolutionary in nature, rather than steeped in consistent tradition.

Girard suggests that up until the 1950s, the bar’s zealous defence of the economic, political, and social status quo led to a lack of access for other segments of the population. These problems brought civil liberty and access to justice issues to the forefront in the latter half of the twentieth century. Girard’s endpoint leads directly into the development of an independent bar from 1950 to the present. How has the independence of the profession been affected, if at all, by diverse events such as the civil rights movement in the United States, the increasing diversity of the legal profession, the patriation of the Canadian constitution, the development of legal aid, and the exporting of notions of the rule of law to other developing democracies, not to mention the impact of technology and globalization in the late twentieth century?

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15. Philip Girard, “The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities” in *In the Public Interest*, *supra* note 1, 45 at 56.

16. *Ibid.* at 58.

17. *Ibid.* at 65.

18. *Ibid.*

Professor Wes Pue provides a comparative analysis of the independence of the bar in both developing and developed democracies. While accepting the independence of the bar as a “foundational constitutional principle,” Pue explains how it can be compromised by hope of preferment, market advantage, firm culture, and the “organized legal profession.”<sup>19</sup> More troubling is a chilling list of abuses practised against lawyers and associations of lawyers in many countries directly affecting the “health of democracies.”<sup>20</sup> Otherwise, Pue sounds a note of caution about regulatory change in England and Australia. These jurisdictions have adopted greater state regulation (“co-regulation”) over the legal profession. Pue observes that in every country, there is evidence of pressure from “political actors to seek to undermine [the] independence of [the] judiciary and lawyer[s].”<sup>21</sup> Pue is concerned that even apparently “polite” forays into the regulation of the bar may be problematic. Recent amendments to Ontario’s *Law Society Act* to include regulation of paralegals by the Society<sup>22</sup> suggest a different trend, in keeping with the Canadian tradition of autonomy and self-regulation. The public nature of the Canadian profession’s discipline processes, and resources provided for investigation and prosecution, tell a different story from Pue’s example from Queensland, Australia. The Report itself recognizes, however, that the underlying issue—that of public confidence in the autonomy of the bar—can lead to erosion of its independence, which is in turn vital for public protection, using this point as a link to the related question of public perception.

Professors Michael Code and Kent Roach presciently note the significant flaw in the *IRPA* security certificate legislation model.<sup>23</sup> Code and Roach term the procedure for the reasonableness hearing under the *IRPA* a “dramatic alteration of the traditional role of solicitor and client.”<sup>24</sup> Nor does the Supreme Court of Canada’s ruling in *Charkaoui* end the potential for similar, if less

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19. W. Wesley Pue, “Death Squads and ‘Directions over Lunch’: A Comparative Review of the Independence of the Bar” in *In the Public Interest*, *supra* note 1, 83 at 83-85.

20. *Ibid.* at 102.

21. *Ibid.* at 98.

22. R.S.O. 1990, c. L.8, ss. 1, 62, and By-law No. 4.

23. *Charkaoui*, *supra* note 4.

24. Michael Code & Kent Roach, “The Independence of the Bar and the Public Interest: The Scope of Privilege and Confidentiality in the Context of National Security” in *In the Public Interest*, *supra* note 1, 151 at 158.

dramatic, alterations in the solicitor-client relationship in matters of national security. The analogy is aptly drawn by Code and Roach to the development of exceptions to solicitor-client privilege, in spite of its acknowledged critical importance as both a substantive and procedural right.<sup>25</sup> From there, the authors consider alternatives, including the special advocate procedure based upon the British model, or, by way of analogy to criminal proceedings, counsel's undertaking of confidentiality under section 38.01 of the *Canada Evidence Act*.<sup>26</sup> The authors recommend consideration of these two alternatives, yet they do not shy away from identifying some of the difficulties with these routes, including the timing of security clearances for counsel, restrictions on the ability of special advocates to consult with the affected person, and the lack of a solicitor-client privilege to protect the relationship between the special advocate and the affected person. Given the introduction of Bill C-3 in the fall of 2007, the analysis of the shortcomings of the UK model have clearly increased the relevance of the authors' analysis. As the Report acknowledges, any solution that achieves public policy ends will meet the needs of security concerns and effective representation to ensure both a fair process and a fair outcome.<sup>27</sup> The implication of the discussion, indicated by Code and Roach and tacitly accepted by the Report, is that independence is not a "trump card," but a factor within a continuum of competing interests.

Professor Paul Paton provides a comparison of the "new imperatives," which led to the introduction of Bill C-22 (*The Proceeds of Crime (Money Laundering) Act*), and the American Bar Association amendments to the *Model Code of Professional Responsibility*<sup>28</sup> in the wake of the *Sarbanes-Oxley Act* of 2002.<sup>29</sup> In 2007, additional regulations and consultation with the Federation of Law Societies were ongoing in an effort to address the public policy concerns that led to the first round of legislation and litigation in the money laundering

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25. *Ibid.* at 151-56.

26. R.S.C. 1985, c. C-5, s. 38.01.

27. LSUC, *supra* note 3 at 30.

28. "ABA Model Code of Professional Responsibility," online: American Bar Association <<http://www.abanet.org/cpr/mrpc/mcpr.pdf>>.

29. Paul D. Paton, "The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers, or Instruments of State Enforcement?" in *In the Public Interest*, *supra* note 1, 175; *Proceeds of Crime (Money Laundering Act) and Terrorist Financing Act*, S.C. 2000, c. 17; and *Sarbanes-Oxley Act*, Pub. L. No. 107-204, 116 Stat. 745.

context. Paton highlights the risk of the profession failing to act proactively in addressing the underlying concerns of regulation, especially where some of the concerns are linked to Canada's international obligations to address the financing of terrorist organizations. Paton urges, and the Report highlights, that aspects of the independence of the bar, such as privilege and confidentiality, ought not to trump other policies, but should be seen, instead, as part of a mosaic of public protection to be considered along with all other measures.

Angela Fernandez considers the value of surveys which report negative public views about the legal profession (paradoxically, even from those who are satisfied with their own lawyer) and the impact of depictions of lawyers in popular culture on public attitudes.<sup>30</sup> Her discussion of public perceptions of the legal profession, which advises some skepticism in the acceptance of polling results, nevertheless reveals global negative perceptions of the legal profession, with lawyers in Canada receiving a "trustworthiness" ranking of only sixteenth out of twenty-two professions in a 2006 survey.<sup>31</sup> Although acknowledging Fernandez' point that public confidence in the legal profession may be positively influenced by pro bono efforts, such as that provided in the United States for families of the victims of 9/11,<sup>32</sup> the Report wisely concludes that "[w]hile it is important to pay attention to media and cultural representations of lawyers, good publicity cannot be a sustainable foundation for an independent Bar."<sup>33</sup>

The notion of creating a sustainable foundation for independence leads to other questions of engagement with the public around these values. The right question for the bar may not be to ask what the public thinks of the profession, but instead to ask more about the public's understanding of the legal services provided by the profession. For example, Ipsos-Reid polls commissioned by the Legal Services Society of British Columbia in 2005 and 2006 found a significant lack of knowledge about the availability of legal aid to low-income British Columbians, yet a high level of support by the public for the right of access to the justice system and to legal aid services for those

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30. Angela Fernandez, "Polling and Popular Culture (News, Television and Film): Limitations in the Use of Opinion Polls in Assessing the Public Image of Lawyers" in *In the Public Interest*, *supra* note 1, 209.

31. Lawyers only ranked above insurance brokers, real estate agents, publicists, unionists, car salespeople, and politicians. *Ibid.* at 222.

32. *Ibid.* at 214.

33. *In the Public Interest*, *supra* note 1 at 25.

in need.<sup>34</sup> Recently, in Ontario, concerns about the state of access to justice led to the appointment of an Integrity Commissioner, the Honourable Coulter Osborne, to inquire into the civil justice system. The Commissioner's interim report and recommendations, released in November 2007, echo these concerns with access to justice and, among other recommendations, encourages the bar to consider "new and innovative billing methods that promote access to justice for litigants with civil legal issues who would not otherwise be able to afford counsel."<sup>35</sup> So, although the issue of the availability of an independent bar to under-served populations is suggested by *In the Public Interest*, it is not addressed directly.

There is a sense of urgency at the heart of this book, as Canada's public policy adapts and evolves in increments of months, not years. The contributions in the book manage to achieve balance of approach and intensity of purpose. The historical relationship between access, public confidence, and an independent bar is drawn from Girard's work. Code, Roach, and Paton explore the practical realities of policy changes to the role of the solicitor and client. Monahan hammers out the constitutional bedrock of independence of the bar from the executive. Fernandez inspires alternative ways of thinking about the public-professional relationship, and Pue unearths a wise comment by Chief Justice Warren Burger, that "'concepts of justice' that do not 'have hands and feet ... remain sterile abstractions.'"<sup>36</sup> The Task Force takes all of these elements in hand and challenges the profession to consider its contribution to the public interest by maintaining an independent bar amidst twenty-first century imperatives. *In the Public Interest* capably demonstrates that the importance of the independence of the bar in supporting the rule of law must be sufficiently understood and factored into policy changes that are certain to be part of Canada's legislative and policy arenas for the foreseeable future.

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34. "Legal Services Society reports," online: <[http://www.lss.bc.ca/about\\_lss/reports.asp](http://www.lss.bc.ca/about_lss/reports.asp)>.

35. Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings & Recommendations* (Attorney General of Ontario, November 2007), online: <[http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report\\_EN.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf)>.

36. Pue, *supra* note 19 at 93, quoting Australian High Court Justice Michael Kirby from a speech delivered at the Law Council of Australia: Presidents of Law Associations in Asia Conference.