

DARK AGE AHEAD FOR AOLS?

By Will O'Hara and Anna Husa



Professional self-governance has a long and rich history that can be traced back to the early clerical societies. These powerful religious groups resented interference from the state and jealously guarded their independence. Traditionally there has been a recognition on the part of governments and the public alike that certain fields of activity – land surveying among them – were complicated enough to be practiced only by “individuals meeting certain predetermined standards of education, training and experience.”¹ It has generally been accepted that the best people to set the standards and regulate the members of those professions were the people most expert in the field: the professionals themselves.² This view is changing.

There are currently at least twenty different types of health professionals and at least fifteen other types of professionals that are self-regulated in Canada, including lawyers, funeral directors, architects, and, of course, land surveyors³. The notion of serving the public interest is integral to all of them. Section 2(2) of the *Surveyors Act*,⁴ stipulates that the “principal object of the Association of Ontario Land Surveyors is to regulate the practice of professional land surveying and to govern its members...in order that *the public interest may be served and protected.*” The *Law Society Act*,⁵ provides that in carrying out its functions, duties and powers, the Law Society “has a duty to *protect the public interest.*” The *Funeral Directors and Establishments Act*⁶ provides that the principal object of the Board of Funeral Services is to “regulate the practices of funeral directors ...in accordance with this Act...in order that the *public interest may be served and protected.*” The same applies to all of the self-regulated professions. This is the trade-off. Professions are given the privilege of self-governance as long as they govern themselves in the interest of the public.

But why do we allow some groups the right of self-governance and deny it to others? Why do builders have to comply with building codes imposed by the province or the municipality? Why do truckers have to submit to random inspections by the province? Could the learned professions find themselves in the same position?

Some argue that self-governing professions are essential to the existence of our culture. In her best selling book *Dark Age Ahead*⁷, Jane Jacobs describes in great detail how perilously close our culture is to decay. She points to five “pillars of our culture that we depend on to stand firm”, and included in that impressive list of institutions, along with family, higher education, science and government is self-policing by the

learned professions. Jacobs describes the role of self-governing professions like the AOLS in contemporary society:

Members of the learned professions have traditionally been regarded by themselves and others as capable of responsibly regulating and even policing themselves... These people not only enjoy status as educated experts; they are seen as establishment figures with stakes in maintaining stability, honesty and good order for the common good.

Jacobs says that self-governing professions are well tolerated in North America partly because their reach is confined mainly to internal professional concerns, but also because there is no better alternative to self-governance: “The likely alternatives are probably burdensome and irrelevant bureaucracies...”

Unfortunately, these same self-governing professions are under attack from outside and from within. Jacobs describes the rot that sets in when the professional bodies put their own interests ahead of the interests of the public, citing cover-ups of professional misconduct or crimes committed by members, unreasonable tardiness in dealing with complaints from the public, price fixing and attempts to justify practices that cannot be justified, particularly in the accounting profession that led to the Enron disaster. Jacobs says that the personal shortcomings of professionals are caused by lack of education. Speaking as only an elder writer and philosopher can⁸, she observes: “Like children, professionals need to be taught right and wrong, and why.”

All of these signs of decay described by Jacobs lead to an erosion of public confidence in institutions that are mandated by statute to govern themselves in the best interests of the public, and when the public loses confidence in these self-governing institutions they come under attack from the outside. This is happening throughout the Europe and North America.


In January 2007, the Solicitors Regulation Authority (“SRA”) officially came into being. The SRA is an independent regulatory body set up to regulate more than 100,000 solicitors in England and Wales. Its purpose, as advertised on the SRA’s website, is to “protect the public by ensuring that solicitors meet high standards and by acting when risks are identified.” Among other things, the SRA sets the standards for qualifying solicitors, drafts the rules of professional conduct, sets requirements for solicitors’ continuing professional development, provides guidance and rules to solicitors on ethical

issues and provides information to the public about solicitors, their work and the standards the public is entitled to expect.⁹ All of these functions had previously been performed by the Law Society itself. The SRA acts independently of the Law Society of England and Wales. The Board of the SRA is made up of sixteen members, only nine of whom are solicitors. The others are lay persons, including a Chartered Accountant, a consultant in human resources, and the former controller of editorial policy for the BBC.¹⁰ As the SRA proudly proclaims on its website, even its name is meant to emphasize its independence from the Law Society.

The SRA is a response to a report by Sir David Clementi, which examined the regulatory framework for legal services in England and Wales. The report's findings were clear: "the current system is flawed."¹¹ Among other things, the Clementi report discussed the perceived shortcomings of a system where complaints about lawyers are handled by lawyers themselves. Sir Clementi questioned whether "systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence".¹² This is due to the fact that there is often a feeling among members of the public that the legal profession is still an old boys' club where members will act to protect their own. There is no doubt that such a concern exists in Canada as well as in England and that it is not limited to lawyers but all self-governing professions.

As is true of lawyers in Ontario, complaints about land surveyors in this Province are handled by the AOLS members themselves. Whether this is a good thing or a bad thing may depend on your point of view. If you are reading this article in the Ontario Professional Surveyor you may feel that there is no better group to govern land surveyors than the AOLS and its members. So far the public and the legislature have retained a level of confidence – or at least indifference – in the ability of the professions to govern themselves. There has been no serious breach of trust in Ontario in recent years that would outrage the public to the point of concluding that the existing system is flawed. The inner workings of the AOLS and other professions go largely unnoticed by the public.

That may simply be because the professions in Ontario are, for the most part, complying with their statutory obligation to act in the public interest.

Recent history shows us that the privileged position of self-governing professions is tenuous. When public trust is eroded for any of the reasons listed by Jacobs, the light of public scrutiny will be shone on the professions and the privilege of self-governance will be lost. The obvious alternative to self-governance is being governed by some other group. Who will teach professionals the difference between right and wrong if it is not the professions to which they belong, including the AOLS? Who will judge the conduct of land surveyors if it is not other land surveyors? Will it be the "burdensome and irrelevant bureaucracies" that Jacobs feared? If the experience with the SRA is any guide, the answer is  probably yes.

Will O'Hara is a partner at the firm of Gardiner Roberts LLP, practicing in professional liability litigation, intellectual property, insurance and dispute resolution. He is certified by the Law Society of Upper Canada as a Specialist in Civil Litigation and teaches a post-graduate course at Ryerson University entitled Legal and Ethical Issues in GIS and Data Management. wohara@gardiner-roberts.com.

Anna Husa is an associate at Gardiner Roberts LLP practicing in the areas of professional liability, insurance, litigation and dispute resolution. ahusa@gardiner-roberts.com.

¹ "Professional Independence and the ABCPF Member" available at http://www.abcpf.ca/regulating_the_profession/documents/guideline-independence.pdf

² Ibid.

³ "Geoscience - How we regulate ourselves and are regulated for others", Presentation to APGO Professional Practice, September 2005 available at <http://www.apgo.net/news/presentations/OBonhamSept15%20PPCSeminarRegulatingGeoscience.pdf>

⁴ R.S.O. 1990, c. S. 29

⁵ R.S.O. 1990, c.L.8

⁶ R.S.O. 1990, c. F. 36

⁷ Published by *Vintage Canada*, 2004

⁸ Jane Jacobs died in 2006, a few days before her ninetieth birthday.

⁹ <http://www.sra.org.uk/about.page>

¹⁰ "Report of the Review of the Regulatory Framework for Legal Services in England and Wales" located at <http://www.sra.org.uk/about/board.page#pwilliamson>

¹¹ <http://www.legal-services-review.org.uk/content/report/foreword.htm>

¹² Ibid.