

**From Bullied to Besties:  
Can BC Notaries Survive Sitting at the  
Benchers' Table?**

by

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## **Abstract**

This is an exploratory study of the evolution of a monopoly shared between two self-regulated but otherwise unequal professions, the lawyers and notaries in British Columbia, Canada from 1981 to 2013 inclusive. The analysis of documents and interviews with key informants identify significant events during the study period and explore the relationships among lawyers, notaries, the provincial government and the courts. The study investigates the maintenance, expansion, and justification of monopolies, and how the delivery of legal services has been affected by competition, education, turf wars and the metamorphosis of the law society into a public interest regulator. The results are framed against the literature on professionalization and the relationships between professions and between the state and the professions. The study adds credibility to existing theories about inter-professional machinations, and demonstrates the precariousness of a non-exclusive, independent, subordinate position in the professions.

**Keywords:** lawyers, notaries, monopoly, competition, professional regulation, inter-professional conflict.

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## List of Acronyms and Definitions

ABA	American Bar Association
BC	British Columbia
BCLI	British Columbia Law Institute
Besties	best friends
CBA	The Canadian Bar Association
CBABC	The Canadian Bar Association British Columbia Branch
CBAO	Ontario Bar Association A Branch of the Canadian Bar Association
CBC	Canadian Broadcasting Company
CEO	Chief Executive Officer
DLSTF	Delivery of Legal Services Task Force
FLSC	Federation of Law Societies of Canada
GA	gentlemen's agreement
GPSF	global professional service firm
GSB	government supervised body
Law Society	The Law Society of British Columbia
LPA	<i>Legal Profession Act</i>
LSB	Legal Services Board
LSBC	The Law Society of British Columbia
LSPTF	Legal Service Providers Task Force
LSUC	The Law Society of Upper Canada
MAALS	Master of Arts in Applied Legal Studies
MLA	Member of the Legislative Assembly of British Columbia
MLRC	Manitoba Law Reform Commission
Notaries Society	The Society of Notaries Public of British Columbia
OLA	Open Learning Agency
ORE	Office of Research Ethics
Paralegals	BC Paralegal Association
PLTC	professional legal training course
SFU	Simon Fraser University
SRL	Self-represented litigant
SRO	self-regulated organization
TAF	trust administration fee
TILMA	Trade, Investment and Labour Mobility Agreement
UBC	University of British Columbia
UK	United Kingdom (England, Northern Ireland, Scotland and Wales)
US/USA	United States of America
WESA	Wills, Estates and Succession Act

## **Chapter 1.**

### **Now, Then and The Questions In Between**

#### **1.1. Where Are They and Where Were They: An Introduction**

As I write, there are approximately 330 notaries and 11,000 practicing lawyers in British Columbia (BC). Notaries and lawyers have told the provincial government that they want to “subsume” the regulatory operations of The Society of Notaries Public of British Columbia (Notaries Society) into the operations of The Law Society of British Columbia (Law Society). Executives of the two societies are busy discussing how to make the subsuming merger happen. Members of each society have been advised of the events. So far, members have not been asked to vote on the matter. If the merger is approved and legislated, it will have immediate effect on how, where and by whom the regulatory business of notaries is done. Given the Law Society’s size and administrative sophistication, it is unlikely that the merger will affect the Law Society’s regulatory operations in any fundamental way.

Mutual agreement on anything (let alone “subsuming”) has not been in the lexicon for the relationship between lawyers and notaries in British Columbia. In fact, lawyers and notaries are notorious for their historic animosity toward each other. They have been skirmishing over jurisdiction for almost a century. Their dynamic relationship has been researched up to 1981. My research begins there and extends a study of their relationship to the end of 2013.

In 1981, lawyers and notaries were both self-regulating organizations (SROs) with an exclusive, shared monopoly over the delivery of specified legal services and both had the power to discipline their wayward members (Brockman, 1998, p. 588-9), but the

similarities ended there. The jurisdiction and qualifications of notaries were significantly inferior to lawyers.

Lawyers in 1981 had the exclusive right to practice law generally and the right to enforce their jurisdiction, while the notaries held a concomitant right to provide a few, narrowly restricted legal services. Admission to the Law Society depended on completion of a three year, graduate level law degree, a year of articling, the Law Society's Professional Legal Training Program and approval by a bencher of the Law Society before swearing in and being called to the bar by a Supreme Court Justice. With limited exceptions, only practicing members of the Law Society were entitled to practice law. As an SRO, the Law Society controlled admission, discipline and disbarment of its members, as well as enforcement of its exclusive jurisdiction over the practice of law. In 1981, there were approximately 4500 practicing lawyers (Brockman, 1997, p. 1).

Notaries on the other hand, were restricted to real estate conveyancing, preparing affidavits and simple wills, administering oaths and attesting documents. The educational component of notarial qualification was a six month, part time correspondence course. Admission as a notary was signified by issuance of a notarial seal. The total number of seals was capped at 322, dispersed over 81 districts in the province. The seals were not transferable among the districts (Brockman, 1997, p. 223).

As of 2013, the jurisdiction and qualifications of lawyers were essentially the same as in 1981 but their numbers had more than doubled to approximately 11,000 practicing lawyers. In contrast, the qualifications and limitations of notaries had changed substantially and their scope of practice had increased modestly. Their numbers had dwindled by about 20% to approximately 262 in 1990, and had gradually recouped the loss by 2013 to approximately 330.

Specifically, notaries in 2013 were entitled to draw representation agreements and other estate planning documents such as those pertaining to health care, all of which had been subject to elaborate new legislation that excluded notaries for more than twenty years (*Notaries Act*, 1996, s. 18). Additional services in connection with international wills were added but did not come into force until March 31, 2014. Admission as a notary depended on completion of an 18 month bespoke graduate level

master's degree including at least six weeks of in-office mentoring, a mediation workshop, and, as in 1981, examinations set by a board of examiners appointed by the Attorney General, and finally, approval by the Supreme Court of British Columbia (*Notaries Act*, 1981, s. 5-11 and *The Society of Notaries*, 2012, n.p.). The cap on the number of notaries was removed as had the geographic limitations on where notaries could practice. The Notaries Society made a formal proposal to the Provincial government in 2010 to increase the scope of their services to include incorporations, probate, marriage agreements and uncontested divorce (*The Society of Notaries*, 2010, n.p.). The Canadian Bar Association (British Columbia Branch) (CBABC) objected vociferously. The government backed away from the conflict and told lawyers and notaries to get together and come back with mutually satisfactory recommendations about regulating legal services. The Law Society formed a committee; the Notaries Society sent a representative to sit on the committee and in December 2013, the committee recommended that the Law Society become the sole regulator of legal services and govern lawyers, notaries and paralegals. The notaries' representative joined in the committee's unanimous recommendations, supporting the concept that the notaries would hand over regulation to the Law Society and the autonomy of the Notaries Society would be terminated.

This research is a qualitative exploration of what happened in the roughly thirty years between 1981 and 2013 to foster the fundamental changes in the restrictions on the number and location of notaries, their academic program and how lawyers and notaries engaged with each other, as well as modest changes in what a notary was authorized to do. Before discussing the research methods, findings, and conclusions in chapters 3, 4 and 5 respectively, an outline of the background between lawyers and notaries leading up to 1981 is summarized, followed by the research questions and, in the next chapter, the literature providing the theoretical framework for the research.

## **1.2. How Did They Get There: The Background Before 1981**

For better or for worse, notaries came with the British Columbia territory. Notaries arrived in 1864, before BC joined confederation (Brockman, 1999, p. 216). By 1875 there were 40 notaries. At first, the governor of the colonies (British Columbia and

Vancouver Island) controlled notarial appointments (Brockman, 1999, p. 216). After joining confederation in 1871, the Lieutenant Governor made the appointments for the entire province. The appointments were for a discretionary term, with the power to attest and protest commercial documents. No training or other prerequisites were required (Brockman, 1999, p. 216). Most notaries were businessmen who used the notarial appointment to facilitate property transfers and other business matters.

In 1884, the legislation was amended so that notaries' appointments could be restricted to a particular part of the province. By 1893, two prerequisites for appointment were introduced: notaries had to be British subjects and have their qualifications examined by a judge (Brockman, 1999, p. 217).

In 1900, the geographic limits on notaries were removed, and once again, notaries were entitled to practice anywhere in the province. In 1910, the requirement for judicial examination was rescinded, leaving the Lieutenant Governor as the only gate keeper (Brockman, 1999, p. 217). By 1909 there were 89 notaries (Brockman, 1999, p. 218).

In contrast to the notaries, lawyers arrived about the same time (1858) but their numbers remained small. There were only 14 members when the Law Society was organized in 1869. The courts governed call and admission to the bar until turning the responsibility over to the Law Society in 1874 (Brockman, 1999, p. 218). Prospective lawyers had to complete an apprenticeship followed by examinations set by the Law Society. The courts in BC preferred to appoint lawyers trained in England and as a result, the lawyers' ranks grew slowly. This system continued until law schools opened in BC in 1914 (Brockman, 1999, p. 218).

During the early 1900s lawyers and notaries co-existed in relative harmony but as time went on, the lawyers began to complain about notaries practicing beyond their authorized jurisdiction of attesting and protesting commercial documents (Brockman, 1999, p. 218-219).

Then in 1922, the competition between lawyers and notaries began in earnest. With a lawyer as Attorney General, legislation was introduced to move appointment of



notaries to the discretion of the courts and to require that all notarial appointments be renewed every four years (Brockman, 1999, p. 222). Renewal depended on the Attorney General's satisfaction that there was a "need for public convenience" in the location of the notary's intended practice. This legislation was not passed but the lawyers had revealed their belligerent aims. In that same year (1922), the legislation governing notaries was amended so that only lawyers could practice in any incorporated city or municipality where at least two practicing lawyers were located. Notaries were pushed into rural communities (Brockman, 1999, p. 222-223).

In 1924-5, there was a failed attempt at legislation to restrict notaries from "such matters as lawyers claim involve the possession of legal knowledge" (Brockman, 1999, p. 224). The legislation was withdrawn after the notaries agreed with the Law Society to three restrictions:

- cancellation of any inactive notarial commissions;
- examinations as a prerequisite for any future notarial appointments; and
- no jurisdiction to prepare, amend or otherwise deal with wills, bills of sale and chattel mortgages (Brockman, 1999, p. 225).

Legislation concerning these matters was not introduced until 1927. In the meantime, the notaries got themselves organized. They held a convention and incorporated (Brockman, 1999, p. 226). When the new legislation was introduced, there were some additional restrictions. Every notary had to:

- enroll with the registrar of the Supreme Court and be identified on the "Roll of Notaries Public" (akin to the lawyers' roll of barristers and solicitors);
- practice only within prescribed geographic limits;
- be a British subject resident in BC for at least three years; and
- demonstrate a need for service in the location of the notary's practice (Brockman, 1999, p. 227).

The notaries protested these extra restrictions but the legislation passed in 1927. Shortly thereafter the government introduced regulations requiring stiff examinations not only for new applicants but also for any notary who failed to register on the Rolls by a specified date (Brockman, 1999, p. 229). Again the notaries protested but the legislation

passed (Brockman, 1999, p. 230). In 1928, there were over 1,000 notaries and approximately 600 lawyers (Brockman, 1999, p. 234).

Lawyers then turned to the courts to enforce the new legislation against the notaries. The government supported the lawyers by means of the examination process. By 1931, four years after the legislation passed, only two new notaries had passed the examinations (Brockman, 1999, p. 234).

During the 1930s and 1940s, the lawyers' main focus was public relations. They mounted publicity campaigns to encourage the use of lawyers and to improve and defend the reputation of lawyers. They accepted support from The Canadian Bar Association (CBA). They continued to pursue claims against notaries for unauthorized practice and successfully opposed most notarial appointments (Brockman, 1997, p. 200).

The notaries were also busy defending their turf against encroachers. They began lobbying government for self-regulatory powers. They wanted control over approval of applications for new appointments, and mandatory membership in the Notaries Society (Brockman, 1997, p. 210). In 1952, W.A.C. Bennett, a Kelowna farmer, was elected Premier and the lawyers became concerned that notaries would be successful in getting favourable legislation passed (Brockman, 1997, p. 211). The lawyers were motivated to keep the matter away from politics, and in 1955 the lawyers and notaries reached a "gentlemen's agreement" (GA) (Brockman, 1997, p. 211).

The Law Society agreed not to oppose applications to replace any notary in an existing territory, and the notaries agreed not to increase the total number of notaries in the province and that all notaries must be members of the Notaries Society. Neither side would challenge amendments to the other's legislation, but, the lawyers insisted that approval from the Law Society as well as the Attorney General was a prerequisite for amendments to the notaries' bylaws (Brockman, 1997, p. 219).

Over the following 25 years, the lawyers fought amongst themselves over the GA. There were recurring (unsuccessful) proposals to unilaterally terminate it.

Meanwhile, the Notaries Society continued to professionalize, gaining power to discipline their members (Brockman, 1997, p. 219).

In 1973, the lawyers mounted a campaign to terminate the existence of notaries, claiming that notaries were an anachronism (Brockman, 1997, p. 219-220). The Notaries Society responded firmly and the matter was made public. For the rest of the 1970s, the Law Society complied with the GA and did not oppose applications for notarial seals, but, both the CBABC and independent groups of lawyers made representations in opposition. For the most part, they were successful on the basis of the “need” clause (Brockman, 1997, p. 220-221).

Consequently beginning in 1980, the Notaries Society pressed the government to eliminate the “need” clause and tie the maximum number of notaries to a percentage of the population (Brockman, 1997, p. 222). They were not successful in these requests, but they were able to negotiate legislation that preserved their existence. Chapter 4 begins with further details of the 1980 to 1981 confrontation.

### **1.3. What Happened: The Research Questions**

This research illuminates the evolution of two competing self-regulated organizations from their public battles in 1981 to their public chumminess in 2013. Changes in the relationship show trends, themes and implications in theory, policy and practice for professional monopolies, shared monopolies, SROs, competition, the role of education and the role of the state. The research looks at how monopolies are maintained, expanded and justified in a 21<sup>st</sup> century, capitalist, free trading society operating in a global economy with ready access to information. I investigate and contextualize the motivations and objectives behind changes in the role of notaries, and issues related to public interest and access to the legal system. This thesis is relevant to parties involved in the currently unresolved machinations concerning the notaries’ quest for expanded jurisdiction and the lawyers’ proposition to annex the notaries, and in any future changes in the structure, governance or regulation of delivery of legal services.

The research questions are as follows. What happened between 1981 and 2013 in British Columbia to foster the fundamental changes in the role and academic program for notaries, as well as the modest changes in their jurisdiction? Why were the restrictions on the number and location of notaries lifted? What prompted notaries to improve their standards of education and seek to broaden the scope of their legal services? How have lawyers and the government continued to justify restrictions on notaries' jurisdiction, and why? What role do notaries play in public interest issues like self-represented litigants and access to legal services? What is the role of self-regulating professions in the legal arena in British Columbia today? What happened to seed the reversal of public animosity between lawyers and notaries in 2013?

## **Chapter 2.**

### **Literature Review**

This thesis is about relationships. It is set in the legal world in BC, Canada, and the main actors are lawyers, notaries and the provincial government. The courts play a small, sporadic but significant role. The relationships among the actors pertain to a shared or overlapping monopoly between lawyers and notaries, created by legislation, with the boundaries of the overlap interpreted occasionally by the courts.

The monopoly is not shared equally. The lawyers have plenary jurisdiction to practice law, whereas the notaries have been allocated a short, specific list of legal services that they, as well as lawyers, may provide. That list is the limit of the notaries' business and professional function or purpose in society. Lawyers have unlimited jurisdiction over legal services. There is a long history of strife between the two professions as well as a dramatic size difference between lawyers and notaries during the study period. So this thesis is really about three professional changes: first, the inter-professional conflicts between two unequal, self-regulated, professional organizations, one of which has full jurisdiction and monopoly, and has been mandated by government to share with the other a short, specific list of legal services; second, the continuing pursuit of professionalization by the notaries; and third, the relationship between government and the two self-regulated professional organizations in terms of both professionalization and monopoly status. Consequently, the literature is divided into two parts: that dealing with inter-professional relationships; and that dealing with professionalization and the government-SRO relationship of which there are four sub-categories: the quest for professional status, competition/monopoly, limited or reduced governmental powers, and critics of self-regulation.

## **2.1. Abbott, Witz and Friends: Inter-professional Relationships**

This section of the literature review focuses on Abbott (1988), Witz (1992) and those who have advanced their theories, and Adams (1999, 2004, 2010).

### **2.1.1. Abbott's system and the overlap with Witz**

Adams (2010) refers to Abbott's theories in "*The System of Professions: An Essay on Division of Expert Labor*" (1988) as "one of the last great American works on professions" (p. 50). Abbott sought to explain how the professions came to exist and how they related in society. He characterizes the professions as a unified system within which the boundaries between professions are constantly changing (p. 2). Each profession is defined by its work, its exclusive jurisdiction. In explaining the changes in the jurisdiction of notaries since 1981, Abbott's framework would identify the forces that initiated a "disturbance in jurisdiction" and then trace the effect of those disturbances through the professional maze of relationships until the effect died and the professions came to equilibrium. Along the way, the disturbance would be affected by its location or "audience" in any one or more of the legal system, public opinion and the workplace (p. 59-60). Abbott (1988) calls the point of equilibrium a "settlement" and he categorizes six types: full and final; subordination; division of labour; intellectual settlement; advisory jurisdiction and workplace settlement (p. 69). Brockman (1997) suggests that BC lawyers and notaries do not fit into these categories and a seventh category that she calls "concurrent jurisdiction" should be added (p. 198). She distinguishes her concurrent jurisdiction settlement from Abbott's "division of labour" settlement, as not simply the "rapidly evolving ... functional interdependence" described by Abbott (p. 198), but a functional independence and a true sharing of the work that continues in relative stability for a long period of time, over 100 years in the case of BC lawyers and notaries (p. 198).

Abbott (1988) says the initiating factors for disturbances could be external (new groups, new tasks, organizational change, challenge from invaders, enclosure) or internal (new knowledge, social structure change, ambition) (p. 92-98). He provides

theory about how change was carried out which he calls the “mechanisms of jurisdictional shift” (p. 98). Accordingly, “standard cognitive strategies” move disturbances through the system by “changing the relevant level of abstraction” (p. 111). In other words, once a vacancy in the system is identified, one profession or another would move to take it over, justifying their actions with rhetoric like reduction (we already do this), the gradient argument (we do the most extreme cases so we should do the easy ones too), metaphor (efficiency would suffer if we don’t do it) and a claim to treatment expertise (we already treat this problem so we should handle the entire problem) (p. 98-102).

Abstraction is a key feature of Abbott’s definition of profession in that he claims “only professionals expand their cognitive domain by using abstract knowledge to annex new areas” and “knowledge is the currency of competition” (p. 102). Professions are always looking for the “optimal balance” between abstraction and concreteness (p. 104). Too much abstraction causes content to become amorphous; too little abstraction and content becomes obvious (p. 102-3). In both cases, the profession is weakened by the lack of balance in abstraction. The common method to attain the optimal balance is amalgamation or division among professional groups (p. 105). Abbott points to several factors that facilitate successful mergers such as the dominant profession exerting power to end a jurisdictional threat, separate professions recognizing how much they have in common, or related professions reinventing themselves collectively as a new profession (p. 105). He also comments that mergers “often fail” because “distinct professional heritages and tasks prevent a unified cognitive and social structure” (105). He cautions that political motivation for merger (such as the motivation to maintain jurisdiction) does not compensate for a lack of common knowledge among “interchangeable” members of the merging parties (p. 105) and does not bode well for a successful merger.

Abbott (1988) looks at other forces affecting his system, and identifies the effect of “internal differentiation” or how each profession orders itself and its work. Internal machinations could do three things:

- generate or absorb disturbances by degrading or elevating work;
- affect relationships among colleagues and between professions; and

- create a workplace where change is the norm and public perception is different from the reality (p. 133-34).

Abbott (1988) also identifies the effect of the social and cultural environments surrounding the system of professions. His discussion of the social environment is more straw dog than beef. He talks about the creation of the “corporate society” (p. 148) from the advent of technology and large scale organizations, and how these two events are “the chief forces opening and closing areas of work for professionals in the last two centuries” (p. 149). The professional workplace has become bureaucratized, but there is no consistent effect of the bureaucratization. Different professions react differently. There is a proliferation of divisions of labour and a mix of professionals and paraprofessionals in the workplace (p. 153). Inter-professional competition is affected by commercial organizations taking over internal administrative functions, and, a growing need for more investment (such as the cost of computerization and medical machines). If the investment comes from external sources, it would indicate a weakness in the profession. He also suggests the arena for competition would move externally where the big corporate allies competed amongst themselves (p. 176). In short, Abbott is of the opinion that despite significant social changes, the social environment has not changed “the central constitution of the professions” (p. 176).

As for the cultural environment, Abbott (1988) claims that changes in knowledge (volume, complexity and legitimacy) and the rise of universities affected the professions. New knowledge pressured professions to subdivide, and replacing old knowledge pressured professions to use their strongest defence, abstraction, to resist change. Professionals were forced to either re-educate themselves or move into a field where their out-dated knowledge was not a problem, like management. (p. 181). Abbott characterizes the situation as a “race between forms of creativity” (p. 184) as to whether the new knowledge would overcome professionals, or the professionals would retrain, regroup and claim new work fast enough to stay alive.

The democratization of universities has no consistent effect on the professions as a whole, Abbott found. He comments that the democratization of education is the harbinger of decreased power in the elite universities, and that corporations are threatening academic independence by using their donations to influence research and



expansion (p. 211). According to Abbott, corporations also threaten professional autonomy because the professions have become dependent on the corporations either as employers or clients. In 2011, Muzio and Kirkpatrick agreed but widened the circle of blame for the change to organizations, business schools and academic institutions (p. 395).

Abbott's comments about the effects of social and cultural changes on the professions are of limited value in interpreting the inter-professional events between lawyers and notaries. Many of these changes originated before the study period and although they are ongoing, lawyers and notaries have adapted and continued to survive.<sup>1</sup> For example, both professions embraced new technology in stride, without requiring external investment. Similarly, notaries were first to identify the new knowledge area of representation agreements, moved into the field and stayed invested in it, despite their problems in obtaining enabling legislation, for 22 years.

Maroto's (2011) study looks at another aspect of professionalization, namely quality in regulated services and how quality is achieved. Competence and quality of services are the key criticisms by BC lawyers in rejecting each of the notaries' proposals for additional jurisdiction. Maroto (2011) is critical of Abbott's threshold concepts of exclusivity and abstract knowledge as essential for professionalization, saying that few professions "actually exert exclusive jurisdiction" (p. 102). Maroto (2011) finds that a combination of informal controls (referrals, personal contacts, apprenticeship) (p. 114) and formal controls (licencing) are effective management strategies for work quality and membership compliance (p. 110). Maroto suggests that Abbott's theories are too narrow and that in the real world, personal relationships are effective controls over the quality and distribution (sharing) of work (p. 125) equivalent to Abbott's theoretical organizational "disturbance" within any kind of identifiable system. Maroto's findings are consistent with the practice of BC notaries who regularly refer work that is outside their authorized scope of practice to lawyers that they know and trust to competently serve

<sup>1</sup> Abbott (1988) admits that "expert systems have little general inter-professional effect because professions competing against each other will generally compete against the same expert system" (p. 183).

the client. The notary would not make a referral and risk losing a client without knowing the lawyer's quality of service.

Kay (2009a) examines the decline of Quebec notaires<sup>2</sup> in the 1980s and 1990s and uses Abbott, in part, to critically explain how it happened. Under Abbott's theories, "size and bureaucracy conferred competitive advantage" (p. 902) so the large law firms (where avocats dominated) were able to serve the multinational clients, while the solo or small firm practitioners (where notaires typically worked) could not and remained static. Kay suggests that Abbott would identify the cultural structure of work as having a significant impact on intra-professional status (p. 909),<sup>3</sup> which should have benefited the notaires. Kay observes that as the first legal practitioners in Quebec, the public considered the notaires as holding higher cultural status (or symbolic capital) than the avocats in the legal profession. On the other hand, the public viewed the avocats' displays of abstract knowledge in the courtroom as higher status work than the routine, closeted work of the notaires. Also, avocats being litigators were "more costly to clients and more remunerative to avocats" (p. 909). In the end, the notaires' cultural status was overcome. They withered in the 1980s and 1990s while the avocats flourished.

In terms of explaining the notaires' decline, Kay's study (2009a) found that avocats had greater "exchange rates" on their human and socio-symbolic capital than notaires (that is, they could charge and make on average twice as much as notaires). Avocats were expanding faster than notaires (p. 916) and had corralled the most lucrative, specialized work (p. 918). Like Brockman (1997), Kay disagrees with Abbott's idea that professionals in shared jurisdictions reach a functional interdependence fairly quickly, resulting in an "uneasy truce" (p. 932). In Kay's view, the avocats with their multidisciplinary law firms and multinational clients simply took over the work and the workplace. It was more a question of annihilation than uneasy truce. Kay

<sup>2</sup> The jurisdiction of notaires in Quebec is significantly larger than BC notaries, roughly equivalent to that of a solicitor's practice in BC.

<sup>3</sup> Kay characterizes the conflict in Quebec as "intra-professional." Although both avocats and notaires have different governing bodies, they both attend law school and there is some overlapping jurisdiction.

acknowledged Abbott's contention that the workplace was an increasingly important site for control of work (p. 932).

In a follow-up study, Kay (2009b) looks specifically at the notaires and their prospects for recovery. She notes increasing numbers of notaires and rising enrolments in notarial law school (p. 109). Notaires had expanded their jurisdiction particularly with international clients and electronic commerce, and had promoted their financial planning skills and their impartiality for mediation and arbitration work. Ninety percent of the polled public expressed confidence and trust in notaires (p. 110). Economists and scholars applauded them for reducing litigation. Kay (2009b, p. 110) refers to the foregoing as "demarcationary strategies," crediting Brockman (1997) and Witz (1992), "intended to contest legal jurisdictions through the legislature, courts and administration," crediting Abbott (1988).

Witz (1992), like Abbott, explains the creation and role of professions in society. For both Witz and Abbott, capitalism is a driving force. For Witz, patriarchy is the villain. But Abbott, in true capture theory style, casts the professions themselves as the villain, labeling them and their behaviour throughout his book with a plethora of unsavoury descriptions, including "malfeasance" (p. 1), "corporate extortion" (p. 7), "education ... is often irrelevant to practice" (p. 68), "gratuitous advice" (p. 76), "greedy" (p. 98), "professions will search for work at the expense of old neighbours" (p. 98), "pariah professionals" (p. 121), "demographically rigid" (p. 130), "training ... irrelevant to practice" (p. 131) and finally "exercises subjective jurisdiction to so define its work that outsiders cannot see that treatment [the work] fails" (p. 136). Abbott looks at the professions as a whole from the outside, observing the machinations of the aggregate mass of professionals, while Witz seems to be standing with a professional "wannabe" and examining the entrails of that group's efforts to join the professional ranks.

Brockman (1997) also compares Witz to Abbott and finds several similarities, like the "audiences" (public, legal and workplace) in Abbott performing similar functions as Witz's "sites" (professional organizations, universities, and the state). Abbott envisions that different audiences would determine different claims, while Witz's sites have a determinative effect on professional projects. Brockman notes that Witz did not fully

recognize Abbott's category of claims for public jurisdiction (like cultural and social authority) being determined by public perception and public media (p. 199). Instead, she reports that Witz talked about "discursive strategies" in her introduction, but downplayed them, leaving Abbott's concept of public-authority-by-public-perception unaddressed. Brockman points out that up to 1981, the lawyers' and notaries' discursive battles "revolved around ... characterization of the 'public good' " (p. 199). That battle continues until 2013 as described in chapter 4.

### **2.1.2. Witz and the professional projects**

Witz's focus was the role of gender in the establishment of professions in 19<sup>th</sup> century England.<sup>4</sup> In particular, she studied the conflict between patriarchal, capitalist institutions and female efforts to penetrate them. She called these efforts "professional projects." Under Witz's theory, lawyers in BC with their exclusive jurisdiction to practice law would be the dominant group, and the notaries with their shared right to provide the specific services set out in the *Notaries Act*, would be the subordinate group. She would advocate for an event by event, individual analysis of the notaries' ongoing professional projects to expand their jurisdiction and the lawyers' range of professional projects in response, like the lawyers' media campaigns to bolster their public image, or lobbying government to abolish notaries entirely.

Witz's (1992) model of professionalization would forecast that the dominant lawyers would use exclusionary strategies to control admission and members (p. 46) and demarcationary strategies to control neighbouring or related occupations (p. 47). The notaries as the subordinate group would tend to use dual closure strategies. That is, they would respond to the dominant group's demarcation strategy by directly claiming jurisdiction using usurpatory tactics against the dominant group, and by consolidating its position using exclusionary tactics against the groups below, or both (p. 50). In her research, Witz found that subordinate groups like the midwives she studied, generally were not successful in credentialist tactics because the universities as well as the state

<sup>4</sup> Gender is not considered in my research, but Witz's model of professionalization is still valid for analytical purposes.

were controlled by antagonists, namely, men. The subordinate women had a better chance of success using legalistic tactics and applying directly to the state (p.208). If the subordinate groups could muster sufficient support against the antagonists in the legislative sphere, their projects would receive professional status (p. 67). If female professional projects failed in the legislative sphere, sometimes the projects altered course and moved to credentialing through gender segregation and inclusionary usurpation tactics (p. 50). The latter were claims that used competence to challenge monopoly and gain acceptance in the dominant group. The subordinate claimed equal opportunity with the dominant members and then allowed the dominant to reject individual subordinates but not the entire group.

Witz (1992) illustrated these tactics with the conflict between the dominant male doctors and the subordinate female nurses and mid-wives (p. 197-200). Men controlled the state, the universities and the doctors' occupational associations, and all these institutions excluded women (exclusionary tactics by dominant men). The nurses, mid-wives and female medical students sought to be included (inclusion by subordinate women) and were denied access. In response, the women turned to separatism and created their own schools for women (segregation by subordinate women), or, through male proxies, convinced hospitals to undertake training and education (usurpatory inclusion by subordinate women) and to make a place for women in the workforce.

Brockman (1999) suggests three permutations on Witz's theories. First, she notes that the dominant group's demarcation strategy of deskilling could be expanded to include a new category of geographic deskilling where the dominant group allowed the subordinate group to work in a particular area as long as the dominant group had no members who want to work there. This happened to the BC notaries during the 1920s, when a lawyer was Attorney General and influential in the legislature. As mentioned in Chapter 1, in 1922, legislation was passed prohibiting notaries from practicing in any incorporated city or municipality where there were at least two practicing lawyers. As a result, notaries were forced to relocate to rural communities that had not yet attracted any lawyers (Brockman, 1999, p. 222-223). The 1927 *Notaries Act* was not much of an improvement. By its terms, every notary was limited to practicing within a prescribed territory (Brockman, 1999, p. 227). Geographic limits on notary practice were not lifted

until January 1, 2009. Geographic limits are not the same as the 1922 “no go” zones and may not have involved deskilling, but, geographic limits are nevertheless demarcationary strategies aimed at controlling the notaries’ expansion and preserving the lawyers’ dominance.

Second, Brockman’s review of the events between lawyers and notaries reveals that in a number of key instances, the success or failure of a particular professional project was determined or influenced by players who occupied more than one site (1999, p. 215). For example, lawyers acted as judges in the court system. Both lawyers and notaries were members of the legislature. Brockman calls these players “dual members” and suggests that they caused internal conflict detrimentally affecting the autonomy of the other players (p. 216).

Third, Brockman develops a continuum from Witz’s concept of the relationship among demarcation strategies, the degree of control and institutional sites. She suggests that the institutional sites for demarcation strategies included not only the autonomous means (like professional schools and universities) and heteronomous means (through the state), but also the courts and appeals to the public (p. 214). Table 2.1 shows Brockman’s continuum.

**Table 2-1 Brockman’s Continuum of Institutional Sites for Demarcation Strategies used by Lawyers and Notaries in British Columbia**

<b>Demarcation strategy</b>	←-----→	<b>Internal conflict</b>
Autonomous		Heteronomous
Professional body	University      Courts      State	Public

Note: Adapted from “A cold blooded effort to bolster up the legal profession’: The battle between lawyers and notaries in British Columbia, 1871-1930” by J. Brockman, 1999, *Social History* 32(64), p. 214. Reproduced with permission.

### **2.1.3. Adams and inter-professional links between conflict and status**

In 1999, Adams wrote about how the dentists in Ontario had managed to avoid “medical dominance” by the doctors in the early years (1868-1918) (p. 407). It came down to four factors: timing (the two professions were taking their first steps toward professionalization at the same time); separate jurisdictions (mouths and teeth were the

only jurisdiction that dentists pursued while doctors were professionalizing for the entire human body); shared knowledge foundations (both professions relied on the same science for their work so did not contest each other's expertise); and the leaders of doctors and dentists came from the same social class and gender that "encouraged positive relations" (p. 418).

Unlike the cordial relationship described by Adams between dentists and doctors in early Ontario, BC lawyers and notaries exhibit only one of her four factors. The fledgling BC government instituted a series of restrictions on notaries as discussed in chapter 1, but the early inter-professional relationship seemed benign as both professions were professionalizing at the same time. According to Brockman (1999, p. 222), the real conflict began in 1922 and appears to have continued for next 90 years. The only Adams' factor evident between the first BC lawyers and notaries was their contemporaneous initiation and pursuit of professionalization. One out of four is apparently not enough to avoid "legal dominance."

In a later study of the origins of Canadian professions, Adams (2010) observes that Abbott shifted the focus away from the process of acquiring professional status toward the inter-professional conflicts over work and jurisdiction (p. 50). In doing so, Abbott ignored status. After examining 1020 legislative acts (statutes and amendments between 1867 and 1961) concerning professions and an additional 152 statutes from five provinces concerning occupations, regulating 36 professions (p. 55), Adams concludes that, in addition to "practice rights and privileges" the legislation granted "special legal status" to the professions that was not granted to occupations (p. 64). Sometimes legal status was "accompanied by considerable social and cultural status" (p.64). According to Adams, status is a key characteristic distinguishing the professional from other experts. Professions are "organized status groups" and Abbott's focus on inter-professional conflict needs to be "embedded in the complex web of relations and ongoing drive for status, social authority and privilege that characterize professionalization" (p. 67). To understand professions in society, Adams says, the focus should be on "status, status group formation and status power in society" (p. 68).

In 2004, Adams writes about the conflict between the dentists and the dental hygienists in Ontario. The dentists in Ontario, like the lawyers in BC, were intent on preserving the status quo while the dental hygienists, like the notaries, wanted to expand their scope of practice. Adams (2004) is critical of Abbott's sole focus on inter-professional conflict because inter-professional conflict is often shaped by the process of professionalization. According to Adams "professional projects quite often generate inter-professional conflict, and ... inter-professional conflict is shaped by occupational groups' efforts to attain and/or maintain professional status and authority" (p. 2245). The links between inter-professional conflict and professionalization "have not been fully explored" (p. 2245).

This thesis explores these links as it examines the professionalization of notaries in light of their inter-professional conflict with lawyers. Similar to the Adams' dental hygienists, BC notaries wanted to expand their scope of practice to "better claim professional status" (2004, p. 2251). As Adams explains, status seeking and inter-professional conflict are linked and jurisdictional battles are often also battles for the "*status, privilege and security that accompanies possession of specific jurisdictions*" (emphasis in original, p. 2251).

## **2.2. A Many Splendoured Thing: Professionalization and The Relationship Between Government and SROs**

The following review examines four aspects of the government relationship with professionalizing SROs: the changing attitude of government to the quest for status (Adams); the interplay between competition and monopoly (Priest, Competition Bureau, and Iacobucci and Trebilcock); advocates for less governmental power over SROs (Turrieff, Feinberg and Flood) and critics of self-regulation (Tuohy, Brockman, Clementi and Rhode).



### **2.2.1. Seeking professional status**

During most of the study period, the notaries in British Columbia actively tried to enhance their professional status by asking the government to expand their scope of services.

Adams (2009) examines the relationship between four provincial legislatures (including BC) and their respective regulated professions. Adams (2009) confirms conclusions from her previous research (2005b) to the effect that the relationship between legislators and the SRO was fluid and responded to changes over time and place (p. 239). She identifies three eras of regulation in the relationship (p. 226). During the first era, the regulated professions were the traditional ones like lawyers, doctors and chartered accountants. In the earlier study, Adams (2005b) examined entry to the professions in Ontario in this first era. She found that before World War I, legislators felt a direct connection and responsibility to constituents, had little confidence in the newly created SROs and were willing to override the SROs' delegated jurisdiction (p. 177). This was not an unreasonable reaction when the population was small, the legislators few, the professionals in high demand to help with a developing country, and the SROs newly minted with virtually no track record (Adams, 2005b, p. 177-178). The legislators before World War I did not know if SROs would be reliable.

During the second era between the Wars, legislators were focused on regulating the health professions (Adams, 2009, p.226). In the third era after World War II until 1961, the legislators doubled the number of regulated professions (p. 231). The increase in regulated professions brought increased governmental involvement, less autonomy for the professions and greater delineation of boundaries among the professions (Adams, 2009, p. 233). Adams (2009) points to a correlation between the "welfare state" and the proliferation of regulated health care professionals (p. 239), suggesting that regulation is beneficial to both state and professional self-interest. The provinces expand their reach by delegating power to SROs. The SROs gain enhanced social status, power and privilege (p. 237).

Despite the difference in study periods between Adams (2009) and my research, the notaries' relationship with government definitely changed over time from the

government co-operation in the early 1980s, to the rejection and broken promises of the 1990s, to tolerance in the early 2000s and the abandonment in recent years. On the other hand, lawyers' relationship with government remained relatively stable and, as described by Adams (2009), grew in status as the government delegated greater self-regulatory powers to them.

### **2.2.2. Competition vs. monopoly**

Professional monopolies often go hand in hand with self-regulation. The monopolies in this study are creatures of statute, created by government and endowed with self-regulatory powers. The continued existence of the self-regulated monopoly depends in part on government satisfaction that free market competition is more dangerous than beneficial for the public and independent regulation is not necessary to protect the public.

After identifying five existing models of self-regulation (para. 15) and comparing them to a "public policy framework" (para. 135), Priest (1997-1998) recognizes that "many of the factors that are conducive to effective self-regulation also may create incentives for anti-competitive behaviour" (para. 235). She suggests that government supervision of self-regulated entities might be the best solution, saying:

Self-regulation appears to work best where the government maintains a presence either through supervision of self-regulatory functions or through residual enforcement powers. The structure breaks down when the small minority of the regulated members who are disposed to noncompliance are allowed to operate with impunity ... Self-regulation thus often works best when it functions in the "shadow" of government regulation ... There appears to be evidence that the advantages of self-regulation (e.g. flexibility, buy-in by the regulated industry, expertise, leverage of industry power) are genuine. There is, however, sufficient evidence of regulatory failures to indicate that the government cannot completely abdicate responsibilities to self-regulators in those areas where there is evidence of a regulatory problem that indicates the need for a government regulatory response (para. 237-239).

Ten years later, in 2007, the Competition Bureau Canada and its Commissioner challenged the self-governing, monopolistic policies of lawyers and were met with a feisty response from Iacobucci and Trebilcock (2008). The Competition Bureau Canada

(2007) issued a report evaluating self-regulation and competition in certain Canadian professions. Lawyers and legal services were included in the evaluated professions.<sup>5</sup> The report identifies “restrictions that give certain professionals exclusive rights to offer certain services” (p. 24) as one of the ways of reducing the competitive supply of services. With respect to lawyers specifically, the report criticized their monopoly saying:

The range of activities that is reserved for lawyers must be justified by a clear social benefit. An overly broad scope of practice for lawyers only raises costs for consumers by prohibiting alternative low-cost providers (such as paralegals and title insurers) from offering certain legal services. The FLSC [Federation of Law Societies of Canada] stated in its consultation submission that “the underlying rationale for [providing lawyers with an exclusive right to practise law] is to protect the public.” The Bureau acknowledges that this is valid but is of the view that it can be achieved without affording lawyers complete exclusivity on all legal tasks. (p. 70)

The Competition Bureau (2007) recommended that law societies were not appropriate regulators for paralegals or other competitors because of “the obvious conflict of interest” (p. 69), and that law societies need “compelling evidence of demonstrable harm to the public” before limiting or prohibiting others from “performing legal tasks” (p. 20). The Commissioner of Competition, Sheridan Scott (2007) voiced her support for the report’s findings and agreed that all regulations reducing competition should be examined against the harm done to consumer choice, prices and competition (np).

Iacobucci and Trebilcock (2008) responded promptly, challenging the foundation of the report,<sup>6</sup> testing an alternate analysis of the Ontario legal services market, and, using the Bureau’s own tests for competition in mergers, discovered that legal services appeared to be “robustly competitive” (p. 13). They contended that the Bureau had failed “to provide compelling evidence of serious concern about a lack of competition in the legal profession” (p. 23).

<sup>5</sup> Notaires in Quebec were included in the report but not notaries in BC.

<sup>6</sup> The Competition Bureau (2007) based its report on American standards of productivity and found that Canadian legal services were below standard. The report suggested that the lack of productivity was linked to regulation (p. 14), and regulation undermined competition (p. 15).

In their concluding remarks, Iacobucci and Trebilcock (2008) discuss the “tension” in self-regulation between professional self-interest and consumer protection (p. 37) and the need to balance professional independence with public accountability. They point out that potential conflict with respect to assuming regulatory responsibility for paralegals was a concern to lawyers and that the Law Society of Upper Canada (LSUC) had instituted a committee to work on “qualifications, roles and responsibilities of paralegals” (p. 29). Paralegals and lawyers were equally represented on the committee which also had a handful of lay benchers. Iacobucci and Trebilcock admitted it was too soon to assess if this initial step in the LSUC regulation of paralegals would satisfy concerns over conflict of interest.<sup>7</sup>

Iacobucci and Trebilcock (2008) then discuss “boundary questions” in the legal profession and claim that the Competition Bureau report did not recognize the complexity of these issues (p. 29-30). They refer to problems with title insurance in the US and recommend caution in opening up regulatory boundaries. As far as the conflict of interest in self-regulation is concerned, they claim that since only lawyers know enough about practicing law, lawyers are the right people to regulate lawyers (p. 35). They acknowledge the risks of self- regulation particularly:

... where the profession’s economic interests are at stake, such as the protection of a professional monopoly over rights to practice and in the discouragement of competitive practices among its members or the protection of obsolete or inefficient production functions. (p. 36-37)

But Iacobucci and Trebilcock (2008) do not discuss the risk. Instead, they point to the “least restrictive means” test as the appropriate test for setting the rules for professional competition. Their main point is that assuming the existing rules “restrict competition no more than necessary,” then the status quo should prevail unless there is

<sup>7</sup> The Morris report (2012) discussed below in chapter 4 found that the paralegals had been under-represented at convocation (the LSUC name for benchers’ meetings) because of higher than expected paralegal membership. Morris recommended rectifying the situation by basing the number of paralegal representatives on the same ratio as the number of lawyer representatives at convocation.

a “reasonably available regulatory alternative” (p. 40).<sup>8</sup> It would appear from the Morris report (2012) that Iacobucci and Trebilcock have prevailed in Ontario in terms of self-regulation, monopoly and regulation of competing legal service providers. Morris reported that among those surveyed, the LSUC was “universally viewed as the appropriate regulatory body” for paralegals (p. 12). However, the LSUC had “sidestepped” the issue of paralegal scope of practice, so had not yet faced the acid test for conflict of interest in matters of a financial or economic nature (p. 10). Ontario paralegals are discussed further in the context of the findings in chapter 4.

The Competition Bureau (2007) and Iacobucci and Trebilcock (2008) describe two different sets of criteria for government policy on self-regulation and competition for professional monopolies. As shown in the findings below, BC has not followed the Competition Bureau recommendations or Priest’s observation about self-regulation “in the ‘shadow’ of government regulation” (p. 237), but, over the study period has increased the powers and jurisdiction of the Law Society and has accepted with gratitude and praise the Law Society’s latest expansion to regulate notaries and paralegals (see section 4.4.2).

### **2.2.3. Advocates of reduced government powers over SROs**

Mr. Turriff, as President of the BC Law Society in 2009, delivered a passionate speech to the Conference of Regulatory Officers in Australia (Law Society of British Columbia, 2009) that was subsequently posted on the Law Society’s website. Turriff calls for reinforcement of independent self-regulatory power for lawyers, without interference by government or any other source. Turriff claims that there is a “constitutional imperative” for independent lawyers (p. 3). The only oversight that would preserve independence would be an ombudsperson with power to expose lawyers’ wrongdoing, but no other sanctioning power (p. 18). Turriff’s fundamental argument is that without independence, lawyers would be unwilling to challenge government on

<sup>8</sup> Iacobucci and Trebilcock (2008) refer to Sykes (2003) who argues that high stakes regulations tend not to change unless the alternative is certain and without doubt, whereas low stakes regulation is changed if the alternative is less restrictive regardless of its proven efficacy or its cost to regulators (p. 39-40).

behalf of clients and for Turriff, the lawyer's "duty of undivided loyalty" to the client is sacrosanct (p. 19). Ironically, Australia has been a leader in moving away from the stringent, bright-line boundaries of self-regulation described by Turriff. Since 1994, Australia has been gradually changing to a co-regulatory framework in the "consumerist-competitive mode" described by Semple, Pearce and Knake (2013, p. 277-8) where regulatory responsibilities are shared among lawyers' professional associations, independent statutory authorities and the courts. According to the Office of the Legal Services Commissioner in Australia (nd, np), "there is a general tendency towards investing more regulatory power in independent statutory authorities."

Turriff was espousing a radical departure from the current regulatory scheme in Australia, a return to the pre-1994 days. He was also describing essentially the regime of lawyer regulation in BC except that there is greater recourse against BC lawyers than the toothless ombudsperson recommended by Turriff. The Legal Service Providers Task Force (LSPTF) used Turriff's independence argument as the reason to reject regulation by a third party even though the Law Society as sole regulator would be more likely to risk conflict of interest in regulating itself and competing professions (Law Society, 2013, December 6, p. 16). Consequently, in BC, the Turriff arguments are on the verge of being put into practice with a sole SRO regulator of three competing professions, notwithstanding any increased risk of conflict or accompanying adverse effects on professional projects by the notaries, as discussed in more detail in chapter 4.

If the recommendations of the LSPTF are effected, notaries and paralegals will be swept under the Law Society's aegis thereby relieving government of any direct oversight or responsibility. Another possible avenue to reduced government involvement is to eliminate professional status, monopoly and self-regulation, and replace them with the business model. Feinberg (2011) claims this approach is already a *fait accompli* in the US (p. 89). In Feinberg's view (citing Pearce, 1995), the government should carry the onus to set standards and ensure access to justice. The corporate professional would comply with governmental edicts because it would be good business to do so (p. 95). In sum, Feinberg claims the business model would improve the quality and reduce the costs of professional services but only if the government stops regulating in the traditional, delegated manner.

Feinberg's business model is the polar opposite of Clementi's (2004) professional principles of integrity and duty to act in the client's best interests (discussed in section 2.2.4 below). Both Clementi and Feinberg see a role for government but for Clementi, the role is paramount as the ultimate independent overseer, whereas for Feinberg, the role is almost an afterthought to manage details not covered by the business model (p. 95). The Feinberg position also seems at odds with Trebilcock's (1978) suggestion that everyone in society has a stake in professional regulation (p. 12). Feinberg seems unconcerned with Trebilcock's goal of finding a balance among the interests, but seems to view the relationships in a hierarchical fashion with self interest and capitalism ranking ahead of government and public interest. Perhaps Feinberg's views simply mirror the views of global conglomerates that have been instrumental in the dramatic development of the special economic zones of China for the past thirty years. Regardless of the origins, Feinberg's views represent a fundamental reversal in the concept of lawyer as agent, fiduciary and social trustee. Abbott (1988) might signal this as a residual opportunity and might predict consequential changes in other parts of the professional system.

Flood (2011) and Feinberg (2011) are conceptually complementary, but while the latter advocates, the former observes. Both authors examine changes in the form of the professional service delivery model. Both seem to agree that the professional priority in the client's interest has been superseded by self-interest. Flood describes the rise of "global professional service firms" or GPSFs and how they have successfully negotiated freedom from key aspects of regulatory control. GPSFs have convinced law makers in the United Kingdom that their sophisticated corporate clients have stringent internal policies governing such controversial matters as hiring professionals with a potential conflict of interest. Further government-imposed regulation would be superfluous and unnecessary (Flood, 2011, p. 521). Additionally, the GPSFs' internal standards and regulations meet or exceed those stipulated by the independent government regulator, the Legal Services Board (LSB). Consequently, GPSFs have become essentially autonomous, freed from the mainstream of oversight and regulation under the LSB with relatively minor residual LSB reporting requirements (Flood, 2011, p. 517, 518).

While the GPSFs have some similarities to Feinberg's business model, there are also differences. The GPSFs do not appear to consider social responsibility whereas Feinberg (2011) stresses it as an integral part of the business model (although he offers no proof of his claim). The GPSFs seem to increase the mystique about expert knowledge and widen the gap with common knowledge by effectively removing themselves from public scrutiny, whereas Feinberg suggests that the business model would democratize legal knowledge and encourage compliance with governmental requirements as a matter of good business practice. The GPSFs compliance with governmental requirements is accomplished only through negotiating exceptions for themselves. This seems like specious compliance at best. In the end, GPSFs legitimately exist in the professional business world while the validity of Feinberg's opinions remains untested.

In terms of the BC notaries ambition for greater jurisdiction and professionalization, it is possible that individual notaries could perform broader services as employees or otherwise under the auspices of a GPSF, but that would not address the notaries' collective desire for more scope and it contemplates an entirely different business model from the one used by the historically independent sole practitioner notary.

#### **2.2.4. Critics of self-regulation**

The following literature includes critics of deficiencies in self-regulation as well as advocates for independent regulation to replace self-regulation. In each case, the problem being addressed has an effect on professionalization projects or inter-professional conflict.

Tuohy (1976) examines the benefits and detriments to society of characterizing regulated professionals as either private government or stewards of public property. She suggests that Western nations tend to treat professionalism as a private right vested in groups, conditional on fulfilling social obligations (p. 674, 681). Tuohy (1976) points to health reforms in the 1970s, saying that technological advances and the welfare state would conflict with and eventually overwhelm the private rights of professionals (p. 678).



Instead, Tuohy suggests that professional technologies should be public property, professionals should be “stewards of their skills” (p. 679), and that knowledge should be equitably shared in society. Rather than delegating self-regulation to the professionals, governments should make the necessary institutional changes and retain control over professional technologies and knowledge as public property (p. 681). Brockman (1996) reports similar recommendations from the Manitoba Law Reform Commission (MLRC) to the effect that a government supervised body (GSB) should hold ultimate control over all professions (p. 305). Tuohy’s concept for the relationship between government and the professions is prescient of Clementi’s (2004) recommendations and the Semple et al. (2013) consumerist-competitive mode of regulation, both of which neutralize the forum for professionalization.

Brockman’s 1998 cross country survey of Canadian SROs reveals various methods of monopoly preservation, and discusses possible trends in self-regulation. First, she reviews the common arguments for and against regulation. Regulation is justified on the basis that it compensates for the “information gap” (Brockman, 1998, p. 593). Consumers are ill-equipped to evaluate the competence of professionals, so state sanctioned licencing is a condition precedent to entering the profession. On the critical side (and consistent with Brockman and McEwen, 1990), Brockman (1998) found little evidence in the literature that licencing requirements improved the quality of service (p. 596-597). Furthermore, licencing “eliminates consumer choice” (p. 597), and evidence generally shows that licencing increases costs to consumers, encourages work hoarding and could lead to over-training (p. 599). Brockman (1998) then looks at the licence as a form of property (p. 600) extending the reach of government through delegation, a concept also identified by Adams (2009) and Tuohy (1976). Brockman (1998) reviews various methods employed by SROs to protect their turf (p. 601) including litigation for breach of statutory monopoly (in some provinces with additional criminal sanctions), forfeiture of fees from illicit practice, injunctive relief, litigation in tort, pursuit of law reform, and seeking new power to subsume or supervise an encroaching occupation. In

short, Brockman (1998) shows that the origins of self-regulated organizations are to protect members from encroachers and have little to do with public interest.<sup>9</sup>

Finally, Brockman (1998) identifies four trends in professional regulation, namely:

- multiple licencing where more than one occupational group shares the exclusive monopoly;
- more public consultation when self-regulated organizations are created;
- more public representation in the governance structure of self-regulated organizations; and
- the conflict-inducing delegation of law-making power by enabling the professional organization to prepare its own codes, bylaws and regulations and only sometimes requiring approval by cabinet to enact (p. 607-612).

In BC, the Law Society has had public representation at the benchers' table since 1988 but the lay benchers have remained a minority (31 benchers all lawyers except six). Lay benchers have become eligible to serve on bencher committees where their participation may be more influential. This manner of incorporating outside voices in Law Society governance does not affect the lawyers' control over their profession, nor does it solve conflict of interest in regulating competitors and their professional projects. But, it does give the Law Society a tangible, risk-free example to bolster their credibility with the government and the public as a servant to the public interest thereby reinforcing their main professionalization project of maintaining their grip on self-regulation.

Perhaps the most prominent and influential proponent of professional governance by independent body is Clementi (2004). His report was the catalyst for changes in the regulation of legal services in England and Wales that moved ultimate control to a newly constituted LSB made up of a majority of non-lawyers. The LSB's chair and CEO are appointed "by the Secretary of State in consultation with a senior member of the judiciary" (p.83) in an effort to balance independence with the rule of law. The LSB reports directly to parliament and controls entrance to the profession. The

<sup>9</sup> Interestingly, the Law Society did not approve public interest as its sole object and duty until September, 2010 and then only after "spirited debate" (Hainsworth, 2010). Furthermore, the *Legal Professions Act* (LPA) retained an object and duty of "upholding and protecting the interests of its members" until January 1, 2013 when it was finally deleted from the *Act*.

“front line organizations” have two arms, one to represent the profession and the other to handle regulation, discipline and misconduct (p. 10-11). Consumer complaints are handled by a subsidiary of the LSB, not by the front line organization (p. 80).

Clementi suggests that the basic professional principles should be independence, integrity, duty to act in the clients’ best interests and confidentiality (p. 21). Duty to protect the professionals’ self interest is noticeably absent. Clementi’s concepts are the antithesis of the policies evident in BC during the study period when successive governments have enhanced the power and authority of the Law Society as an SRO. My research did not reveal any instance when the BC government refused a request from the Law Society for legislative change to their governing *Act*. The government has not had the same response to notaries’ professional projects.

Turning now to the monopoly enforcement aspects of self-regulation, Brockman (2010) reviews all actions for unauthorized practice by the Law Society between 1998 and 2006. She finds that most cases are resolved by undertaking, that there are no prosecutions under the *Legal Profession Act* (LPA), and that injunctive relief and contempt proceedings are the exclusive avenues pursued for cases that could not be settled (p. 16). She reports that in her research, “more cases [were] in the ‘meeting an unfulfilled need’ category than those falling in the ‘harm’ category” (p. 39). Also, the LPA penalties (which were not pursued) were less than those for injunctions, and she questions the equity of that situation (p. 40-42). For Brockman (2010), the fair process and arguably the one contemplated by the legislators would be to require the Law Society to exhaust its remedies under the LPA first, or, obtain governmental approval before being eligible to pursue injunctive relief (p. 42). So far, the BC government has not moved to amend the legislation. If the LSPTF recommendations are effected, then the Law Society may have another arrow in its unauthorized practice quiver. In addition to the Law Society’s present remedies, notaries and paralegals working outside their allotted scope as licencees or entities regulated under the Law Society might lose their licence or permit to practice.

Finally, with a view from the USA, Rhode (2013) advocates consumer and competition enhancing changes to the entrenched self-regulation of lawyers in that

country. She is critical of the American Bar Association (ABA) for failing to adopt modifications to the regulatory system that recognized the impact of technology and globalization on the legal profession. She says that the ABA's success has been its downfall:

In no country has the legal profession been more influential and more effective in protecting its right to regulatory independence. Yet that success, and the structural forces that ensure it, has also shielded the profession from the accountability and innovation that would best serve public interest (p. 244).

Rhode (2013) goes on to describe the Clementi (2004) process in the UK with their incorporation of non-lawyers, suggesting that if the ABA was interested in access to justice and cost-effective delivery of legal services, they would have to re-examine their claims to "inherent jurisdiction" (that is, turf), and their "one size fits all" standard of education (p. 245). She says that while inherent jurisdiction may protect lawyers from political influence, it also diverts any criticism and prevents public participation in the regulatory process. As far as legitimizing the use of non-lawyers is concerned, Rhode bemoans the lack of legislative will to make it happen (p. 247) and points out that unauthorized practice complaints are more or less blatant turf protection, as they rarely come from the public or included evidence of harm. Brockman's (2010) results support Rhode's contention about the source of unauthorized practice complaints.

Rhode's key argument for bringing non-lawyers into the profession is based on the Moorehead Paterson (2003) study in the UK, the Morris (2012) report on the Ontario paralegal experience, and other US studies, all of which show the value of non-lawyer specialists as follows, respectively:

- it is specialization not professional status which appears to be the best predictor of quality
- solid levels of public satisfaction with the services received [from non-lawyers]
- lay specialists who provide legal representation in bankruptcy and administrative agency hearings find that they generally perform as well or better than attorneys. Extensive formal training is less critical than daily experience for effective advocacy (p. 249).

Rhode (2013) says:

To the extent that the goal is to protect clients from incompetence, rather than lawyers from competition, regulation, not prohibition, of lay specialists makes sense ... a consumer-oriented approach would make for a more socially defensible regulatory structure than the conventional ban on non-lawyer practice irrespective of its quality and cost-effectiveness. (p. 249-250)

As far as non-lawyer investment in legal services is concerned, Rhode (2013) outlines the traditional objections and notes that in the jurisdictions where it has been permitted to some extent, there is no evidence of the anticipated problems (p. 251). Furthermore, research shows that innovation “most often comes through interactions with those in related fields” so collaboration and investment from the outside might be a boon to keeping the legal profession vital and competitive, says Rhode (p. 254).

Finally, Rhode (2013) looks at education of lawyers as a function of “rising costs, declining applications, reduced job placements and disaffected students” (p. 254). She says that law school standards:

... impose a ‘one size fits all’ structure that stifles innovation and leaves many students both under-prepared and over-prepared ... legal practice is increasingly specialized and it makes little sense to require the same training for a Wall Street securities lawyer and a small town family practitioner. Three years in law school and passage of a bar exam are neither necessary nor sufficient to guarantee proficiency in many areas where routine needs are greatest, such as uncontested divorces, landlord tenant matters, immigration and bankruptcy. The diversity in America’s legal demands argues for greater diversity in educational structures. (p. 255)

Rhode’s arguments are equally applicable to the claims of inherent jurisdiction and the ‘one size fits all’ education of lawyers in British Columbia. The impediments she describes in the ABA (regulatory independence, resistance to non-lawyers and competition, single standard education) are the same impediments to BC notaries gaining expanded scope, status and professionalization.

## **Chapter 3.**

### **Collecting Data: The Methods**

#### **3.1. To Begin: A Timeline and an Interview Schedule**

The impetus for this research began with the simple question “what happened between lawyers and notaries between 1981 and 2013?” Gradually over approximately a year and a half, that simple question was refined, and additional research questions and the methods for collecting data were developed. From the outset, I planned to include interviews in the research design for three reasons. First, given the relatively recent study period, a sufficient number of key informants were expected to be available and agree to participate. Second, interviews could provide background, context and interpretation of the events during the study period beyond that available publicly. Third, despite the limitation of subjectivity, interviews had the potential to reveal controversy, agreements, motivations, intentions, hidden agendas, successes, failures and other explanations for the trajectory of events during the study period and the changes in relationships among the parties. The aim was to interview key informants representing a balance of lawyers, notaries and government, and a variety of capacities, affiliations and perspectives within those categories.

However, before the interviews could begin, I wanted to have a timeline of events that could anchor the interviews. The timeline was also important because the basic thrust of the research was to tell the story of “what happened,” so my priority was to identify the important events in sequence, and then to identify possible key informants. Data were gathered from publicly available information about the interaction among lawyers, notaries and government during the study period (1981 to the end of 2013). The sources included the websites of the Notaries Society, Simon Fraser University (SFU), the Law Society, the CBABC and the Internet Archive: Wayback Machine for

each of these organizations. Each of the websites was combed for information about changes to the status, reputation or operations of the Notaries Society during the study period. The Law Society and CBABC websites were also searched for any information about notaries' and lawyers' interaction and other relevant matters. The SFU website was searched for information about the Master's program for notaries. Other public sources of information about BC lawyers and notaries included reports of court cases, Canadian Newsstand, published print news reports collected by a private clipping service, statutes and the Official Report of Debates of the Legislative Assembly (Hansard) of British Columbia.

From these sources, a timeline was constructed and refined into six, point form significant events affecting notaries and lawyers during the study period. A seventh event was added in response to the first three interviews and, for clarity, two events occurring in the same year were separated creating an eighth event. Table 3.1 shows a form of the timeline used in the interviews. After preliminary informalities, the timeline was handed to the participant and used to guide the interviews.

**Table 3-1 Form of Timeline Used in Interviews**

<b>Eight key events since 1981</b>	
1.	<b>1981 new Notaries Act</b> proclaimed codifying the 1955 gentlemen's agreement with cap on number of seals, geographic territory for each seal, and deleting the requirement for a "needs" test.
2.	<b>1989-90 Notaries' proposal to expand jurisdiction</b> to include probate of simple wills and incorporation of non-reporting companies (among other things).
3.	<b>2000 McCallum report and 2002 McClean report</b> recommending that notaries be empowered to draw representation and other health care agreements (legislation passed 2007, enacted 2011).
4.	<b>2007-2008</b> Notaries announcement of overhaul of education requirements and the first cohort are admitted into the new <b>Master's of Arts in Applied Legal Studies</b> at SFU.
5.	<b>2009:</b> geographic restrictions and numbers cap deleted (TILMA).
6.	<b>2009:</b> international wills added to scope of practice (WESA) legislation passed 2009, enacted 2014.
7.	<b>2010 Notaries' proposal to expand jurisdiction</b> to include probate of simple wills, incorporation of non-reporting companies and simple uncontested divorce proceedings, and subsequent developments (see 8.).
8.	<b>2013</b> Notaries represented on Law Society's <b>Legal Service Providers Task Force</b> , starts January, final report December recommending LSBC as the sole regulator for notaries, lawyers and paralegals; Benchers approve immediately and move forward.

Interview schedules were customized for each participant depending on their involvement over the study period. The semi-structured interviews revolved around two

basic questions: what do you know about the events, and, why do you think the events turned out the way they did? Predominantly open-ended questions were asked and the participants were encouraged to elaborate. As a result, some interviews were less structured than others. An example of the content of the interview schedule is attached as Appendix A. The format of schedule used in the interviews included space for notation under each discussion point.

### **3.2. Interviews – How, Where, Why and Who**

Fifteen interviews were conducted with fourteen participants and all were in person except for one by telephone for the convenience of the participant. I also used an interview with one of the participants from a broadcast of BC Almanac on CBC radio (Forsythe, 2013). All interviews other than the one from CBC were audio recorded with permission from the interviewee. All participants had first hand knowledge of one or more events on the timeline. The name, contact particulars and occupation of all participants were public information. In addition, all participants either were previously known to me or dealt with the public as part of their occupation. In accordance with the terms of approval from the Office of Research Ethics (ORE) at SFU,<sup>10</sup> participants were not promised confidentiality or anonymity since key informants could be identified by the content of their responses. All participants agreed to attribution of their comments and no one requested anonymity. Notwithstanding the participants' agreement to attribution, most participants are identified by occupation because their capacity was more revealing than their name. Few if any of the participants would be recognized outside the legal community, and even then, I doubted if many lawyers would recognize the names of notaries and vice versa. Several participants are named when it added to the context. For example, Dr. Gordon is named when talking about the notaries' education program at SFU because he is the Director, founder and spokesperson. Each interview began with confirmation that the participant had received and agreed to the interview conditions

<sup>10</sup> A copy of the ORE approval dated September 23, 2013 has been filed at the Theses Office of SFU, as confirmed by the ethics statement at page iv of this thesis.



set out in the request for participation that had been previously forwarded to them in the form approved by ORE.

The interviews took place in the office of each participant except for the telephone interview, one interview in a coffee shop, one in the participant's home and one in a hotel business centre, all at the request of the respective participant. All interviews were conducted in the Lower Mainland except for one in Victoria and one in Kelowna. The length of the interviews varied from just under an hour to more than an hour and a half. Most lasted a little over an hour.

### **3.3. A Public Consultation Meeting, Too**

Before beginning the interviews, I attended a public consultation meeting in Victoria at 4 p.m. on Monday, September 16, 2013 convened by the LSPTF. The LSPTF was a committee constituted by the benchers of the Law Society in December 2012 to make recommendations to the Attorney General about (among other things) whether the Law Society should become the sole regulator of all legal service providers in British Columbia. The members of the LSPTF included a representative from each of the Notaries Society and the BC Paralegal Association (Paralegals). (The LSPTF is one of the events discussed more fully in section 4.4.2). Short notice of the meeting was announced by press release on September 5, 2013 on the Law Society's website and directly to Law Society members. It would appear from the attendees that the Notaries Society and the Paralegals also distributed notice to their members. The meeting was held in a half ballroom meeting space at the Hotel Grand Pacific on Victoria's waterfront. The room had been set up in a formal, theatre-style with rows of chairs for the audience facing a long, white cloth-covered table with chairs behind for the panel. The meeting was conducted by the chair of the LSPTF accompanied by three of the six other members of the task force. The four of them sat at the long table at the front of the room. An in house lawyer in the Policy and Legal Service Department of the Law Society sat in the audience and participated when requested by the chair.

As the meeting began, there were approximately 20 attendees, most of whom identified themselves later during the question and answer portion of the meeting as

paralegals or notaries. There were also a few lawyers, one lifetime (and former lay) bencher of the Law Society and at least one interested member of the public (me). More attendees arrived after the meeting began. The agenda for the meeting was a PowerPoint presentation by the chair and the rest of the panel outlining the mandate, research and deliberations of the LSPTF to date. The presentation took approximately half an hour. The presentation ended with the task force asking the audience for comments on the task force's mandate. Comments and questions from the floor followed and were fielded by one or more of the panel at the front. The meeting lasted approximately 90 minutes.

At the end of the meeting as people were milling about, I introduced myself to each of the chair and members of the LSPTF, all of whom confirmed willingness to participate in this research. The chair and two of the three other LSPTF members at the meeting were subsequently interviewed. Since the meeting was public and tantamount to a group interview, I obtained permission of the chair and the attendees to audio record it for this research. The audio was transcribed, imported into *NVivo*<sup>11</sup> and coded along with the interviews.

### **3.4. Choosing Participants**

The list of prospective participants developed gradually over time, beginning with my contacts who were involved with the Law Society. As the timeline was developing, the list was supplemented and modified. During the interviews, more changes were made to the list. To enable this flexibility, prospective participants were contacted gradually as the interviews and timeline research indicated that the person had some unique perspective or capacity and would make a valuable contribution to the research. In the end, all key informants contacted for an interview agreed to be interviewed except for two. Other comparably qualified key informants filled the gap.

<sup>11</sup> *NVivo* is software that, among other things, permits documents like the transcripts to be stored and analyzed by assigning codes to a portion of each transcribed interview. Scott and Garner (2013) describe the process as “analogous to putting a sticker on a file folder” (p. 360). For further basic information about *NVivo*, please see Scott and Garner, 2013, p. 355-373.

Currently sitting politicians, in particular, the present or recent Attorney General in the ministry responsible for lawyers and notaries, were not approached for an interview. It was unlikely that any Attorney General involved with the LSPTF or the events leading up to the LSPTF would be willing to comment because they had delegated deliberation about the regulatory scheme for legal services to the Law Society and the LSPTF. The status of the notaries went into limbo in late December 2012 when the task force was convened and while it was deliberating. Then, following the task force's recommendations and final report in December 2013, the limbo continued while lawyers and notaries (and paralegals) worked out implementation plans. Several participants suggested it could be a couple of years before an implementation plan for notaries was presented and a decision made by government whether or not to proceed with the plan. Until then, the Attorney General was likely to take no position on the machinations between lawyers and notaries because her hands were tied while someone else was looking into it. Consequently, an interview with the sitting or recent Attorney General was not requested.

The interview process began with the notaries in September 2013 and finished with the lawyers at the end of February 2014. There were three reasons for this choice of order. First, I was familiar with lawyers, having practiced law in British Columbia for the first 25 years of the study period, but did not have the same quality of knowledge about notaries. Second, in compiling the timeline of events, the Notaries Society website disclosed substantially less information than the Law Society website. Third, the lone notary member of the LSPTF had already agreed to participate and was the only one of the four LSPTF members at the Victoria meeting who was located in the Lower Mainland, so arranging an interview with him appeared to be relatively easy. And it was. Interviewing notaries first allowed me to explore and substantiate the notaries' perspective on the events which in turn provided a platform to explore lawyers' perspective on the events.

As to the ultimate composition of participants, there were one academic, five notaries, four lawyers and four lawyers with one or two additional occupations during the study period, such as teaching notaries in the Master's program at SFU, or sitting as a member of the legislative assembly, or both. Those participants who did not have

multiple occupations held responsible positions within their respective professional organization. Specifically, the participants held the following positions: two former Attorneys General for the province, three former or current benchers of the Law Society, two former Presidents of the Law Society, a former president of the CBABC, a former Court of Appeal judge, seven practicing lawyers, three lawyers who taught in the Master's program for notaries at SFU since its inception, two lawyers who represented the notaries in one capacity or another, four former directors of the Notaries Society, three past presidents of the Notaries Society, the current and immediately preceding CEO of the Notaries Society, three practicing notaries, and the founding Director of the Master's program for notaries at SFU.

### **3.5. Interviewing Elites**

Scott and Garner (2013) write about “elites” as “people with more power or social status than the interviewer” (p. 288) and discuss strategies for dealing with them as research participants. If they agree to be interviewed at all, some elites try and “spin” the interview with pre-planned answers consistent with their organizational objectives. As research data, “canned” responses are potentially superficial and less than satisfactory.

Based on Scott and Garner's description, most of the participants in this research probably would consider themselves elites, and might have considered me a subordinate despite my credentials as a lawyer. To counter the possible problem with elitism, I did not accept the offer from my thesis supervisor that she make initial contact with participants. Instead, direct personal contact was made with each participant, affording a chance to introduce myself as a former colleague, an equal, with a shared history of mutual experiences in the profession. The tactic was to capitalize on connections with the participants, thereby opening the possibility for more genuine, less rehearsed responses. Regardless of the participants' attitude, all of them were asked to explain or expand their answers, to comment on criticisms and opposing views, and generally to talk about their own and others' motivations, goals and objectives behind the events and for the future. The data include some passionate responses.

### **3.6. After the Interviews**

After the interviews were completed, the study period was defined as ending with the delivery of the final report of the LSPTF in December 2013. This seemed a natural place to stop since the implementation of the report, if it went ahead, could be several years away. The timeline was revised and amplified using information from the interviews. While working on the revised timeline, one of my contacts who had made Freedom of Information requests concerning notaries, gave me a copy of the responses, and this information was incorporated in the timeline. In an effort to confirm public information, the Law Society was approached to provide information about references to notaries in bench minutes and agendas during the study period. The Law Society volunteered the information as requested. A similar request was made to the CBABC. They searched their files but did not find anything new to contribute to my existing archival data.

### **3.7. The Approach to Coding**

The interviews (along with the audio from the public consultation meeting in Victoria and the CBC interview previously described) were transcribed, imported into *NVivo* and coded into themes and events. A portion of the transcription was undertaken by a reliable, accurate and patient assistant who had reviewed the request to participate in the form approved by ORE, including the description of the researcher's responsibilities, and had agreed to abide by those terms. The audio recording of the interviews was transferred to a USB stick and hand delivered to her. She spent three hours on each transcript (other than the CBC interview) that, in aggregate, turned out to be less than half the time required for the entire transcription task. She emailed her work to me, deleted it from her computer and returned the USB stick to me by hand. I reviewed her work against the audio recording, filled in problem words or passages when possible and completed the transcriptions. Initial transcriptions were verbatim including speech mannerisms. The mannerisms were deleted in the quotations for the thesis. Transcriptions did not include the occasional digression into irrelevant matters like holidaying on Vancouver Island, but the subject matter was noted along with the duration for future reference if necessary.

Themes from the public consultation meeting were coded first and primarily inductively using language in the transcript. As I worked through the transcripts of the interviews, analytic themes were added to the coding, such as “differences between lawyers and notaries,” “notary autonomy” and “turf.” I added new themes in order to capture nuances, rather than force interview data into a loosely fitting existing theme. For example, the node for “public interest” eventually had five sub-nodes for the different types of public interest under discussion. Most passages were coded at two or more thematic nodes and virtually every coded passage was also coded by event based on the timeline. The participants were classified by occupation using all their occupations (for example, lawyer, politician and judge).

After some exploratory queries using word frequency, coding queries were run on the data to assist in formulating the findings from the research. The eight events were analyzed by occupation (academic, lawyer, notary) to ascertain which group had the most to say about which events. The number of responses and participants for each event was compared to see which events were most popular. Not surprisingly, more participants had more to say about the more recent events.

Coding of themes was revised and refined three times as patterns, subsets and duplications were identified. Eventually, there were over 80 themes and eight events. When the archival and interview material was reviewed as a whole, themes and trends over the study period emerged for the lawyers, notaries, CBABC, courts and government. Based on the apparent patterns, the 80 themes were consolidated into predominant themes or trends for each party, as described in more detail in section 4.5.

### **3.8. Methodological Limitations**

There were several methodological limitations to this study. The collection of data from public archival sources (clipping service, websites, databases) was subject to

the usual limitation of selective deposit and survival.<sup>12</sup> With respect to data from the interviews, key informants may have presented only their particular occupation's or organization's desired version of events without revealing motivations, background, strategies or objectives. These participants might be particularly likely to do so as they were all (other than the one academic) members of self-regulating organizations that had serious historic conflicts with each other. The impact of this potential bias was reduced by interviewing key informants representing a balance of perspectives from all involved parties, thereby incorporating inconsistencies and disputes into the data, along with agreements among the parties.

Similarly, there were more interviewees who had completed law school and were called to the bar than those who had completed their notary education and received their seal. This ostensible inequality of representation was addressed by choosing lawyer participants who had some relevant connection to the notaries. Four of the eight lawyer participants could be characterized as aligned with notaries in a supportive capacity by virtue of years of teaching or representation, thus occupying a position on the fulcrum and leaving the five notary participants to balance against the other four lawyer participants. The goal was to develop a balanced study by interviewing key informants with a variety of perspectives on the timeline of events.

The final limitations pertain to money and me. I was unable to collect any formal financial information about the proposed merger of the notaries into the Law Society. This deficiency is discussed in more detail in section 5.7. As for me, my background probably had impact on the research. I was a member of the Law Society for two and a half decades, practiced as a solicitor in a large firm and served on several committees of the benchers. This potential bias was minimized in a number of ways. I resigned from the Law Society eight years before undertaking this research. In the intervening years, I had little contact with lawyers and engaged in pursuits unrelated to the practice of law. In addition, I came to the practice of law after working in the arts and as an entrepreneur. Furthermore, I made a conscious effort to be vigilant for my own preconceived notions

<sup>12</sup> Selective deposit means the likelihood that any particular information would have been added to the historical record, and selective survival means the likelihood that once information is in the historical record, it will still be there over time (Palys and Atchison, 2008, p. 428).

about lawyers or notaries. Assuming any bias was minimized, the advantage of my experience was a view from both inside and outside the legal profession.



## **Chapter 4.**

### **Findings and Analysis**

Findings and analysis are presented sequentially by decade, followed by additional analysis of themes and trends from the findings in section 4.5.

#### **4.1. The 1980s: Turf, Trust, Honour and Control**

The decade started with the notaries relying on publicity and politics to escape the chokehold of lawyers and judges, and ended with the notaries testing the strength of their political goodwill.

##### **4.1.1. “An offer they couldn’t refuse”: The battle for survival**

As the 1980s began, the notaries were faced with increasing likelihood of extinction. Their governing legislation had not been amended to reflect the 1955 gentlemen’s agreement (GA, discussed in chapter 1) that remained an undocumented understanding between the Law Society and the Notaries Society. Contrary to the GA, the *Notaries Act* gave the courts power to adjudicate the limitations on notaries. Every application for a new seal (whether from a newly qualified notary or as a result of a proposed transfer from one notary to another) depended on convincing a court that there was a “need” for that seal in the area where the notary was intending to practice.

In contrast, under the GA, the Notaries Society agreed that the number of seals would not be greater than the existing number (around 300) and the lawyers agreed not to challenge any dealings with those 300 seals. The Law Society and the Notaries Society both agreed not to challenge amendments to the other’s governing *Act* (Brockman, 1997, p. 212). The GA functioned smoothly for almost 20 years. Then,

beginning in the early 1970s, groups of rogue lawyers from local bar associations began using the courts to enforce the old “need” test and successfully prevent the issuance or transfer of seals. The lawyers’ success rendered the notary seals nugatory. New notaries were prevented from entering the profession and existing notaries could not sell or expand their practices. If the courts continued to support the lawyers, the number of notaries would diminish by attrition until eventually there would be no notaries working in British Columbia.

In 1980, the chief executive officer of the Notaries Society was its secretary, Dr. Bernard Hoeter who, from all accounts, was an impressive and confident leader (see for example Rutherford, 2006, p. 19, Skinner, 2006, p. 20 and Sablok, 2006, p. 23). The situation with the Law Society claiming its own compliance with the GA while ignoring the renegade lawyers who contravened it, did nothing to help the notaries. The simplest, perhaps the only viable option was to get the legislation changed. That would require political support and co-operation from the Law Society.<sup>13</sup>

The notaries’ urgent quest for a legislative solution began formally at their 1979 annual general meeting where the directors were deputized to pursue legislation to end the lawyers’ blockade (Hoeter, 1991, p. 203). Their first step was hiring H.A.D. Oliver Q.C., a prominent member of the bar to draft the appropriate legislation. With the draft in hand, Dr. Hoeter and a group of directors of the Notaries Society met with then Premier Bill Bennett and Attorney General Allan Williams in July 1980. Dr. Hoeter reported that the reception was “cool” so the Notaries Society decided to go public with their problem (p. 203). The strategy of the Notaries Society for acquiring their new governing legislation in 1981 was later described by Dr. Hoeter in an interview for *The Scrivener*:

... together with then-President of the Society Roy Bishop ... we got the damn “need” clause out of the *Notaries Act*. He and I traveled to Victoria every second week. We solicited the assistance of Members of [the

<sup>13</sup> There was (and continues to be) an understanding within the Ministry of the Attorney General that the Law Society be consulted about any legislative changes affecting legal services. The justification for the practice is the Law Society’s responsibilities under the *LPA*. The Attorney General and the legislature must still exercise their discretion notwithstanding the Law Society’s recommendations.

Legislature] and the Attorney General and we made it. Vancouver Sun reporter Kayce White helped a lot with her newspaper articles. The new Act effectively cut the umbilical cord from the Law Society. (Wilson, 2006, p. 26)

By the time the notaries met with the Premier, the notaries were already media darlings through coverage of the *Drew* and *White* cases (Brockman 1997, p. 221). In 1980, the Court of Appeal confirmed the 1979 decision of the lower court in *Drew*, denying him a seal by transfer on the basis that no “need” had been established. Later that year, the *White* case was successful in establishing need and acquiring a seal by transfer. The *White* decision was made in the wake of public attention and private support for her application (Brockman, 1997, p. 221).

While the courts seemed to flip flop, Mr. Oliver encouraged the Notaries Society to stay the course. In his keynote speech at the Notaries Society annual general meeting in September, 1980, Oliver called the lawyers’ attacks on notarial appointments “selfish and ill-considered,” questioning the *bona fides* of the attackers. He challenged whether lawyers really protected the public better than notaries when lawyers received “no training at law school in basic notarial practice. If lucky, [law students] may obtain a little practical experience in these fields during one year of articling” he said (Hoeter, 1991, p. 206). In an interview with the *Vancouver Sun* the following month, Oliver suggested the impetus for the attacks on notaries was “too many law school graduates ... competing for previously unattractive business” (White, 1980, p. D1).

The Notaries Society kept their problem in the public milieu. They gave interviews, wrote letters to the editor that were published in prominent positions in the *Vancouver Sun*, and collected supporters. In January 1981, they delivered a petition of more than 30,000 signatures to the Premier, asking for help to stop the lawyers (“Premier petitioned,” 1981).

Meanwhile, during the summer and fall of 1980, the Law Society appeared to cooperate with Mr. Oliver and the Notaries Society in negotiating the new legislation (Collins, 1980). At the same time, media reports indicated that lawyers and the Law Society were attempting to justify and obviate responsibility for the attacks on notaries. They pointed to the dramatic increase in lawyers since World War II who were “available

to do the work previously performed by notaries. Lawyers began to question the rationale for the continuance of these notaries” (Tait, 1980). The Law Society confessed “our members are mad at us because we’re honouring the gentlemen’s agreement” (Tait, 1980). The papers reported that lawyers who were attacking the notaries defended their aggression because they believed that lawyers “can do the work better” than notaries (Collins, 1980). The President of the Vernon Bar Association claimed ignorance of the GA and quipped “this is a fairly young group of lawyers here. I was probably stealing hubcaps when they made that agreement. Had we been aware, we might have discussed the matter with the law society” (“A-G takes action,” 1980). Ultimately, the Deputy Secretary of the Law Society excused his organization by suggesting that it could not control the lawyers who were attacking the notaries. “Who can say what a group of lawyers in any particular area are going to do?” (White, 1980).

The media coverage prompted support for the notaries from MLA Peter Hyndman, an experienced lawyer and former Secretary-Treasurer of the Vancouver Bar Association. In August 1980, he raised the news report of the *White* case in the House, lamenting the “resumption of some very old hostilities” (Official Debates, August 14, 1980, p. 3949) and “a form of local civil war between lawyers and notaries, ending up in the courtroom” (p. 3950). Hyndman contended that the situation was disadvantageous to both sides and confusing for the public. He advocated a “truce” while the Law Society and the Notaries Society worked out a legislative solution to present to the Attorney General (p. 3950). He also asked the Attorney General to intervene if the battle in court and the media continued. The proper place for the debate was in the legislature, he said, as any change to the jurisdiction of lawyers and notaries was “a matter of public policy” (p. 3950).

Hyndman was not alone that day. MLA Dennis Cocke from the other side of the House was less conciliatory in his criticism of the lawyers’ actions, saying:

I suggest the notaries are scared to death. Those that are there probably don’t want to rock the boat too much. There is a problem ... That vacancy is not to be filled, as far as the local lawyers are concerned. They’re saying: “There’s lots of us.” The only problem is they’re not available, and they cost more money. I might be dead wrong but it strikes me that this cabal of lawyers in this province pretty well runs the legal affairs, and I think that maybe the Attorney General should give us his impression of

what he feels should be done in terms of giving the notaries an opportunity to practice, and giving them the opportunity not only to fill vacancies but maybe to better reflect the population as it now stands. (p. 3951)

In response to Messrs. Hyndman and Cocke, Attorney General Williams agreed that the fighting was not in the public interest, but a “retrograde step” (Official Debates, August 14, 1980, p. 3953). He confirmed that the Law Society and the Notaries Society had been working together on the legislative solution, and while that was taking its course, he would speak to the Treasurer of the Law Society to see if he could take steps to keep the matter out of the courts and avoid undoing “so much of what has been properly adjusted over recent years” (p. 3953).

The new legislation took months to negotiate and the Notaries Society did not get everything they wanted (Brockman, 1997, p. 223). They had proposed tying the number of seals to population on the basis of one seal for every 5,000 people. They also wanted the power to set up new notarial districts, to require retirement at age 75 and to deal with inactive seals (White, 1980). The notaries got none of these things in the new legislation.

Instead, the notaries’ private bill was negotiated with the Law Society and then delivered to Attorney General Williams who presented the legislature with a public bill in late June 1981. The new *Act* was consistent with the GA in that seals could be transferred freely from notary to notary within the prescribed territory without having to convince a court that there was still a demonstrable public “need” for a notary in that territory. In introducing the bill for second reading, the Attorney General said that the “need” test was retained only for “areas of the province which perhaps were not identified in the established notarial districts” (Official Debates, June 26, 1981, p. 6458). The government had incorporated the provisions from the notaries’ private bill, said the Attorney General, as well as “[making] the necessary housekeeping changes and [modernizing] the statute, thereby enabling the notaries’ society to better discharge its responsibilities” (p. 6458). The Notaries Society was successful in gaining operational independence from the Law Society in that approval from the Law Society was no longer needed to amend the bylaws of the Notaries Society. At last, the notaries could use

their own discretion about the workings of their organization without oversight and potential veto by the Law Society.

As the Attorney General was moving the bill through the legislature, there was discussion about the prudence of fixing the maximum number of notaries and specifying how many seals were allowed in each notarial district. One MLA, Mr. Howard, pointed out that this failed to recognize how population (and therefore the market for notarial services) increases, decreases and shifts over time (Official Debates, June 26, 1981, p. 6458). A question was raised about why revision of the number of seals and notarial districts, an obvious eventuality, was not delegated to cabinet like other similar or more serious matters, rather than requiring the legislature to make revisions. Another MLA suggested that the composition of the board of directors ought to include lay persons. The most critical comments came from NDP MLA Hall (p. 6459) who supported the bill but said:

Mr. Speaker, the bill will be supported on the basis that it is going to help the notaries who are presently operating. I do have some misgivings. It occurs to me that if we were talking about landscape gardeners or butchers or carpenters, the chamber would be full; the press gallery would be full of people wondering why we were allowing one group of people to prevent somebody else from doing part of their work. That is essentially what's happening here. We have a really powerful monopoly of lawyers at work here, who are basically preventing a group of people from doing part of their work. That's really the story behind this bill.

The Attorney-General has said that they're moving forward in concert, but he knows full well that the notaries public were made an offer they couldn't refuse. They were really under the gun, and if, indeed, they had proceeded with the private bill, or anything more than just acquiescence to a diminishing population rollover, every one of their applications would have been fought by some young lawyer somewhere in front of an old lawyer somewhere, dressed somewhat differently and sitting in a chair slightly higher than the young lawyer. That's how this work is carved up. That's what it's all about ... This isn't fair; you know that. You've made them an offer they can't refuse, and they're accepting it. We've got a schedule which is part of the *Act*. I suppose I'd have been happier if the number of notaries public in the notarial districts had been – beggar the thought – part of the regulations. At least they could have been changed swiftly.

This is really what the bill is all about. I'm sorry the notaries public lost their courage at the last minute and didn't go ahead with it. We'll support

it, but it's a vested interest in a full monopoly on one side fighting some small people on the other. Let's not forget what it's all about.

In response to the questions and criticism, the Attorney General stressed that the legislation was in the form approved by the Notaries Society and that “they established the schedule” specifying districts and number of seals in each district (Official Debates, June 26, 1981, p. 6462). If the legislation was not passed, said the Attorney General, “there are, I believe, some 20 applicants for notary seals, for which positions are made available in this schedule, who can't be considered until this bill is passed” (p. 6462). The legislation passed second and third reading on June 26, 1981 without amendment and was given Royal Assent on Tuesday, July 7, 1981.

In the end, it is unclear whether notaries were bullied into accepting less than ideal terms as suggested by MLA Hall and others. But it is clear that the notaries were under significant pressure to settle with the Law Society and get the legislation before the House in order to stop the rogue lawyers' attacks. If the Notaries Society had not found the public and political support for the new *Act* and the lawyers had continued to successfully challenge the movement of every seal, then within a few decades, most if not all the notaries and the seals could have been eliminated. The new *Act* entrenched the seals in each territory and guaranteed a place for at least 322<sup>14</sup> notaries to practice in British Columbia. The effect of these limitations was “a problem for us for quite a few years ... but the problem was both internal and external, you know, protectionism at its best or worst” (interview with notary, November 26, 2013). The limitations were both an advantage and a disadvantage for notaries. They created a limited supply of seals that, in the most active markets, translated into a valuable commodity that could be bought and sold. On the other hand, the limitations meant that notaries were virtually stuck at a size that was diminishing as the lawyers' ranks continued to grow which in turn affected not only the notaries' viability as an organization, but also their bargaining power in Victoria. In addition, the limited number of seals decreased competition and freedom of choice in the marketplace. So although the limitations were advantageous to those notaries holding a seal in a profitable territory, ultimately the number of active seals

<sup>14</sup> There were actually 323 seals in 1981, an error that was discovered in 1989 and corrected by the legislature in 1993.

decreased<sup>15</sup> but there was no evidence of concern from the government. The public interest in freedom of choice was apparently not a motivating issue for government or lawyers.

The notaries' battle for survival in the early 1980s was illustrative of several aspects of Witz's theories. The subordinate notaries used every available tactic and site in response to the lawyers' demarcation strategies. They used dual closure, a combination of usurpatory and exclusionary tactics, played out along the continuum of sites envisioned by Brockman (1999, p. 214). They claimed to enforce the 1955 GA and held out their own 25 years of honouring the agreement as entitling them to that claim, both usurpatory tactics against the Law Society. When lawyers continued flouting the GA with support from the courts, the notaries took their fight to the government (legalistic tactics) where, according to Witz, a subordinate group was more likely to succeed (p. 208). They asked the government to incorporate the GA into their enabling *Act*, and to legislate their right to practice within territories, an exclusionary tactic preventing notaries from practicing except within the territory ascribed to their seal. When the government was less than enthusiastic, the notaries moved on to the media and the public. The media continued to cover the story until the legislature responded, the new *Act* was in place and the notaries were saved.

#### **4.1.2. “The commercial side of the law business”: After the storm**

The next half dozen years as notaries' numbers were decreasing, there was relative peace between lawyers and notaries. There were a few snipes against notaries in the media and Vice-President (soon to be Secretary) Nicol responded in the same manner as his predecessors, with letters to the editor correcting misstatements and defending the notaries. In 1982, Dr. James I. Reynolds, a prominent and respected solicitor, wrote a flattering article in the *Advocate* (the Law Society's magazine) pointing out “the high standard of integrity and honour expected of a notary” and suggesting that lawyers ought to be regarded in the same light (p. 409). Two years later, when there

<sup>15</sup> In 1981 there were 323 active seals; by 1990 the number had dropped by close to 20% to approximately 262 (Law Society, 1990, p. 3).



were rumblings among lawyers about the propriety of accepting an undertaking from non-lawyer notaries (an essential element of any real estate closing), the *Advocate* again published an opinion that supported the competence and role of notaries. Keith Hamilton, Director of Research and Planning for the Law Society, opined that a notary's undertakings were "virtually as enforceable as a solicitor's. The only significant difference is that a notary's undertaking is not enforceable by summary proceedings because the notary is not an officer of the court. But in all other respects the situations of notaries and solicitors are comparable" (Hamilton, 1984, p. 57). The qualification about summary proceedings was not critical to the practitioner since breach of undertakings was rare whether by lawyer or notary, and other suitable remedies were available.

Under the new *Act*, there were three new notarial districts proposed between 1981 and 1989 and only two of them were successful in the courts. The Law Society opposed a new seal for Sointula and a 15 km. radius around Sointula that included Port McNeill. Minutes of the benchers meeting on September 28, 1984 (Law Society, Benchers, p. 10) reveal that the benchers were told that one of the three Port McNeill lawyers was opposed to the 15 km. radius but that the other two lawyers "are not opposed to the application at all." The benchers were also told that:

Dr. Hoeter [then Secretary of the Notaries Society] agreed with the Law Society proposal that if the Sointula seal did not include the 15 kilometre radius, they would agree not to fill the Prince Rupert seal so long as the Sointula seal was filled. However, the applicant for the seal is not agreeable to the compromise because his two largest clients are located in Port McNeill. Consequently, the Society of Notaries is not in a position to agree with the Law Society's proposal, but is not supporting the application because of the 15 kilometre radius stipulation.

The benchers resolved to oppose the application. With opposition by the Law Society and no support from the Notaries Society, the courts rejected the application. However, approximately a year later, the same applicant sought a new seal for Malcolm Island. This time none of the three local lawyers "care[d] whether the seal is granted" (Law Society Benchers, December 6, 1985, p.7). Despite an in-house opinion that the Law Society could defeat the application, the benchers did not oppose it and it was granted.

Not to be outdone by the notaries' new legislation, the LPA was overhauled, passed in 1987 and proclaimed in June, 1988. The Attorney General described the changes to the *Act* as:

... a lot of very good, new provisions that tighten up control over the profession and should ensure greater competency and protection for the public. We will be appointing three lay benchers within the next several months, people able to bring a different point of view to the administration of that professional body. (Official Debates, April 14, 1988, p. 3881)

Besides lay benchers, the duty to “uphold and protect public interest” was spelled out, and a complaints review committee was instituted to review staff decisions declining further proceedings for complaints (Law Society, 2008, np).

Notaries maintained enough political currency for two amendments to the *Notaries Act*, both more or less duplicating provisions in the LPA. The most significant was the 1985 amendment that enabled creation of a subsidiary foundation. The lawyers had created the first such subsidiary in North America in 1969 and it had been copied in “almost every other jurisdiction in North America” since then (DuMoulin, 1998, p. 18). The purpose of the foundation was to collect interest on the general trust accounts that otherwise would accrue to the banks, and use the funds for (among other things) legal education, legal aid, legal research, law libraries, and education for notaries. The Notaries Foundation was incorporated in 1986 after “two years of negotiation with the Ministry of Attorney General over the terms and conditions of its operations” (Nicol, 1998, p.9). Leadership of the Social Credit government had changed in 1983 when Bill Bennett retired and Bill Vander Zalm took his place. Vander Zalm appointed Brian Smith as his Attorney General, replacing Brian Williams who had shepherded in the new *Notaries Act* in 1981. The Notaries Society dealt with Smith for their 1985 amendments. In announcing the new legislation, Smith estimated that the Notary Foundation would “funnel up to \$250,000 a year into legal aid” (“New foundation,” 1985). The legislation required fifty percent of the funds collected to be distributed annually to legal aid. In its first year of operation, the Notaries Foundation collected \$500,000 and contributed to legal aid exactly the amount forecast by Attorney General Smith.

The second amendment to the *Notaries Act* was characterized as “changes to improve the administration” and was part of the omnibus *Attorney General Statutes Amendment Act*, 1989 (Official Debates, April 25, 1989, p. 6332). In introducing the bill to the House, Attorney General Bud Smith (who had replaced Brian Smith) made a point of commending the Notaries Society for their substantial and publicly-minded contribution to legal aid despite notaries having nothing to do with legal services that qualified for legal aid. He said:

... funding from the notaries public, which in 89-90 provide a million dollars for legal aid services province-wide. Frequently lawyers and notaries don't break bread together. I don't know why that has been the case, because notaries are doing extremely well in BC today and provide quality “bread,” Mr. Opposition House Leader, I can assure you of that. Indeed, I had the pleasure last fall of speaking in Kelowna to the annual meeting of the notaries public, and I want to say publicly to them that their contribution to legal aid in British Columbia, through the investment of their trust funds, is greatly appreciated. As most members in the House would be aware, the notaries do not usually deal in criminal or family matters; they're more on what those of us who are solicitors would understand to be the commercial side of the law business. (Official Debates, April 25, 1989, p. 6332)

The Attorney General's comments were flattering but somewhat misleading given that the legislation prescribed not only the contribution to legal aid but also the amount of the contribution. The notaries had no choice about it.

At about the same time (1980s and 1990s) as the decrease in BC notaries, the Quebec *notaires* were also in decline. Kay's study (2009a) applied Abbott's theories to the situation with the Quebec *notaires*. Kay agreed with Abbott that size mattered (p. 902) and the large firms grew with their multinational clients, while the solo *notaires* could not compete and remained static, much like the growth pattern in BC between lawyers and notaries. Kay, like Brockman (1997), disagreed with Abbott about professionals in a shared jurisdiction becoming functionally interdependent in a quick but “uneasy truce” (p. 932). Kay said the large firms in Quebec simply took over the work and pushed the *notaires* out, more like annihilation than truce. In BC in the 1980s, there

was no uneasy truce<sup>16</sup> and no successful annihilation. Instead, once the notaries had their new *Act*, it was back to business that included riding the coattails of lawyers for non-controversial improvements to their operations.

#### **4.1.3. “Political problems” averted: Paralegals make waves**

During the latter half of the 1980s, paralegals became a topic of interest in law societies across the country. Although paralegals and legal assistants are outside the scope of this research, the Law Society has regarded them in a similar light to the notaries. All are non-lawyers providing legal services. The Law Society monitored their activities on the basis that the LPA obliges them (the Law Society) to “uphold and protect the public interest in the administration of justice” (s. 3) and gives them the power to prevent anyone other than a practicing member of the Law Society from practicing law (s. 15 and s. 85). Paralegals and legal assistants are mentioned in this research to the extent their status or relationship is relevant to the relationship between lawyers and notaries.

In February 1987, the CBA magazine, *The National*, did a cover story on “Paralegals: where do they fit in?” with interviews from law societies in every jurisdiction. The Association claimed that it had done “extensive work on the paralegals question from the national perspective” and proposed a resolution at its midwinter meeting that year supporting “affiliate membership for legal assistants and paralegals” (“Paralegals,” 1987). The LSUC was at the forefront of the controversy. Former policeman Brian Lawrie and his company POINTTS started charging a fee and appearing as agent for the accused in traffic courts in Ontario. The law society sued for unauthorized practice of law and in September 1985, Lawrie won. The law society appealed twice and Lawrie won both appeals. Court of Appeal Justice Gordon Blair noted “It is obvious from the business they have attracted that they are providing an unmet need for public service” (Lorinc, 1989, p. 17). Lawrie’s success in Ontario hinged on legislation that specifically allowed agents to appear on behalf of parties to particular provincial legal actions.

<sup>16</sup> Most notaries had a circle of friendly lawyers to whom they referred clients for work that was contentious or otherwise beyond notarial jurisdiction. These arrangements were personal and separate from the relationship between the two professional organizations.

Lawrie's case opened the door for paralegals in Ontario to start their own businesses, independent of lawyers or any other credentialing or supervisory requirements. They could appear on behalf of clients, for a fee, in traffic court, workers compensation board hearings and other provincially regulated tribunals (Lorinc, 1989, p. 15). Some paralegal firms did not take clients from the public, but based their business exclusively on providing lawyers with a variety of routine work. A plethora of paralegal operations flourished. Lawrie went on to franchise his operation in Ontario, Manitoba and Alberta. He was unsuccessful against the Law Society in BC (*Law Society of B.C. v. Lawrie*, 1991). The Ontario paralegal story continues in following section 4.2.4.

The paralegal evolution in Ontario in the 1980s was not determinative of what would happen in British Columbia, but in 1988 the Law Society (of British Columbia) established the Paralegalism Subcommittee to recommend what role the Law Society should take with paralegals and other non-lawyer legal service providers. In the Subcommittee's October 1989 report, they admitted:

Although our Society does not have the same legal problem in halting independent paralegals as does the LSUC, political problems remain. It is for this reason that our Subcommittee was charged with studying the independent paralegal practice in BC ... Because legal assistants are so well integrated into the law firm structure, it seems improbable that many would be interested in independent paralegal practice. The possibility cannot be disregarded, however. We believe that a Law Society certification program would help satisfy the professional and economic aspirations of legal assistants, solidifying their position *inside* the law firm (emphasis in original). (Law Society, 1989, p. 13-14)

The report revealed the Law Society's predisposition to protect its turf with language like "halting independent paralegals" and emphasis like "their position *inside* the law firm." With the Law Society as the gatekeeper for certified paralegals, it would look like they were sharing the monopoly when in reality, there would be no change whatever in the monopoly. Paralegals, certified or not, had to remain supervised employees of lawyers, as always. The Law Society's aim to maintain control and protect its turf has been a theme in this research and is discussed further in section 4.5.

#### **4.1.4. “Friendly atmosphere” meets “grave concerns”: Notaries’ campaign for more rejected**

The last year of the decade, 1989, was remarkable for the Notaries Society for two reasons: first, they pushed professionalization by doubling their education and training program; and second, they made a formal request to the Attorney General to expand their jurisdiction.

Previously, the notary education program had consisted of a six month correspondence course through the University of British Columbia (UBC), followed by the statutory examinations required by the *Notaries Act*. A board of examiners appointed by the Attorney General set the exams. In 1987, a planning committee of the Notaries Society resolved to increase the educational requirements in terms of duration, depth of coverage and number of subjects. The Notaries Society spent \$150,000 on the improvements (Law Society, 1990, Appendix B, p. 2-3). In 1989, the UBC component was extended to a one year set of courses, supplemented by a preliminary six months of skills training through the Open Learning Agency (OLA). Both the UBC and OLA components were by correspondence. Then, the notary candidates did a week of classroom tutorials followed by the statutory examinations. After that, there were five days of classroom tutorials in practice management before the candidates were eligible to receive a seal. Newly minted notaries were encouraged but not required to arrange a post-seal period of supervised practice with an experienced notary. According to information from the Notaries Society in 1990 (Law Society, 1990, Appendix B, p. 12), “almost all new notaries have arranged a period of articles ranging from 3 weeks to 6 months.”

Contemporaneously with the planning and negotiation for educational improvements, the Notaries Society was preparing to approach the Attorney General for three substantive changes to their Act: adding jurisdiction to provide simple, non-contentious probate and non-reporting incorporation services; adjusting the notarial districts to coincide with school districts rather than the then current municipal districts; and deleting the requirement to notify the Law Society with every application for issuance or transfer of a seal. The Notaries Society had asked the legislature for the latter two changes once before, in the negotiation of the new Act in 1981, but was not

successful. There is evidence that the CEOs (or Secretaries as they were called then), Mr. Nicol from the Notaries Society and Mr. Ralph from the Law Society, had discussions about these matters for some time and at least during the latter half of 1988 and the first half of 1989 (Law Society, 1990, Appendix A, p. 1 and 3).

Then, in July 1989, Mr. Nicol wrote a letter to Mr. Ralph. The letter indicated that Mr. Nicol wrote on his own initiative after consultation with the directors of the Notaries Society, and not at the request of the government. Mr. Nicol formally advised the Law Society of the notaries' intention to pursue legislative change, saying "we felt it appropriate to make you aware of our plans and to solicit your comments in regard to our proposal" (Law Society, 1990, Appendix A, p. 1). Several times, he mentioned the relationship between the two societies in a conciliatory manner, using words like "co-operation," "friendly atmosphere," and "putting to rest areas of concern" (Law Society, 1990, September 25, Appendix A).

According to Witz (1992), the subordinate notaries were embarking on a professional project using a usurpatory strategy. The notaries were politely laying claim to more legal services and attempting to expand their intrusion into lawyers' exclusivity. They started by using legalistic tactics in approaching government, a strategy that, according to Witz, promised greater likelihood of success for a subordinate player than credentialist tactics (p. 208). But, because of the understanding that the BC legislature was expected to consult with lawyers on matters affecting legal services, the notaries were obliged to involve the Law Society. The letter to the Law Society leap-frogged the site of the project to the other end of Brockman's continuum, to the autonomous professional body, a site where subordinate groups were unlikely to succeed, according to Witz. Witz was right. Notaries in BC have had no success expanding their power and jurisdiction when the lawyers did not acquiesce, including in 1989.

The first mention at the benchers' table of the notaries' intentions appears to have come from Treasurer (as the chair of the benchers was then called) Paul Beckmann who advised on August 4, 1989 that the letter from Mr. Nicol had been received. The benchers reacted immediately by striking a small committee of three to "develop and articulate the Law Society's position" (Law Society Benchers, August 4,

1989, p. 12). A month later in September 1989, the Law Society reported that the Attorney General had asked them to “express their views” on the notaries’ proposals (Law Society, 1990, p. 1).

The new Notaries Committee of the Law Society did not move swiftly. The first meeting between the concerned parties was in early January 1990 for a preliminary discussion between Secretaries. There were two more meetings between the Law Society’s Notaries Committee and representatives from the Notaries Society, one in mid-January and another in May 1990. These two meetings were called by the Notaries Committee for the purpose of “explor[ing] in greater depth the notaries’ proposal” (Law Society, 1990, Appendix C). The lawyers’ Notaries Committee requested extensive disclosure from the Notaries Society of previous and present educational programs, insurance programs, and a comparison of the location of current and proposed seals. The main thrust of the Committee, they said, was to ensure that notaries would be competent to practice in the requested areas of probate and incorporations, if the legislature permitted the expansion of their jurisdiction (Law Society Benchers, July 6, 1990, p. 10). The Committee delivered a “progress report” to the benchers in July, 1990 (Law Society Benchers, July 6, 1990 p. 10-11), with the final report delivered in mid-October 1990 (Law Society Benchers, October 12-13, p. 7-9).

The minutes of the July 1990 benchers’ meeting record that the Notaries Committee believed there were “longstanding tensions” between lawyers and notaries and that they had experienced “difficulties” in obtaining information from the notaries (p. 10). The benchers also discussed their options in responding to the notaries, namely, “abolish notaries altogether ... ‘grandfather’ notaries ... [or] a political compromise between lawyers and notaries” (p. 10). The Chair of the Notaries Committee called for an “urgent need to educate Ministers and MLAs about the Law Society’s position” (p. 10) and stated that although the Notaries Society had qualified their proposal so that probate or incorporation services would be conditional on completing appropriate training, nevertheless, “the executive of the notaries is very aggressive in seeking an expanded jurisdiction” (p. 11). One bencher wondered if notaries wanted to become solicitors and was corrected by the Notaries Committee chair who said “notaries do not wish to become solicitors. They are fiercely independent and the people on the executive of the



Notaries Public have very lucrative businesses ... the notaries feel they do a good job, better than lawyers do” (p. 11). Another bench member disagreed, saying that he understood that the “present executive” of the Notaries Society had “aspirations” of becoming comparable to the Quebec notaries, but were being held back by their small size (p. 11). “Upgrading education is the first step to full-scale education,” he warned. Ultimately the notaries could be “doing all the work that solicitors presently do” (p. 11). Finally, a bench member of the Treasurer’s Committee reported that when meeting with the Attorney General two days earlier, he concluded that the “notaries legislation issue was not as pressing as the paralegal licencing issue” on the government’s agenda, suggesting that the bench members should decide both together since the “issues are inter-meshed” (p. 11).

Witz would characterize this response from the Law Society as a professional project by a dominant group using classic demarcationary strategies. The lawyers were building a case for rejecting the subordinate group’s (the notaries’) proposal and maintaining lawyers’ exclusive control over the requested areas of practice. They were also effectively compounding the demarcationary strategy by de-skilling the notaries, regarding them as comparable to paralegals who had never been regulated, organized or independent. At the same time, the dominant lawyers used Witz’s legal tactics by directing their efforts at those in power in Victoria. The entire project was focussed on reinforcing the lawyers’ existing boundaries with the notaries.

At some point while the notaries were waiting for a response from the Law Society, the Law Society claimed that the notaries prepared a written report that further expanded and supported their proposals and that this report was “presented to M.L.A.’s throughout the province in late 1989 or early 1990 and subsequently forwarded by the Notaries Society to the Law Society in May 1990” (Law Society, 1990, September 25, p. 1).

The final report of the Law Society’s Notaries Committee dated September 25, 1990 was a resounding rejection of the notaries’ proposal. In summary, the Committee expressed “grave concerns,” concluding that the Notaries Society had “fail[ed] to demonstrate ... that they understand what knowledge and skill are required to provide

legal services in the areas of estate probate and the incorporation of companies” and that the public would be at risk if they were allowed to proceed (p. 3). Appendix F to the final report showed comparisons of lawyers, legal assistants and notaries in terms of the type and duration of education, and the number of hours of education by type (such as class hours, tutorial hours). The Appendix also compared the number of hours of education in three subject areas, real property-related courses, estate-related courses and corporate law courses. In every case, the lawyers’ education dwarfed the notaries’. Lawyers’ education totalled 5430 hours, while notaries’ education totalled 891 hours. The comparison to legal assistants was more favourable showing that notaries spent four times as long studying real property and almost twice as long studying estates as legal assistants. Neither the Appendix nor the final report of the Committee attempted to reconcile these comparisons with the substantial differences in jurisdiction between lawyers and notaries (present or proposed), or the relevance of comparing self-regulated, independent notaries with unregulated legal assistants whose work was always supervised by lawyers.

The thrust of this argument by the lawyers against the notaries’ expansion project – incompetence – is remarkably similar to the argument more than a decade later by Ontario dentists against dental hygienists as described by Adams, 2005a, p. 275. In that case, the hygienists wanted to end the prerequisite “order” from a dentist before the hygienists could work on a patient. Adams noted that (p. 275):

Dentists claim that their opposition to dental hygiene independence stems not from financial interests but rather from concerns about public safety. Dentists contrast dental hygienists’ two years of college education with their own seven years of university to demonstrate that dental hygienists do not have the training, knowledge, or expertise to determine whether it is safe to proceed with treatment in every instance. It is becoming clear to dental hygienist leaders that if they are to defeat dentists’ opposition, eliminate the order clause, and attain a broader scope of practice, they will need to change the way they are educated. Their claims to expertise and autonomy depend on it.

For the notaries in BC, the dramatic improvement in their education in 2009 was accompanied by a dramatic change in the attitude of lawyers, as described in more detail in section 4.3.5. But in 1990, BC notaries were in much the same position as the Ontario dental hygienists in 2005, vulnerable to attack based on education.

In addition to the incompetence argument, the Notaries Committee was concerned that the proposed change in notarial districts would increase the number of seals. The current legislation had given jurisdiction to the courts to decide if new seals should be issued, and besides, since approximately 60 seals (of 322) remained vacant, there was no “need” for any change to the legislation nor for any more seals (Law Society, 1990, September 25, p. 3). The Committee did not mention that the lack of flexibility in determining the territory for notarial districts was one of the concerns about the *Notaries Act* raised by the legislature in 1981 but glossed over with assurance from the Attorney General that the locked in schedule of districts and seals was at the request of the notaries (Official Debates, June 26, 1981, p. 6462). There was no mention that the notaries may have been “made an offer they couldn’t refuse” in 1981 as intimated by MLA Hall (Official Debates, June 26, 1981, p. 6459) and were forced to condone the restrictions in order to survive. As the Secretary of the notaries at the time, said:

... it’s tough when you’re part of a body of people in a profession of less than 300 and you’re dealing with a juggernaut like the law society which certainly had the ear of government. It’s really tough.  
(interview, January 24, 2014)

The Committee’s one concession was to agree that notice to the Law Society was not necessary for transfer of existing seals. However, notice was still required for any new seals since that was to be determined on the basis of “need” in accordance with the *Notaries Act*.

As the 1980s ended, the notaries were in the middle of a rollercoaster ride. They started the decade at a low point, facing extinction and betrayal by the Law Society over the GA. The Law Society and the government recognized they were honour-bound to comply with the GA, but neither was willing to embellish the notaries’ rights beyond the GA regardless of how reasonable the embellishment may have been. With their new *Act* in place, the notaries got on with taking care of business, keeping their organization on comparable footing with the Law Society. They ended the decade at a high point with significant improvements to their education and a hopeful new proposal before the Attorney General to enhance their powers and operations. Both lawyers and notaries had protected their turf, the notaries had trusted the lawyers to honour their 1955

agreement and assist in getting proper legislation passed, and everyone had retained control of their jurisdiction.

## **4.2. The 1990s: “Not in the Public Interest,” the Paralegal Waffle and Bad News from the Courts**

The 1990s were filled with hostilities. The Notaries Society used the media to continue their push for credibility and greater jurisdiction. The lawyers resisted defensively and offensively. The government delayed and eventually sided with the lawyers. The lawyers flip flopped on expanding their own jurisdiction to certify legal assistants. The notaries began what would become a 22 year unsung contribution to the estate planning overhaul of adult guardianship, health directives and representation agreement legislation in British Columbia. By the end of the decade, the Law Society had twice convinced the courts to restrict the authority of notaries.

### **4.2.1. The big no from big brother**

The final report of the Law Society’s Notaries Committee was delivered to the notaries and the Attorney General and adopted by the benchers in late fall of 1990 (“Notaries proposal opposed,” 1990, p. 1). The treasurer reported that “the real issue here is competence, not turf protection and not competition” (Guile, 1990, p. 2). He chastised the notaries for emphasizing the simple process of the proposed services without recognizing the complex laws or setting out an “educational blueprint” for how notaries would transition into practice in the proposed areas. The Treasurer called for the report to be widely circulated within the legal community and lawyers were encouraged to participate in the discussion about notaries.

The CBABC was more aggressive and called for testimonials of dissatisfaction with notaries. Their own committee on notaries announced in the press in March 1990 that not only were notaries charging more than some lawyers, but also that “horror stories” about notaries were being uncovered. The bar associations across BC were solicited for “examples of problems” and asked to “encourage members of the legislature to vote against any proposed expansion in the notaries’ jurisdiction and numbers” (“B.C.

branch opposes,” 1990). In September 1991, the CBABC passed a formal resolution opposing any changes in the *Notaries Act* in an effort to ward off any softening of governmental sympathy for the notaries.

These steps by the Law Society and the CBABC illustrate Adams’ (2004) link between jurisdiction and status but as a function of denial/diminishment rather than enhancement/elevation. Adams (2004) talks about how a group’s motivation for improved status can mould inter-professional conflict over expanded jurisdiction (p. 2251). In this case, the Law Society’s and the CBABC’s motivation to reduce the status of the notaries was part of their rejection of notaries’ jurisdictional proposals. Jurisdiction and status seem to be linked on the way down as well as on the way up.

#### **4.2.2. Notaries choose their weapons**

Following these attacks on their competence, the Notaries Society commissioned an Educational Review Project concerning their newly expanded Notary Preparatory Course from a respectable expert in education. As part of the study, the notaries asked for analysis of the background of the candidates in the Preparatory Course. The analysis indicated that candidates were active adult learners, consistently expanding their knowledge with a variety of educational courses as well as post secondary professional or technical certification (Lamoureux, 1992, p. 21), they were experienced in “people, numerical and detail-oriented skills” (p. 22), and they were significantly involved in community and professional volunteer organizations (p. 22). The typical notary candidate was “positive, concerned, focused and action-oriented,” qualities that “few organizations can really boast of” (p. 23).

Over the next few years, lawyers in the province were regularly reminded by notices in the *Benchers Bulletin* of the restrictions on advertising their services as notaries<sup>17</sup> (April-May, 1991, p. 6, April-May 1992, p. 6, May-June 1993, p. 8). By 1993,

<sup>17</sup> All practicing lawyers in BC were (and still are) also notaries public. Lawyers were (and still are) prohibited from advertising their services as a notary public without also advertising their status as a lawyer (Section 8, Chapter 14, Professional Conduct Handbook of the Law Society of British Columbia).

the notaries were tired of being stonewalled by the government. Notary Michael Carr wrote an article for the *Vancouver Sun* entitled “David and Goliath Revisited: Notaries vs. Lawyers.” The article appeared on January 15, 1993, above the fold on the front page of the opinion section of the paper, complete with custom illustration of tiny corporate David with a briefcase and a slingshot, standing at the enormous wingtip-clad feet of Goliath. Carr reviewed the acrimonious highlights of the relationship between notaries and lawyers over the previous half-century. His main thrust was that notaries were being treated unfairly. There were no restrictions on lawyers’ numbers or location, so notaries should not be restricted either. Besides, polls showed that the public wanted more services from notaries. Carr (1993) argued that it made no “common sense” not to respond to the public’s wishes and that “public interest should not be subordinated to an antiquated notion of the power of a lawyer.”

The lawyers responded through both the CBABC and the Law Society. Robert Gourlay, the President of the CBABC, responded the following week with a letter to the editor of the *Sun* (p. A16) claiming that notaries were insufficiently educated to provide probate or incorporation services, nothing was simple, and lawyers’ fees were competitive with notaries. Consequently, there was no public interest in expanding notaries’ jurisdiction, he said. A week or so after that, Brian Wallace, the Treasurer of the Law Society was given space in the newspaper to respond more fully to Carr’s article. Wallace contended that notaries were form fillers and should not be entitled to charge fees for such a service. Lawyers on the other hand “gave essential legal advice” and there was “no justification for expanding [notaries’] jurisdiction” (as reported in Daisley, 1993, p. 5).

The *Lawyers Weekly* reviewed the Carr-Gourlay/Wallace confrontation in the *Sun* and interviewed the authors. Mr. Carr admitted that notaries would need additional education before providing incorporation services, but maintained that notaries already had better education than lawyers about probating estates as lawyers did not deal with probate until articles. Wallace countered saying lawyers learned the law of probate and that was essential to handling even the most straightforward probate matter. Mr. Carr indicated that the notaries were seeking publicity because “nothing had happened” in the

three years since the notaries approached the government for an increase in their jurisdiction (Daisley, 1993, p. 5).

Under Witz's framework, the notaries' choice to move their 1989 proposal into the media was foreseeable after the legislature failed to respond definitively to the Law Society's Notaries Committee report. The notaries appeared to have failed with legal tactics through the state, so they moved their argument more towards the heteronomous end of the continuum (see Table 2-1) and engaged the public through the media. The media had helped in the 1981 confrontation with lawyers so perhaps notaries thought it would work again. But 1981 was a different circumstance from 1989. 1981 had a moral issue at heart (lawyers living up to their 1955 agreement) whereas 1989 was driven by the notaries' ambition. Adams (2010) recognized the key role of "the ongoing drive for status, social authority and privilege that characterize professionalism." She said that Abbott's theory should be "embedded in the complex web of relations" (p. 67-68). BC notaries in 1989 were illustrating Adam's theory.

Abbott (1988) would characterize 1989 as a "disturbance in jurisdiction" whose "audience" was first the government ("legal system") and then public opinion. The notaries waited almost four years for a government response before engaging the media, as discussed in more detail in section 4.2.5, so from the notaries' perspective, the disturbance was not short-lived as predicted in Abbott's theory. However, there was no change in the notaries' jurisdiction as a result of the 1989 proposal, so from that perspective, equilibrium was maintained which Abbott would term a "settlement." As Brockman (1997) points out, Abbott's concept of exclusive jurisdiction for each profession as a prerequisite for settlement has never been the case between lawyers and notaries in BC. Brockman's new type of settlement, "concurrent jurisdiction" (p. 195) aptly describes the BC situation.

In June 1993, the government responded with complimentary words but no action on the subject of notary jurisdiction. Attorney General Colin Gabelman introduced an amendment to the *Notaries Act*, stating that the province had been "well served" by the notaries with their "long and unique history" (Official Debates, June 29, 1993, p. 8053). The purpose of the amendment was to allow notaries to practice through a

corporation (as lawyers and other professionals were doing) and to correct an error in the count of notary seals in 1981. One more seal in Quesnel came to light in 1990 when the Notaries Society was responding to enquiries from the Law Society concerning their 1989 request to the Attorney General. The extra seal was added to the legislation, bringing the maximum number of permitted seals to 323. The bill passed first reading June 10, second reading June 29 and third reading on July 7, all with little discussion in the House and without amendment. In a way, the government was sending mixed messages to the notaries, flattering them in public and allowing them non-jurisdictional improvements, but privately ignoring their formal request for more scope.

The lawyers kept the pressure on the Notaries Society to retrench. At the Law Society's annual general meeting in September 1993, a motion was proposed to authorize the Notaries Committee to ask the government to remove the self-governing powers of the Notaries Society and give them to the Law Society. This would qualify as the ultimate Witzian demarcationary tactic by a dominant group: extinction. The motion was defeated after assurances from the then current chair of the Notaries Committee that the Law Society was opposed to any increase in the notaries' jurisdiction and they (the Committee) would "continue to communicate this position to the government" ("Other motions debated," 1993, p. 8).

In reflecting on the failure of the 1989 proposal, the Secretary of the Notaries Society at the time said: "I don't think we were ever taken seriously on it" (interview, January 24, 2014). One of the lawyer interviewees pointed to the apparent futility of the notaries' efforts, saying that the 1989 proposal was "a typical something that seems to come up every ten years or so for the notaries and I guess it didn't get anywhere" (interview, December 11, 2013). Another lawyer offered the following four justifications for the lawyers' dismissive response to the 1989 proposal (interview, February 28, 2014):

***"Like red banners for lawyers."***

The Notaries Society deserved the resounding rejection from lawyers, he said, because the notaries:



always used the word 'simple' and 'simple organization' or 'simple probates' and using those words almost were like red lights or red banners for lawyers ... but they aren't necessarily simple ... you have to have a basic understanding of a legal background ... so you can keep it simple.

***“We have not taken the notaries seriously.”***

This lawyer agreed with the Secretary of the notaries' explanation for the 1989 failure and went on to say:

So much of the problems, historically and traditionally between lawyers and notaries is the fact that we lawyers, because there's so many of us, there's 11,000 lawyers versus 300 notaries, have not taken the notaries seriously and what I mean by that [is] seriously to the point that we made the necessary efforts to sit down and talk and discuss and communicate. Having said that I think from a CEO level to a CEO level the organizations they've done a good job of that, I think from a board level to a board level we've done a terrible job of that. We've ... essentially ignored our colleagues in the notaries society and hopefully those days are behind us now.

***“Not areas that the public is having problems with access.”***

Notaries should not be allowed to expand their services because there was no public interest or access problem in incorporations and probate, he said. He implied that the public interest in freedom of choice in service providers was insignificant when compared to the public interest in access to legal services in the criminal justice system. Therefore, notaries should not be allowed to expand into these well-served areas. This argument smacks of the old “need” test that was substantially abolished in 1981 and completely rescinded in 2009, and is inconsistent with the Competition Bureau (2007) view that there must be “compelling evidence of demonstrable harm to the public” before lawyers should prevent others from “performing legal tasks” (p. 20).

***“We're doing all that.”***

This justification for rejecting the 1989 proposal is one of the main planks supporting the Law Society as the single regulator of all legal service providers, as discussed more fully in section 4.4.2. Abbott (1988, p. 98) would call it “reduction,” a rhetorical justification for claiming jurisdiction and causing a disturbance. After

acknowledging that lawyers only resent “notaries’ desire to expand their scope,” this lawyer suggested that lawyers currently “accept that [notaries] have the educational background to get involved and [they] will have the educational background to do this expanded scope.” However, despite the notaries’ appropriate standards of education and training, only the Law Society has the appropriate governance standards for any legal service provider, he said, adding:

I mean if you want to practice in the areas that we’ve regulated in for 130 years that’s fine, but we, ... the Law Society of British Columbia, have the experience and the expertise to ensure that the public is properly protected in those areas, so that’s where the real kicker is. Fine, notaries want to do that, that’s fine, but then they’re doing all of these things, they’re conveyancing, wills, estates, incorporations, some minor, simple family law agreements, those are all areas that the law society regulates, its practices standards, admission qualifications, discipline, credentialing. We’re doing all that ... So we have the experience and the resources to make sure the public’s well protected. So that’s fine that you want to expand those areas, then you should be subject to the same standards that lawyers are. And that’s how you protect the public interest.

This argument about having one standard for a particular legal service is attractive logic. But, when lawyers in the interviews were asked what was wrong with notaries, no one offered any criticism of notaries’ standards. In fact, notaries’ standards and lawyers’ standards have co-existed in BC for over 150 years with no apparent prejudice to the public interest in quality of legal service. Some say that lawyers’ historic standards are no longer necessary or affordable in today’s high tech, fast paced, global environment and it is lawyer’s resistance to change that has played a part in the crisis over access to justice (see for example Susskind, 1996 and Finch, 2010). One notary described his experience with the difference in standards when hiring a former lawyer from Ontario to work as a notary in BC:

She came out of there and ... I hired her and put her on a daily wage and said you’ll be expected to work six months with me, which is perfect for her because she’s got young kids and more education than me. Prior training, unfortunately the lawyer/notary, there’s a bit of a difference so it’s a bit of an adjustment for her, but she’s getting there ... I think, primarily to do with time, to get from A to B. Initially, say if she was doing wills for instance, from taking instructions to producing the will was a two hour journey for her, but she’s learned now to hone ... through to what’s important in those types of things, because she

was [on the] corporate side of the things. Well back over there, if you spent ten hours doing it, you just billed the client for it. You don't do that [here as a notary with regular people as clients], you know. Or you eat it. (interview, December 3, 2013)

One lawyer admitted how difficult it was for lawyers to change, saying “The fear of change. People don't like change. Lawyers are the worst. Lawyers are worse than notaries” (interview, February 24, 2014). And academics agreed. Rhode (2013) referring to Maister, said: “lawyers and former lawyers ... by training and disposition tend to resist change. That resistance is particularly intense when the profession's own status and financial interests are at risk” (p. 243-244).

Once the notaries finally got the message that their 1989 proposal was dead, it was 21 years before they formally requested any significant revisions to their Act. Even after 21 years, the lawyers' reaction and justification for their reaction to the notaries' proposal were virtually identical to their reaction in 1989. The 2010 proposal is discussed in section 4.4.

#### **4.2.3. Representation agreements: “We didn't think of it so it must be a bad idea”**

As the stalemate over their 1989 proposal was evolving, community groups approached the Notaries Society to fund work on revolutionary new legislation concerning adult guardianship and other estate planning matters. The nature of their involvement in those early days was described by their Secretary at the time:

I think probably the reason when we first heard of it and got involved in it so quickly was the Notaries Foundation was producing money and we were a place where they could look for funding while they produced some research for that ... Yeah, it was probably the Alzheimer's society was first I think. And my interest in it and the reason why I spent so much time, probably much more time than my board would have liked, was that it hit us personally, my wife and our family, on so many levels, my mom was in care for Alzheimer's ... My dad was a haemophiliac from a stroke, he was paralyzed on one side and in a wheelchair and my father in law was in a car accident and he was a partial quad, so these were family issues for us ... We were looking for solutions and could see no reason why this couldn't be done in a simple way that families would be able to use it. (interview, January 24, 2014)

The new package of legislation was not only conceptually novel, but so was the process of creating it. As Mr. Nicol said:

The government was not then involved in the project. This is what resulted in the process being developed from the ground up. The usual approach, to request changes in the law from government, with the public having little input into and even less control over timing of the changes, was sidestepped.

The project sought out information from individuals and groups all over BC to determine what changes would best meet the needs of the public and specific needs faced by certain constituency groups such as the BC Head Injury Association, the Alzheimer Society of BC and seniors' organizations around the province, thus ensuring input of those facing planning for the elderly. The research and reporting caught the attention of the government. (Nicol, 1998, p. 6)

In those early days, few lawyers were involved in the project (interview with one lawyer and two notaries on December 11, 2013, January 24, 2014 and December 3, 2013 respectively). As another notary put it:

I was part of a working group because they wanted people from urban centers, rural centers and so on. And so I was asked and I think I probably participated in maybe four or five meetings and those meetings brought together people from all kinds of professions, all kinds of helping agencies if you will and so the idea of the legislation started to come together. (interview, November 26, 2013)

At one point, the group meetings “were held at the Society of Notaries; the notaries were very involved in supporting the community initiative” (interview with lawyer, December 11, 2013). While notaries were engaged from the beginning, one lawyer explained his reservations about the legislation, saying:

I have to say from my perspective, I've always been a bit leery about that whole thing because you're contractualizing ... You're putting people in the situation, often time family members when they have a contractual obligation, a contractual obligation to be the representative, you have a contractual obligation to be monitor ... These representation agreements are agreements that lay out rights and responsibilities of all parties, monitors, representatives and in fact the donor, and so I'm a bit sceptical of that because often times contractual relationships aren't necessarily the best relationship when it comes to emotional matters, like health care and family matters. (interview, February 28, 2014)

Another lawyer put it more bluntly:

I got involved at the time and they were developing all that stuff in the early days of representation agreements and notaries were very big in it ... The lawyers then fought it for 20 years ... It was a brand new idea, and it's classic "we didn't think of it so it's a bad idea."  
(interview, December 11, 2013)

Despite the apparent lack of support from lawyers in the working groups, the Law Foundation provided some early funding (interview with Dr. Gordon, December 2, 2013). According to Dr. Gordon (founding director of the Master's program for notaries at SFU) who was involved in one capacity or another from the earliest deliberations, a small working group emerged from the many community groups and government departments affected by the new legislation. The small working group was an amalgam of an inter-ministry committee from government (three people including the Public Trustee and a representative from the Ministry of Health), and PRAG, an acronym for the project to review adult guardianship (three people including Dr. Gordon, a representative of community living interest groups and a representative of elder abuse interest groups). The amalgamated working group of six began meeting:

... on a regular basis, like twice a week ... We started working in September of October [1992] and we had it all in the bag for the first sitting of the House in the following year, so it would have been April, maybe May [1993]. (interview with Dr. Gordon, December 2, 2013)

When the first version of the *Representation Agreement Act* (along with the *Adult Guardianship Act*, the *Public Guardian and Trustee Act* and the *Health Care (Consent) and Care Facility (Admission) Act*) came into force on July 29, 1993, it had been four years in the making. Somehow, on proclamation, notaries were not authorized to consult on representation agreements. Dr. Gordon offered this diplomatic but forthright explanation:

In the early drafts of the legislation, there were three categories of people who could give advice to people who wanted to do what we call now Section 9 representation agreements. Legal practitioners, notaries and paralegals who had had a training course ... And then it went through the process of approvals and it was reduced to just legal practitioners. And the argument was neither notaries nor paralegals had training or education to be able to do it. So we said why don't we

give them the training and education. We could do that, but it's up to them to do that, for the time being we'll leave them in the legislation but those provisions will be unproclaimed ... This amorphous category that said "other people as prescribed in the regulations" ... So they weren't excluded, they were told they could do it if they were able to bring their people up to scratch. There were a few concerns and they were probably right about the level of education of the average notary on these sorts of issues. There were concerns about the average level of education of lawyers as well. (interview, December 2, 2013)

Witz might regard the situation as a demarcationary strategy (new work claimed by the dominant group). Abbott might see it as a vacancy in jurisdiction in the system of legal services, claimed in the legal arena by the dominant profession.

Assuming Dr. Gordon was correct, the exclusion of notaries and the inclusion of lawyers had at least two possible explanations: it showed how powerful lawyers were, and, it indicated that lawyers would rely on their own members to do the right thing (in this case, to make sure they were competent), but would not trust others, even regulated, historic others like the notaries, to do the same. The lawyers' self-perception as neutral and unbiased in their role as a "public interest regulator" is discussed further in section 4.5.

Regardless of the explanation for excluding notaries, the package of legislation was controversial and amended several times after its enactment, but notaries remained excluded for eighteen years until September 1, 2011. The saga of the struggle over representation agreements is continued in section 4.3.2 below.

#### **4.2.4. Law Society confusion over inclusion**

Contemporaneously with the notaries' issues in the early 1990s, the benchers continued to explore how to deal with other, non-lawyer providers of legal services. They approved the recommendations of their Paralegalism Subcommittee to the effect that the Law Society should institute a legal assistant certification program ("Certification program," 1990, p. 1). Their idea was to control use of a title such as "certified legal assistant" but not to prevent others from performing the same work as the certified legal assistants. There would be no change in the requirement for certified workers, like

uncertified ones, to be supervised by lawyers. There was no mention of paralegals as independent operators as in Ontario. The benchers moved quickly and in March 1990, they had formally asked the Attorney General for “legislation to institute the program” (“Benchers seek,” 1990, p. 3). The Certification of Legal Assistants Committee was formed to develop the certification program and by September 1991 they had hired consultants to survey every law firm to assess how legal assistants were being used in the delivery of legal services (“Legal assistants count,” 1991, p. 3). The survey results were published in a full page report of the April-May 1992 issue of the *Benchers Bulletin*. The survey identified “between 1300 and 2000 legal assistants, the vast majority of whom work in law firms” with the larger firms as the biggest employers. Most legal assistants worked in one specific area of law except in smaller firms where legal assistants tended to work in more than one area. Fewer than half of the legal assistants in the survey had some form of post secondary education although the law firm employers preferred work experience over education (“Law Society profiles,” 1992, p. 5).

By early 1995, the benchers had retracted their plan to certify legal assistants. They explained that their recently adopted “more structured governance model” required periodic review of the Law Society objectives and they “were not satisfied that they could support a legal assistant certification program” (“Benchers back off,” 1995, p. 9). Subsequently the benchers explained their reversal more bluntly saying: “the project did not proceed in part because of the cost of the model under consideration and the projected difficulties in cost recovery” (“Shaping a new future,” 2001, p. 7).

Five years later in 2000, the Law Society decided to expand the role of legal assistants. This time they did not need government support or a certification program. The benchers revised their rules to allow greater delegation to legal assistants to negotiate tort claims for amounts that did “not justify the cost of lawyer’s time.” Previously, delegation was limited to liquidated claims where the value was known. Lawyer supervision was still required (“Legal assistants can now negotiate,” 2000, p. 7).

Meanwhile, the story of Ontario paralegals continued to develop during this decade. A number of boards and tribunals in that province permitted parties to be represented by agents. This allowed paralegals to service the market with no

prerequisite training, standards, licence or insurance. For years there were rumblings in government and the media about the rogue paralegals. In 1990, the Ontario government appointed the Ianni task force that recommended the Ministry of Consumer and Corporate Affairs take over responsibility for governing paralegals. Nothing happened for another decade until the former justice of the Supreme Court of Canada Peter deC. Cory (2000) was appointed “to explore the role of paralegals in the Ontario justice system” (np). He suggested (without providing evidence) there was consensus that regulation was required, and that the overarching purpose of regulation should be the public interest in competence and access to justice (np). Cory envisioned the paralegals as a separate organization, governed by co-regulation,<sup>18</sup> with entrance requirements (that is, formal training) and statutory authority to work in specific areas of the law, somewhat like notaries in BC today. The Canadian Bar Association in Ontario (CBAO) supported the Cory report except for Cory’s recommendation to expand paralegal scope of services into wills, real estate and incorporations. That, reported the CBABC, the CBAO “strongly opposed” (CBABC, 2000, np). The CBABC chair of the Notaries Committee remarked on the “significant differences” between Ontario and BC paralegals who are “only allowed to work under the direct supervision of a lawyer and are governed by the *Legal Profession Act*” (np). More accurately, the Law Society’s control over paralegals in BC was indirect, by governing the lawyers. The Ontario paralegal story carries on in section 4.3.4.

Back in British Columbia, the benchers continued to tinker with non-lawyer providers of legal services, but their response to the notaries remained consistent. When Attorney General Dosanjh visited with the benchers in the summer of 1997, the Law Society reiterated its 1990 reasons for rejection of the Notaries Society’s 1989 proposals (“Attorney General speaks,” 1997, p. 1). The Attorney General confided that after the 1991 election and change of government, the 1989 Notaries Society proposal had been referred to a “government caucus committee on social development” (p. 3) of

<sup>18</sup> Semple et al. (2013) described co-regulation as “agencies that include legal service providers but which are dominated by lay people and accountable to the legislative or executive branches of government” (p. 277). Their co-regulation model was akin to the LSB from England and Wales. Cory recommended a board of governors composed of three paralegals, four public members, two lawyers from the LSUC, and four members appointed by the government. An independent chair would preside over the board.



which he was a member. That committee referred the Notaries Society proposal to then Attorney General Colin Gabelman, suggesting that he consider it. Gabelman decided the proposal was not in the public interest. Dosanjh reassured the benchers in the summer of 1997 that “there has been no change in Ministry policy and that he [Dosanjh] has told the Society of Notaries Public that their proposal will not proceed” (p. 3).

#### **4.2.5. Notaries fight for public support; Law Society fights for turf**

It is unclear exactly when the NDP government advised the Notaries Society that their proposal was dead, but it must have been sometime between 1993 when Michael Carr complained that “nothing had happened” and 1995 when Gabelman was replaced by Dosanjh as Attorney General. In any event, by 1995, the Notaries Society had decided to launch a media campaign to gain public support for their proposals. The campaign was described in *BarTalk*, the CBABC newsletter, as “an aggressive negative media campaign” (“Lessons from the Kelowna Project,” 1997, p. 9). According to the Chair of the CBABC Notaries Committee, “their message has a decidedly anti-lawyer edge to it. They say lawyers have used their power and influence to pressure the government into preserving their monopoly” (Scouten, 1997, p. 26). The Notaries Society placed radio advertising and sent their Secretary to make their case for increased jurisdiction on at least one popular radio talk show, the Rafe Mair show on CKNW. Shortly thereafter, the Law Society sent their Treasurer to appear on the show ostensibly to rebut statements made by the Notaries Society Secretary. The Treasurer’s stance on the Notaries Society was succinctly stated in his parting note to the profession in December 1997: “The Society of Notaries Public cannot be accorded new areas of practice without demonstrating how notaries would be educated sufficiently to protect people’s legal rights, not simply trained how to do procedures and paperwork” (Trevino, 1997, p.2). In addition, the Law Society Treasurer and the President of the CBABC both wrote to the Attorney General and the Liberal justice critic Geoffrey Plant (who became Attorney General when the Liberals won the 2001 election) to make sure both sides of the House knew of their joint opposition to the Notaries Society. They also asked for notice if either the present government or the Liberal caucus changed their mind about giving notaries more power (Scouten, J. 1997, p. 27). The request for notice was a defensive strategy, carried out aggressively. It sent a less than subtle message that the

Law Society was serious. The recipients were put on notice to expect resistance if they entertained the notaries. As one former Attorney General said: “It’s the lawyers you don’t mess with. You learn that when you’re in government ... lawyers permeate the power structures of society” (interview, December 20, 2013).

In addition to these defensive measures, the Law Society initiated the Kelowna Project in 1995 with a view to assessing whether the notaries’ advertising campaign was a serious threat. The Project was run over an 18 month period and used “advertising, public relations and client relations initiatives” including client surveys. The objectives of the Project were to test the impact of media campaigns on the decision to hire legal help, to inform the public about the capabilities of lawyers, and to encourage lawyers to improve service to clients (“Lessons from the Kelowna Project,” 1997, p. 9). The results of the Project showed that an advertising campaign had minimal impact on public opinion about lawyers, that consumers perceived notaries as cheaper than lawyers and were more likely to hire notaries when they thought their legal needs were common and straightforward, and that “public attitudes toward lawyers” were influenced most by how the client perceived the quality of treatment and service by the lawyer (“Lessons from the Kelowna Project,” 1997, p. 10). Based on these results, unsatisfied clients were more likely to have a negative effect on a lawyer’s market share than the notaries’ advertising and promotion campaign.

Nevertheless, in July 1997, MLA Jeremy Dalton (West Vancouver-Capilano) presented the Legislature with a petition signed by 37,019 British Columbians supporting expanded powers for the notaries (Official Debates, July 17, 1997, p. 5911). Although the petition was signed by more people than the petition in 1981, it (the 1997 petition) appears to have made little impression in the House. After presentation, the legislature moved on to other business, without comment. That silence may be explained by Attorney General Dosanjh who, that same summer, told the benchers of the Law Society that he had stifled the notaries (“Attorney General speaks,” 1997, p. 3).

Meanwhile, the legal profession in Canada was experiencing difficulty in providing articling positions and jobs for the increasing numbers of law school graduates. On Saturday, March 9, 1996, the *Globe & Mail* published a front page cover story

entitled “Law graduates starving for work: Gold-plated careers no longer guaranteed” (Makin, 1996, p. A1). The article chronicled the “hostile and unpredictable environment” faced by young lawyers, including examples of perceived discrimination on the basis of race and gender. Three years after graduating, only 70 to 80% of the class of 93 at University of Windsor had found jobs. The president of the CBA was quoted as saying: “The vast majority of students entering law school expect to practice with a law firm. Yet, we all know that very few of them will actually succeed in getting articles, let alone a job.” One young lawyer said: “We have got too many lawyers chasing too little work. People think going to law school is a ticket to the good life. It isn’t.”<sup>19</sup> His description of the problem with the legal profession in 1996 was virtually identical to H.A.D. Oliver’s description of the reason for lawyers’ attacks on notaries in 1980, and similar to some of my study participants’ justifications for rebuffing the notaries in 2010-2012. Competition seems to be an anathema to the monopolistic lawyers.

In early 1998, the Treasurer of the Law Society, Trudi Brown, Q.C. recognized that the role and function of the Law Society as an organization needed re-evaluation in light of the increasing turf challenges from notaries, accountants, immigration consultants, mediators and other non-lawyers (Brown, 1998, p. 2). The benchers struck a committee, The Futures Task Force, to suggest innovative ways for lawyers to maintain their jurisdiction by “expand[ing] the scope of practice and giv[ing] to clients what they want.” The Treasurer also reported that since 1992, Attorney General Gabelman had been discussing “streamlining the *Legal Profession Act* ... as a way of relieving the legislative apparatus from constant revisions to the *Act*” (Brown, 1998, p. 2). The legislation had been “languishing in Victoria,” said Ms. Brown, but now the government was ready to go ahead. The changes essentially removed the government from any involvement in the administration of the Law Society. Procedural matters were deleted from the LPA and delegated to the Benchers as part of their rule making power. The idea was to reduce the Law Society’s demands on the Attorney General’s agenda.

<sup>19</sup> The controversy over the number of law school graduates and proliferation of lawyers did not disappear. See for example Gillis, 2013, commenting on the current downward trending fee and compensation survey of the *Canadian Lawyer* magazine, or Chief Justice Finch’s exhortation to the CBABC annual meeting in 2010 to double or triple the number of lawyers in order to improve access to justice and reduce costs to consumers (Smith, 2010, November 28).

The changes also increased the power and authority of the Law Society and the benchers. The new LPA passed third reading on May 12, 1998 and received Royal Assent the next day (1998/99 Legislative, np). Adams (2009) suggested that such a shift in administrative power serves the self-interest of government (by reducing their workload) and the lawyers (by increasing their power and control over their monopoly) (p. 287).

#### **4.2.6. “Anecdotal” and “not simply a matter of choice”: Law Society uses courts to control notaries**

At the end of the 1990s, the Notaries Society and the Law Society were on opposite sides of two significant court cases.<sup>20</sup> The first was the *Dorn* case (1998), an application for a new seal in the Westbank area and a test of how the court would interpret “need” in light of the *Drew* case from 1981. Ms. Dorn got her seal but lost it when the Law Society appealed. The lower court found that despite existing service by lawyers in the area, need was demonstrated by three factors: first, a significant segment of the population wanted to use a notary; second, the area had a growing population; and third, the closest notary was “some fair distance” away (para. 11). In particular, the court disagreed with counsel for the Law Society who argued that need “should not be equated with desire” to have a notary, and was not “simply a matter of choice” (para. 9). Instead, Mr. Justice Shaw’s view was that “need is not as restrictive as that suggested by counsel for the Law Society” (para. 11).

The Court of Appeal (1999) in a two to one decision, Madam Justice Huddart dissenting, agreed with the Law Society’s argument in the lower court. They held that real need could not be inferred from desire alone and since there was only evidence of desire, there was no proof of need. The majority also commented on the legislated jurisdictional distinction between lawyers and notaries and attributed the restriction on the number and territory of each seal to “notaries not having the same legal training as

<sup>20</sup> During most of the study period, the Law Society investigated (sometimes with private investigators) and responded to complaints about those suspected of unauthorized practice (notaries and others). They gathered evidence that was used to obtain either an undertaking to stop from the offender, or, a court injunction (see Brockman, 2010, for examples from 1998 to 2006).

lawyers” (para. 13). There is nothing to support this comment from the Court, and the Court’s attribution became even more questionable when the government lifted the restrictions on the number and location of seals in 2009 (see section 4.3.6 for particulars). The *Dorn* case was emblematic of the notaries’ losing battle for credibility and expansion in the 1990s.

The second case was *Gravelle* (1998), an unauthorized practice claim by the Law Society for advising on probate of a will. The Law Society won. The *Notaries Act* did not (and still does not) include probate in the list of services that may be provided by notaries. However, the judge found that the statute was not exhaustive of the powers of notaries. Counsel for the Notaries Society provided evidence of notaries working on eight probate matters between 1882 and 1946, but the judge rejected the evidence as “anecdotal” and “not proof that the notaries acted in accordance with the law” (para. 98). The case turned on whether notaries in England were probating wills in 1858 when the laws of England were incorporated into British Columbia. Mr. Justice Bauman found that English notaries were not engaged in probate at that time, so British Columbia notaries who practiced in probate matters were committing unauthorized practice of law. The inconsistency between the Notaries Society defence in this case (that is, that they were already doing probate) and their 1989 proposal to expand Notaries Society jurisdiction to include probate was not lost on the judge (para. 104).

The Notaries Society and Ms. Gravelle appealed but the Court of Appeal dismissed the appeal in May 2001, and the Supreme Court of Canada refused leave to appeal in January 2002. That left the Notaries Society with only one avenue to doing probate: they would have to convince the legislature to change to their *Act*, and that was unlikely without acquiescence of the lawyers. The lawyers had illustrated Abbott’s theory by successfully claiming exclusive jurisdiction with the courts as their legal audience. The notaries’ claim to practice was subordinated to the lawyers’ dominant intellectual jurisdiction and a settlement (in Abbott’s terms) was reached.

### **4.3. “Sexy” and “Unassailable” with “No Opposition” and an “All-Encompassing Commitment to Education,” Notaries Gain Ground: The First Decade of New Millennium**

2000 to 2010 was the turnaround decade for the Notaries Society. It began with the familiar resistance from lawyers and rejection from government and the courts. But by 2010, the restrictions on notarial seals were history, notaries’ jurisdiction had expanded modestly to include representations agreements and international wills, and the first cohort of notaries from the Masters of Applied Legal Studies at SFU had graduated and received their seals.

#### **4.3.1. Same old**

The new millennium started with three main events between lawyers and notaries, all of them disappointments for the notaries: the court decision in the *Siegel* (2000) case; new legislation from the government still excluding notaries from representation agreements; and waiting 11 years for the government to make good on its announcement that the exclusion would be rectified.

The *Siegel* case was an unauthorized practice action by the Law Society about whether notaries could provide registered and records office services for corporations. All corporations must have an office of record where they keep their minute book and can be contacted for legal purposes, and all corporations must hold certain meetings and file certain reports every year with the Registrar of Companies. Notary Julie Siegel was offering these services on the basis that the *Notaries Act* empowered notaries to prepare documents relating to property that can be registered in a public office (s. 18(a)). Mr. Justice Sigurdson compared the definition of “practice of law” in the LPA that expressly included those services, to the authority of notaries under the *Notaries Act* that did not. None of the general authority given to notaries in their *Act* clearly included corporate records. Siegel was found to have engaged in unauthorized practice of law and ordered to stop. “You have to realize that most of the work that we’re asking for, notaries always did in this province. But the Law Society keeps chipping away at it through unauthorized practice, you know” (interview with notary, November 26, 2013).

This sentiment is consistent with the findings of Brockman (2010) to the effect that the Law Society's unauthorized practice cases did not usually involve any harm, but were "meeting an unfilled need" (p. 39), thus putting the public interest motivation for the prosecutions in question. The obvious motivation is to protect turf.

#### **4.3.2. Conflict and promises over the *Representation Agreement Act***

The first version of the *Representation Agreement Act* (along with the *Adult Guardianship Act*, the *Public Guardian and Trustee Act* and the *Health Care (Consent) and Care Facility (Admission) Act*) came into force on July 29, 1993. The legislation was controversial because it made fundamental changes to the rights and obligations of the state when a person was unable to live independently in society. For example, as of September 5, 2000, representation agreements replaced enduring powers of attorney, a staple of notary practice, but the legislation prescribed lawyers as the only ones authorized to consult on making representation agreements. Work on the legislation continued after 1993.

Notaries had been at the forefront providing some of the first funding to support work on the legislation. They consistently volunteered for working groups over the years. But in late 1999, the government advised the Notaries Society that notaries "**will not be permitted** to sign the Section 9 Consultation Certificates required to complete the new representation agreements for our clients" (emphasis in original) (Sherk, 1999, p. 5). Mr. Sherk, President of the Notaries Society advised that:

When the legislation was originally brought forward, our Society was assured the notaries public would be one of the "prescribed class" of persons able to sign the Section 9 Consultation Certificates ... when the regulations were ready to be proclaimed by the provincial government ... Given the assurances that notaries could serve their clients in the new area of representation agreements, as they do in the preparation of wills and enduring powers of attorney, the Notary Foundation also provided substantial cash funding, and our Society and its members have provided even more "in kind" ... Citizens of British Columbia will no longer have the opportunity to choose between a notary public and a lawyer for these services – they will be **forced** to use a lawyer (emphasis his). (Sherk, 1999, p. 5)

On February 28, 2000, the Legislature passed Bill 92 amending and simplifying much of the substance of the *Act* and notaries were still not authorized to do the work.

Promptly after the 2000 enactment, the Notaries Society told the media that the revised legislation was a threat and a surprise. The Second Vice-President of the Notaries Society told the *Times-Colonist* that “the notaries society has been involved in the review project for the new legislation since 1989 and had full expectations to be named one, if not the only, of the prescribed class [allowed to consult on representation agreements] when the bill came into effect” (Lee, 2000). Canadian Press picked up the report and it was carried in local newspapers around the province.

Then, on March 25, the Public Trustee responded with a column in the *Times-Colonist* to “clarify a few things for your readers” (Chalke, 2000). He confirmed that the status of notaries was being reviewed and that his goal was “that representation agreements be accessible, affordable and of high quality. In the meantime, until September 5, British Columbians can still make enduring powers of attorney.”

In the April 2000 edition of the notaries’ magazine, *The Scrivener*, Mr. Sherk who was still President of the Notaries Society said:

The former Attorney General and now Premier of British Columbia, the Honourable Ujjal Dosanjh, undertook to commission a review, which is being conducted by former Ombudsperson Dulcie McCallum. Her recommendations are expected to be made to the Public Guardian and Trustee in June of this year. We remain confident that the recommendation will be made that notaries public should be included as a prescribed class of persons permitted to sign the consultation certificates that validate Section 9 representation agreements. (Sherk, 2000, p. 6)

In May, the Public Trustee spoke to the House and outlined how the amendments had evolved, the many interest groups that had participated and the extent of the Public Trustee’s efforts to explain the new legislation and provide education for the public and professionals affected by the changes (Official Debates, May 11, 2000, p. 15583). Opposition justice critic Geoff Plant (soon to be Attorney General) rose to ask about the status of notaries under the legislation since no amendments had been made to allow notaries to provide the consultation or required certificates for the grantor,



witnesses and monitor. The 1993 provisions restricted the consultation to lawyers or “a prescribed class of persons” which had never been prescribed (s. 9(2)(a) of the 1993 *Representation Agreement Act*). The effect was that no one could make a representation agreement for health and financial purposes without hiring a lawyer.

Mr. Chalke (the Public Trustee) confirmed that former ombudsperson, Dulcie McCallum, had been retained to recommend who should be allowed to provide certificates and consultations. Her report was due the following month, in June. Mr. Plant offered the following comments on the suitability of notaries:

I am someone who has a strong respect for the role which lawyers play in terms of protecting our civil rights and the long tradition they have in doing that. What has over the last few weeks been equally if not more impressive to me is, really, the all-encompassing commitment that the notaries have shown to the process of educating themselves in this business of section 9 agreements. I’m told, for example, that three quarters – 80 percent – of the notaries in the province have taken the CLE courses and others that the trustee is talking about.

It is of course contrary to my interest as a member of the legal profession to do anything to limit the jurisdiction of that [legal] profession. In the course of her research and inquiry, what I hope Ms. McCallum is able to do, in addition to the other things around health care that the trustee talks about is to look substantively and functionally at the education that is available for notaries and to ask the question of whether that might in fact be enough to protect the public interest in respect of representation, ensuring that the representation agreements are quality instruments and also thereby ensuring that there is a higher degree of public access and perhaps at lower cost. (p. 15584)

In June, the McCallum Report recommended that notaries be added as authorized consultants for Section 9 representation agreements. Her report was received by the Public Trustee and delivered to Attorney General Andrew Petter who accepted it, announcing that new legislation would be introduced to rectify the situation. The Attorney General suggested there would be changes to the *Notaries Act* to permit notaries who passed a competency assessment to prepare the Section 9 agreements (“Notaries Act changes,” 2000, p. 1).

In October 2000, the CBABC responded in their bi-monthly publication for members, *BarTalk*, criticizing inconsistencies in the McCallum Report and claiming that

they (the lawyers) were “deeply concerned about the protection of the public interest” because representation agreements were so “complex.” They suggested that adding notaries was a political decision (“Notaries Act changes,” 2000). The *Lawyers Weekly* also covered the story (Mucalov, 2000) of how the Attorney General had failed to consult with either the CBABC or the Law Society before announcing his intention to act on the McCallum Report. The CBABC’s Government Relations Committee was tasked to “ensure that all MLAs are aware of our position on this matter” (“Notaries Act changes,” 2000). Despite the Attorney General’s intentions, no changes were made to the *Notaries Act* and lawyers remained in control of representation agreements. Finally, in 2007, the legislation was changed, allowing notaries access to representation agreements by dropping entirely any requirement for prior consultation of any kind, but it was four more years before that change was enacted on September 1, 2011.

In April 2001, the *Vancouver Sun* reported that the CBABC was openly critical of the government and the legislation, saying that the more than 50 amendments made by the House during passage of the revised *Representation Agreement Act* indicated the extent of the flaws (Kane, 2001). The expiry date for enduring powers of attorney had been extended for one year (to September 1, 2001) and the CBABC recommended that “every adult who lives in BC or has assets in the province should consider granting an enduring power of attorney” before it was eliminated. Eventually the CBABC was successful in preventing elimination of the enduring power of attorney so both it and the Section 9 representation agreement are currently available for estate planning in BC.

### **4.3.3. A new era**

The rest of the decade was a cooling off period for notaries and lawyers. The two professions were focused internally. Both hired a new CEO (the new name for the Secretary), Mr. Braid in 2001 for the Notaries Society and Mr. McGee in 2005 for the Law Society; each brought different values and goals to their organization.<sup>21</sup> The Law

<sup>21</sup> Mr. Braid had been a practicing notary in Terrace with a variety of small business experience. Mr. McGee was a Harvard educated lawyer with experience in government (as assistant to the Attorney General during the enactment of the new *Notaries Act* in 1981), in private legal practice, and in senior executive positions with blue chip communications enterprises.

Society created another task force to study paralegals and a Futures Committee to develop a strategic plan concerning how the lawyers might expand delivery of certain legal services, and by whom. The Notaries Society overhauled their education program and expanded their jurisdiction by tagging along on a mobility agreement with Alberta and new legislation covering international wills. The Notaries Society made no overt requests for additional jurisdiction, but, as Mr. Braid put it, the Notaries Society never abandoned their goal of expanded jurisdiction. They kept the dialogue open and the subject on the table when in contact with the government (interview, November 26, 2013).

#### **4.3.4. Paralegals one more time and no competition over “TAF”**

The Law Society’s new Paralegals Task Force was established in 2001 with “clear direction ... [not] to explore allowing independent paralegal practice in B.C.” The decision to review paralegals yet again was influenced by a number of factors. First, it was a pre-emptive, defensive move by the Law Society that admitted:

BC, unlike Ontario, does not currently appear to face significant pressure to expand or institutionalize the role of independent paralegals, although this situation could change. (“Shaping a new future,” 2001)

The President (the new name for the Treasurer) noted that notaries had influenced their decision to review paralegals, saying:

And in BC, unlike Ontario, we have actually seen the reality of self-governing paralegals – in the form of notaries public. That means we can carefully consider whether that model works in the public interest or whether other options are preferable for the harmonious integration of paralegals into the delivery of legal services. (Margetts, 2001 March-April, p.3)

Besides the denigration to notaries in suggesting they were “paralegals” or pseudo-lawyers and not an historic profession in their own right, the President’s comparison seemed inappropriate. Paralegals who were unregulated, legislatively unrecognized, organizationally powerless, and supervised employees of lawyers were hardly likely to behave like members of the Notaries Society, a statutorily established, historically self-regulated, independent, entrepreneurial organization.

The benchers were also influenced by the 2001 *Mangat* decision when the Supreme Court of Canada denied the (provincial) Law Society any jurisdiction over federally legislated activities. Mr. Mangat was an immigration consultant. The federal *Immigration Act* permitted parties to be represented by a barrister or solicitor or “other counsel” before the Immigration and Refugee Board (s. 30 and 69(1)). The court held that the Law Society could not prevent non-lawyers providing legal services when there was an “operational conflict” between the provincial and federal legislation (para. 72). The federal legislation took precedence. With this limitation in mind, the new Paralegals Task Force recommended that the Law Society increase its domain by certifying and regulating paralegals and delegating more functions to them while keeping them firmly under the supervision of lawyers. Another committee was established to work out the costs, standards and other details of instituting a paralegal certification and regulation program (“Law society moving,” 2002). The Law Society did not have the power to stop independent immigration consultants, but they could compete with them by providing supervised, regulated, certificated paralegals to do the same job. In Abbott’s vernacular, the Law Society was “bumped” out of its regulatory role by the federal government, but there was no challenge to its primary jurisdiction as the purveyor of all legal services.

Finally, the benchers were influenced by the reaction of the LSUC to the 2000 Cory Report that recommended independent paralegals be regulated by an independent agency, not by the LSUC (Cory, 2000, np). The LSUC indicated it did not agree with the Cory Report and in 2002 was “considering whether to seek the authority for paralegal regulation” (“Law Society moving,” 2002). In 2004, the Ontario government asked the LSUC to get involved. They did. In 2007, the Competition Bureau Canada wrote to them to warn that:

When one group of professionals is reliant upon another group of competing professionals for the ability to practice its profession and the scope of authorized activities, the Bureau is concerned that unfounded quality of service arguments may be used to artificially restrict access to the market in which the professionals compete.<sup>22</sup>

<sup>22</sup> Ironically, this argument was identical to the one used by the CBABC and the Law Society to defeat notaries’ proposals for increased scope, including the proposal in 2010.

The Bureau encourages vigilance that any such standards and limitations, conditions and restrictions on scope of practice be supported by facts and not speculation and that they not become a barrier that will unnecessarily restrain the ability of paralegals to independently enter the market. (Competition Bureau, 2007, January 27, np)

By 2008, the LSUC had successfully shepherded changes to their constating *Act*, giving them control over (for the first time) all legal services including paralegal licencing and scope of services. Paralegals in Ontario were no longer unregulated. In order to work as a paralegal, they had to be licenced by the LSUC. The legislators had extended their reach indirectly by delegation to the LSUC. This was not the outcome envisioned by Ianni or Cory and it is somewhat inconsistent with Witz's (1992) theory. While it appears as though paralegals have been successful in their inclusionary strategies, they entered the LSUC as a subordinate group, not as equals. The lawyers have the power to continue their exclusionary strategies against paralegals, possibly by raising entry standards.

In terms of demarcationary strategies, so far the Ontario lawyers have been unsuccessful in eliminating paralegals by including them. The government involvement (arena) in instituting paralegal regulation may have made the difference. Unlike the current paralegals situation in BC, the Ontario government initiated regulation, asked the LSUC to help, and followed through with the necessary legislation. The LSUC is regulating the paralegals in the "shadow" of government regulation" (Priest, 1998, para. 238), which should reduce the likelihood that the LSUC would intentionally try to eliminate paralegals. If they do, the government has the power to take back regulatory supervision and create an independent SRO for the paralegals. On Brockman's (1999) continuum, Ontario paralegals were at the heteronomous end, where Witz predicted they would have the most control over creating and maintaining their own profession. Witz's theory failed them. Now that paralegals are regulated by the LSUC, the Ontario lawyers, at the autonomous end of the continuum, have the greatest control over the content and process of regulating paralegals. After twenty years of resisting regulation of paralegals, the Ontario government, rather than creating an independent paralegal profession, directed the LSUC to take responsibility. The final instalment in the Ontario paralegals story is in section 4.4.2.

Back in BC in 2005, the Law Society instituted the Trust Administration Fee (TAF), a mandatory fee (initially \$10, subsequently \$15) for every client matter involving a deposit of funds in trust. TAF was an entirely internal arrangement created and collected by the Law Society from its members, producing a pool of funds for Law Society purposes. No external approvals were required. The stated purpose of the fee was to “help fund its trust assurance initiatives” (Lexis, n.d.). It was up to the individual lawyer to decide whether to expressly pass the fee along to clients or absorb it as part of the billing rate. Notaries, with their strong real estate practices involving regular and substantial trust deposits, were quick to follow suit. Minutes of a benchers’ meeting on June 13, 2004 show that the notaries wanted to co-ordinate the introduction of TAF by both professions, and asked to be advised “when the fee would be implemented so that they could implement the same fee at the same time. Accordingly, introducing the fee would not place lawyers at a competitive disadvantage to notaries” (personal communication, March 27, 2014). TAF was another example of how the notaries consistently identified good business opportunities where they could tag along on other’s initiatives.<sup>23</sup> Here, the lawyers were fronting the introduction of the fee and had figured out all the details of implementation. The notaries could use the blueprint for their own purposes and have little risk of adverse public reaction to the increase in service cost because they were simply following the leader.

#### **4.3.5. “Greatly improved,” “targeted and well-drawn programs”: The notaries’ education revolution**

As demonstrated in 1981 and 1989, education was a point of conflict for decades between lawyers and notaries. Notaries believed they were well educated and well trained to serve the public in their authorized areas (Braid, 2007, p. 7). Lawyers believed notaries’ education was inferior and that only lawyers’ standards of education were in the public interest (Guile, 1990, p. 2). Notaries did not ignore the criticisms, but made a series of changes to upgrade education for notarial candidates as well as qualified notaries. Between 1981 and 2008, the candidates’ education was expanded

<sup>23</sup> There was no evidence that it was not the notaries’ idea to ride the tide with the Law Society on TAF.

and improved twice, once in 1988 and again 1999. As Mr. Nicol (Secretary of the Notaries Society 1986 to 2001) recalled “I had a lot of really, really good friends over the years in that faculty at UBC, so I was very comfortable there” (interview, January 24, 2014). In 1981, notary education was a six month, part time correspondence course from UBC with no examinations on the course material, no practical legal skills, a non-mandatory practicum and the statutory exams required by the *Notaries Act*. By 2008, it was 16 months of “intensive study” through the Sauder School of Business at UBC plus “numerous practical training sessions” delivered by the Notaries Society both before and after passing the statutory exams (Braid, 2007, p. 7). In addition, the Notaries Society had pre-empted the Law Society in making annual educational upgrading mandatory for all notaries beginning in July 2007. The Law Society trailed with mandatory annual education requirements in January 2009. But the mandatory requirement was a non-event for the majority of notaries whose record of participation in continuing education was enviable. According to Mr. Braid in 2007, “for our Spring Seminars where we offer two days of continuing education, we consistently see over 60 percent of our membership enrol and attend” (p. 7).

Early in the new millennium, Mr. Braid and the Notaries Society were casting about for the next iteration of the education program. The Sauder School of Business at UBC was not interested in providing greater emphasis on the legal aspects of the program. The law school at UBC was not interested in doing anything at all with the Notaries Society. “Notaries were just not on the radar” (interview with notary, November 26, 2013). Contemporaneously, the notaries and Dr. Gordon from the School of Criminology at SFU were both involved in the marathon of working groups developing the package of adult guardianship and estate planning legislation. Dr. Gordon described it as a “long standing relationship with the notaries as a result of that particular initiative” (interview, December 2, 2013). One of the things they discussed was how to educate the public and those who would guide the public (like lawyers, notaries and community advocates) about the new package of legislation. Those discussions were ongoing in the working groups when Mr. Braid stepped into the role of Secretary of the Notaries Society in 2001. The CBABC had recently reacted negatively to the 2000 McCallum Report using the usual criticism that notaries were so poorly educated it would not be in

the public interest to allow them to advise on representation agreements (“Notaries Act changes,” 2000, October, p.1).

Mr. Braid acknowledged that there might have been some merit to the lawyers’ criticisms saying: “ ... maybe if we were going to get into more complex areas of the law, our people needed to be trained and have a little more academic knowledge than we did” (interview, November 26, 2013). Dr. Gordon observed that the Notaries Society “wanted to find ways of offering higher education to people who were sitting notaries and those coming in as notaries ... They wanted their existing people to have opportunities to get degrees ... They wanted to find a way of enhancing the educational standing of notaries” (interview, December 2, 2013).<sup>24</sup> Gordon and Braid hit it off, with Braid saying “then I meet Gordon and he’s a big personality. And he’s a guy who can get things done” (interview, November 26, 2013), and Gordon saying “we have a good relationship ... you know, he’s like myself, he’s very entrepreneurial, probably more so than I, he certainly is a go-getter” (interview December 2, 2013).

At some point in 2003, Mr. Braid and Dr. Gordon realized they were talking about something that might be mutually beneficial and attainable. Would SFU be interested in taking on the education program for notaries? Dr. Gordon and SFU had some recent experience with a degree program called the Integrated Studies Program run through continuing education in conjunction with the Justice Institute. That joint program had limited success and was eventually discontinued, but the goal was consistent with the notaries’ aim of improving their credentials. Dr. Gordon and Mr. Braid talked about the level of education – would it be an undergraduate diploma level or a graduate level? Either one could be offered in the two year window that the Notaries Society felt was ideal for their mature candidates. “And I do remember meeting the notaries with Wayne [Braid] ... and I said which road are you on? And he thought the master’s degree was quite sexy, so I mean it is, it carries a lot more weight” (interview with Dr. Gordon, December 2, 2013).

<sup>24</sup> This is a precise example of the link between pursuit of jurisdiction and pursuit of status as identified by Adams, 2004, p. 2251.



When Dr. Gordon received positive feedback from SFU about his initial inquiries for a new master's level degree specifically for notaries, the Notaries Society organized a three day retreat in Victoria,<sup>25</sup> hired a facilitator, and invited key players to map out the new educational program. The attendees included instructors from the existing UBC program, lawyer/professors from UBC law school, SFU's head of continuing studies and representatives from the Notaries Society (interview with notary, November 26, 2013).

From beginning to end, the process of establishing the new master's degree for notaries took approximately five years. In the May 23, 2007 Program Proposal to SFU, one of the justifications for the new degree was improved status for the notaries:

There is a perceived need within the notarial profession to require an educational qualification commensurate with the status and role played by a notary public in contemporary society. (School of Criminology, 2007, p. 1)

The new program was called the Master of Arts in Applied Legal Studies (MAALS) and was described as:

The new educational process includes most of the former training requirements, but there will be an expansion in the depth and breadth of understanding that new notaries will have regarding both the law and broader social issues. Students will complete a genuine graduate degree program, fully sanctioned by Simon Fraser ... The degree program will incorporate a combination of state-of-the-art distance education elements, with intensive in-class instruction. It will provide students with foundation courses that impart skills and deeper understanding about the law ... This foundation will be built upon through the delivery of coursework central to the day-to-day work of a Notary Public, preparing candidates for the standard provincial exams, which will remain substantially unaltered. The program is based on a trimester system – three terms per year, with each term consisting on 13 to 14 weeks of time commitment. A capstone course at the end of the 16 month program helps prepare the student for stepping out into the practical training, which will remain an essential component of notarial preparatory work. (MacAlister, 2007, p. 40)

<sup>25</sup> There were different recollections of the timing of this retreat. One lawyer attendee recalled it happening before Dr. Gordon was involved so when Mr. Braid was discussing the idea of an improved education program, he (Braid) "was able to come to him [Gordon] with a pretty formed idea of what it [the improved education program] looked like" (interview with lawyer, January 16, 2014).

The new education program was generally regarded as a marked improvement over the previous UBC program. The quality of teaching was described as “unassailable”:

Here’s the thing now ... one of the great advantages where I think Rob Gordon did an excellent job putting together the program ... I think he deliberately went out and recruited lawyers to come and teach in the program who would meet the credibility test, right? I think it’s probably fair to say that most of the lawyers teaching the program are QCs. Far greater proportion than you see in the general population of lawyers. And so it would be pretty hard to knock the credentials of the lawyers who are teaching in the program and I think that was a very, very smart move by Rob to do that because that helps to head off any concerns or criticisms that might be raised within the legal profession. I have the utmost respect for the ... regular faculty ... [who] teach in the program, but what Rob did by reaching out beyond the university to the profession, he brought in people who were excellent and ... unassailable. (interview with lawyer, December 20, 2013)

There was an increased emphasis on education before practicing:

So things have changed. We can no longer enter a field and learn as we go along and I think that [MAALS] is simply reflective of that change. The notaries determined that the course they were offering left people on their own to learn more after they became notaries. But now one can practice only after getting an education and some experience. I think it’s greatly improved. (interview with notary, November 12, 2013)

There was also recognition that both academic and practical training played a role in preparing candidates for practice:

... make it as academic as you want. You have to remember that this is a university this isn’t a trade school ... I’m aware of that push pull, I’m aware of that. There were some academic principles in contract law that they should know, even the history of contract law shows some academic discipline ... but I’m not an idiot; there’s a practical side to it. (interview with lawyer, February 2, 2014)

The accolades were not universal. One notary thought the new program came at the expense of practical experience for notary candidates, saying:

So now we get the new master’s thing. The Notaries Society want to up the ante. There’s now the type of people who don’t have any much

boots on the ground experience. So I think it's harder for those people. So they're coming out of this, they have a fancy degree, and it's a solid education, and we in the Notary Society give them some practical stuff, but they don't [already] have that practical thing. (interview, December 11, 2013)

There was also a divergence of opinion on the relative merits of notaries' education and lawyers' education. Perhaps not surprisingly, as shown below, most notaries and the odd lawyer regarded MAALS as providing equivalent or better education for the notaries' limited scope of practice than law school provides for the lawyers' unlimited scope of practice:

... so it was like you guys want to argue about our education when it comes to what we do? We're way better educated than you are. Because we're specialists. (interview with notary, November 29, 2013)

I don't agree that it's [MAALS and the LLB/JD] significantly different. I think it's very similar for the areas of law that we practice (interview with notary, November 12, 2013).

I mean those people [benchers who were also teaching in the MAALS program] were always on us to say be careful what you say about the education requirements because I teach in those areas and you the benchers should know at least from my perspective, they're very targeted and well drawn programs that probably prepare the notaries better than the law students. So the law society has been alive to that. (interview with lawyer, February 28, 2014)

I do know that notaries now, with their education requirements, with their current training, can provide excellent service for people. (interview with lawyer, January 24, 2014)

Most lawyers, on the other hand, were quick to distinguish the two programs and conclude that law school provided superior education to MAALS. One lawyer who taught in the MAALS program from its inception provided a politically sensitive explanation:

For example, in terms of the time I don't think it's expected that they [notaries] would get the same amount of contact and read the same number of pages of material that you would at law school. What they're getting from the SFU master's program is darn sight better than what they had before ... they've got to get a master's degree and they have to take a number of courses over the course of two years, they've got to write papers, they've got to pass exams, they've got to

... attend live for [some of the courses]. They're getting some practical application in what they call a capstone course. They're getting sort of a contractual theory course ... they're getting two real estate courses, they've got the wills course ... legal research and writing ... legal philosophy ... they're getting tons of stuff they never got before ... And I don't think they're getting it from the perspective of it being a trade school either. I think again there's this push pull between let's teach them something academic and let's teach them something practical. Legal philosophy isn't practical. But legal research is, but we teach legal research at law school too, we do it in a university environment ... Are they [the notary students] getting what law students get? No, are they getting a taste, is it law school light? I think it's law school lighter, I think my answer was it's better than what they got before. They're getting much more of a legal education than ever they've received before. But again they're not lawyers, they're mandate is only to do a small amount too. The *Notary Act* says what they're entitled to do, is not nearly what lawyers get to do. But I think in the big picture, is it better to have a more comprehensive legal education than not, the answer's yes. Is this giving them what law school would give them? Absolutely not. Is SFU's program better than the one they got before? I would think yes. (interview, February 2, 2014)

Other lawyers diminished the quality of the MAALS program by comparing it to the paralegal training course and the Professional Legal Training Course (PLTC) that must be completed after law school and during the articling period before being eligible for call to the bar:

So it [MAALS] is very similar to paralegaling. My paralegal here is brilliant, she has the Capilano program and she did it while she was in Vernon. So she did a lot of online. So it sounds like it's similar. (interview, February 4, 2014)

They also take that 18 month master's of applied law program, which is a very targeted program. More like our PTLC (as opposed to law school) that our students go through. (interview, February 4, 2014)

According to the CBABC and the Law Society, the advent of the MAALS program was a non-event even though both organizations consistently rejected the notaries for their quality of education. "I didn't even know about it," said one (interview with lawyer, February 4, 2014). Another lawyer suggested that: "when we were preparing to respond to the last advance by the notaries to the government to expand their scope of practice and change their legislation, the age old argument [the substandard education of

notaries] didn't even hit the radar screen when we were preparing" (interview, February 28, 2014). However, as described below in section 4.4.1, in fact, the CBABC did point to purported deficiencies in notary education when responding to the notaries' 2010 proposal. The same lawyer claimed that "they [the CBABC] recognize that the notaries have come a long way in terms of their educational background" and that "the old argument that lawyers might have brought out about educational qualifications may not hold much water anymore" (interview, February 28, 2014). It is almost as though this lawyer did not read the three submissions from the CBABC in response to the 2010 proposal from the Notaries Society.

In any event, in the fall of 2008, the new Master of Arts in Applied Legal Studies accepted its first cohort. In 2011, one year after its first cohort graduated, the MAALS program received an award of excellence from the Canadian Association for University Continuing Education, an association of "deans, directors, senior administrative personnel and practitioners whose professional careers are in university continuing education in Canada" (Canadian Association, n.d.). Admission to MAALS was (and is) a two step process. The candidate must pass the Notaries Society requirements first which include satisfactory screening of the candidate's professional, financial and educational background including character references and a criminal records check, evidence of community service, evidence of sound business experience, a satisfactory undergraduate degree and satisfactory reports from two personal interviews with a representative of the Notaries Society (Society of Notaries, 2014, p. 4). Those who make that cut are then reviewed by SFU where the primary requirement for admission to any Masters program was (and is) at least a 3.0 grade point average in the undergraduate degree. Between 25 and 30 new candidates have enrolled in the MAALS program each year.<sup>26</sup> The rate of graduation has been improving but attrition is an ongoing concern for both the Notaries Society and SFU. In his five year report to the Notaries Society in the fall of 2013, Dr. Gordon identified the indicia of successful completion as:

<sup>26</sup> The Notaries Society receives over 1600 enquires for membership annually (Society of Notaries, 2014, p. 10)

... admission cumulative grade point average plus the degree topic plus the location of the university where they took their degree plus the gap between when they completed their degree and when they started in the program. So that holds good. So a GPA of 3.5 with a degree in legal studies major or criminology ... from British Columbia where the incoming student is two years away from having completed their degree is more likely to succeed than someone with a marginal degree where the topic is food science and the degree is from University of the Punjab and it's been 15 years since they finished. (interview, December 2, 2013)

Recently, the Notaries Society has been testing an alteration in their admission requirements to address attrition among candidates with a significant time gap since obtaining their undergraduate degree. Instead of requiring evidence of sound business experience (usually at least five years, hence the significant time gap for some applicants) before entering the MAALS program, they have accepted some students directly from their undergraduate degree on the understanding that when they have completed the program and received their seal, they will practice with an experienced notary for at least five years. In most cases, this arrangement has been made where a parent is the experienced notary, and the child is the aspiring notary. The Notaries Society has required no written agreement about the five years afterwards. It has been simply a handshake. And it has worked, says their CEO, because the Notaries Society is a small organization and: "... there are only 330 of them. I can tell you every one of their names, I can tell you every one of their spouse or partner's names and most of their children, you know ... So because of his Dad and his Dad's commitment to our profession, I don't have to worry for five years, you know?" (interview, November 26, 2013). If notaries permanently change their admission requirements to delete the necessity for at least five years prior business experience, then the notaries would be pitted against lawyers for the same class of candidate<sup>27</sup> and one of the distinguishing features of hiring a notary – an experienced advisor – would be eliminated. This is also an example of the potential culture clash between lawyers and notaries, a theme that is discussed in more detail in section 4.5.

<sup>27</sup> Admission to law school requires a significantly higher GPA than the MAALS.

#### **4.3.6. “Demonstrably in the public interest”: Cap and territory gone**

As discussed above in section 4.1.1, MLAs in the 1981 legislature were aware that notaries were being pressured to agree to the restrictions on the number and location of seals because those were the terms of the 1955 GA (Official Debates, June 26, 1981, Hall, p. 6459). The lawyers were “automatically objecting to almost every appointment, so the way we resolved that” was to agree to the restrictions (interview with notary, January 24, 2014). In November 2007, the Ministry of Attorney General issued a “Consultation paper: Proposal to amend the Notaries Act” to remove these limitations. Benchers’ minutes of December 14, 2007 and interviews with key informants indicated that the government’s proposal was a surprise for lawyers and notaries alike. Neither had any advance warning.

The government initiated the proposal solely to comply with their obligations to facilitate labour mobility between BC and Alberta.<sup>28</sup> The consultation paper pointed out how “highly unusual” it was for these restrictions to exist “in today’s society.” The restrictions created a monopoly for notaries, they said, and prevented otherwise qualified people from working as notaries public (np).

The notaries’ reaction to the proposal was mixed. There was a faction who regarded the proposal as “a move to try and increase your income base [for the Notaries Society]” (interview with notary, December 3, 2013) by allowing an unrestricted number

<sup>28</sup> The two provinces had signed the Trade, Investment and Labour Mobility Agreement (TILMA) in April 2006 with a view to eliminating barriers to free movement of people, goods and services across provincial boundaries. The Federation of Law Societies of Canada (FLSC) subsequently adopted a mission to negotiate free mobility of lawyers from coast to coast. The FLSC has completed three mobility agreements that will be replaced by a single National Mobility Agreement 2013 when it becomes effective later in 2014. The 2013 agreement was signed October 17, 2013 and will allow free movement of lawyers (including the Quebec notaires) everywhere in Canada regardless of the nature of their education in civil law or common law. Conceptually, the 2013 agreement takes care of the business end of providing legal services (such as insurance and compensation for defalcation) and leaves competence to the individual lawyer as a matter of “professional responsibility” (Federation, 2013, p. 3). The Law Society’s dealings with the FLSC illustrate the stark inconsistency between the Law Society’s ready acceptance of the 2013 agreement and its reliance on lawyers’ “professional responsibility” to act within their competence, and their repeated rejection of the notaries’ trustworthiness and professional responsibility to know their limits and act within their competence.

of notaries to practice anywhere and to move into the most lucrative locations in the province. The potential increase and movement of notaries could create competition and negatively impact those notaries already practicing in the lucrative areas. Some of these notaries had paid significant sums to purchase a seal and a practice (interview, January 24, 2014). Notary practices would no longer be as valuable when the territorial monopoly was gone.

There were other notaries who regarded the proposal as necessary to avoid a *Charter* challenge (interview with two notaries, November 26, 2013 and January 24, 2014 respectively). And there were those who saw the proposal as a golden opportunity to get rid of the restrictions without battling lawyers, the government or the courts (interview with notary, November 26, 2013). “It became a good way for the Campbell government to deal with an issue without having notaries and lawyers going like this [*butting fists together*]” (interview with notary, November 26, 2013). Another notary recalled “the specific meeting where [deleting the restrictions] was approved and ... we put in a requirement that at the same time they approve the increased scope of practice of notaries ... which [the government] ignored” (interview, November 12, 2013).

Just as the Notaries Society took advantage of the consultation paper to try to advance their agenda, so too did lawyers. The lawyers’ agenda was to maintain their influence on government and their position as the protectors of the public interest. The Law Society’s response was formulated after the executive solicited input on the proposal by Email from their 10,000 lawyer-members. They received ten replies commenting on “the potential economic impact on lawyers from increased competition by notaries” and “the perceived lack of professional training amongst notaries” (Law Society Benchers, 2007, December 14, p. 6).

Mr. McGee (the CEO of the Law Society) cautioned the benchers that notwithstanding the members’ comments, “given the heightened degree of scrutiny self-regulating professions currently face, it is important that the Law Society’s response be demonstrably in the public interest and not simply protection of lawyer’s interests” (personal communication with Law Society, March 27, 2014). The members’ comments



about competition and the shortcomings of notaries were not included in the Society's reply to the consultation paper.

Instead, the Law Society did "not oppose ... removal of the quantitative and geographic restrictions" and went on to demonstrate their influence by warning the government that the new TILMA legislation ought to reconcile the differences between Alberta and BC notaries (personal communication with Law Society, March 27, 2014). This may have been a helpful warning for the Attorney General, but it was gratuitous and not responsive to the consultation paper. Furthermore, the Law Society suggested that the government re-address how the Notaries Foundation was organized and operated "to ensure it is consistent with advancing the public interest." The LPA was offered as a model of how the foundation should be structured and operated in the public interest, said the Law Society.<sup>29</sup> While their concerns about the Notaries Foundation were ostensibly motivated by concern for the public interest, the comments effectively undermined the notaries with the Attorney General while enhancing the Law Society's status as the whistleblower, suggesting that the Notaries Foundation was not being run properly or in the public interest, whereas the lawyers were doing a model-worthy job with their Foundation. The Law Society's tactics here illustrate the contention of Adams (2004) that status and jurisdiction are intertwined (p. 2245).

The *Notaries Act* amendments passed third reading by the legislature on May 29, 2008, received Royal Assent the same day and by its terms, came into force on January 1, 2009 (2008 Legislative, np).

<sup>29</sup> The Notaries Foundation was established under the *Notaries Act* in 1986 with eight out of ten governors (directors) being directors of the Notaries Society and a statutorily prescribed annual distribution of funds. The Law Foundation on the other hand had fourteen out of seventeen governors who were lawyers or judges (but not necessarily benchers) and no prescribed distribution of annual funds. Both Foundations had the same purposes except that the Law Foundation could support law reform and the Notary Foundation could support education for notaries and contributions to their special fund to cover any misappropriation of trust funds.

#### 4.3.7. “There will still be probate issues”: Riding the wave with WESA

In 2009, the provincial government passed the *Wills, Estates and Succession Act* (WESA) that overhauled and replaced four statutes.<sup>30</sup> As with the adult guardianship package, the new *Act* called for significant conceptual and procedural changes and was slated to come into force in due course as the regulations and reviews were completed. WESA gave notaries a small expansion of jurisdiction to include international wills<sup>31</sup> but otherwise did not extend notaries’ powers in the sense that they were already doing simple wills and other estate planning documentation (like health directives and representation agreements). However, unlike the situation with representation agreements, notaries were included in WESA from the outset and were not forced to wait 22 years to participate in providing legal services under the new *Act*. WESA was first introduced by Attorney General Oppal in April 2008, but the House prorogued before it could proceed.<sup>32</sup> The legislation was re-introduced in the following session by new Attorney General de Jong in September 2009, passed third reading on September 24, 2009, was amended twice before enactment, and came into force on March 30, 2014.

Like TILMA, WESA did not provoke any obvious reaction from the lawyers concerning the narrow benefit to notaries. As one lawyer put it, lawyers were savvy to preserve their firepower for the notaries’ significant advances in jurisdiction, saying “WESA was not going to expand the territory of notaries terribly ... notaries are doing

<sup>30</sup> The four statutes were the *Wills Act*, the *Wills Variation Act*, the *Estate Administration Act* and the *Probate Recognition Act*.

<sup>31</sup> The WESA legislation had been under consideration since at least 2003. The British Columbia Law Institute (BCLI) led the reforms with funding and support from lawyers, notaries and academics, and in 2006, produced a comprehensive report “Wills, estates and succession: A modern legal framework.” One of the details recommended by the report was “implementation of the Convention Providing a Uniform Law on the Form of an International Will, to which Canada acceded in 1977” (British Columbia Law Institute, 2006, p. 52). The report also recommended that notaries be included with lawyers as authorized to complete a certificate required by the Convention. When WESA came into force on March 31, 2014, notaries had retained the status of authorized person as originally recommended by the BCLI.

<sup>32</sup> Oppal was the Attorney General who, in 2007, stopped enactment of the revisions to the *Representation Agreement Act* that would have included notaries because of concern that the revisions would be too costly to the province in the face of the global economic downturn (personal communication with lawyer, January 24, 2014).

wills anyway and there will still be probate issues, they will still be fighting notaries over the addition of probate” (interview, January 16, 2014).

#### **4.4. 2010 to 2013 Inclusive: Dancing with the Devil**

These are the final three years of this research. 2010 started with another open conflict between lawyers and notaries, and it ended with lawyers and notaries working together on “subsuming” the Notaries Society into the operations of the Law Society. During these last three years, the Notaries Society made momentous and risky decisions that put them on the path to potential loss of autonomy, exactly the destination that notaries had managed to avoid since 1922 (Brockman, 1999, p. 122).

##### **4.4.1. “Undeveloped,” “limited legal education and training” and “subsumed”: The beginning of the end game**

Near the end of the first decade in the new millennium, the Notaries Society hired a professional lobbyist to improve their working relationships with government: “we found that was the way we needed to get the government’s ear with a lobbyist working for us” (interview, November 12, 2013). It seemed to work. After years of asking for substantive changes to their *Act*, shortly after hiring the lobbyist, the notaries began working with the Attorney General’s office on amendments to the *Notaries Act* to update how the organization was structured, the disciplinary powers and other regulatory matters. “A small part of the changes was to increase the scope of practice ... You have to realize that most of the work that we’re asking for, notaries always did in this province. But the Law Society keeps chipping away at it through unauthorized practice ... We felt it was quite reasonable that if anyone could incorporate companies, maybe notaries should be allowed to as well. And the same with registered and records offices for corporations” (interview with notary, November 12, 2013). In addition, the Notaries Society asked for the right to probate simple uncontested wills and to prepare simple uncontested pre-nuptial, cohabitation and divorce documents (Canadian Bar Association BC, 2010, October 15, Appendix A “Proposed rights and powers of the BC notaries’ new Act,” August 27, 2010, np). By 2010, work had proceeded to the extent of draft legislation with detailed provisions delineating the scope of each new area of jurisdiction.

Several notaries indicated that the government had given assurances that the notaries would get the legislative changes they were after (interview, November 12 and December 3, 2013 respectively). One notary was even more specific saying that:

Around 2010, [Premier] Gordon Campbell told us it would be approved ... Outright statements that our requests for increased scope of practice would be approved by the government. We needed to be patient. (interview, November 12, 2013)

It is unclear when and how the Law Society and the CBABC first became aware of the notaries' inroads with the Attorney General, but, "on September 8, 2010, the Ministry initiated a short-term consultation process requesting written input on the proposed legislative change to the BC notaries' regulatory framework by October 1, 2010" (Canadian Bar Association BC, 2010, October 15, p. 2). The Law Society did not respond since it was now restricting itself to purely regulatory functions.<sup>33</sup> The CBABC submitted their "Briefing Note" on October 15, 2010 advising the government that in essence, the notaries' proposals were "undeveloped" and not in the public interest. The CBABC claimed that the public interest would not be served without broader consultation among the CBABC, the Attorney General, the Law Society, "justice system stakeholders and the public" (Canadian Bar Association BC, 2010, October 15, p. 2). Despite the Notaries Society assurance that existing notaries and candidates in the MAALS program would receive proper education and training in the new areas of jurisdiction, the CBABC trashed the notaries for "limited legal training and education" that resulted in notaries who were incapable of knowing when a matter was simple or complex, or "what to do when something is outside the norm" (p. 7). Lawyers, they said, "are steeped in complex issues of conflict of interest and ethics" and lawyers have "ongoing expertise" in law and legislation (p. 7). The Briefing Note compared the MAALS program to law school education concluding that notaries' "appreciation and understanding of the rule of law is significantly less" than a law school graduate's (p. 9). The CBABC offered no evidence to support their assertions.

<sup>33</sup> See section 4.4.2 concerning the change to the Law Society's statutory purposes.

The CBABC also raised competition in rural areas as a reason to reject the notaries' proposal. They warned that if competition became too great, lawyers would abandon rural communities and that, they said, would affect "access to justice"<sup>34</sup> because the community would lose access to the services that notaries could not provide (p. 10).<sup>35</sup> Finally, the CBABC called for "further dialogue" with the Notaries Society and the Attorney General "to determine how both professions can best serve the needs and protect the interests of the people of British Columbia" (p. 11). The Briefing Note did not mention that Canadian society supports competition in a free marketplace<sup>36</sup>, that full absolute monopoly is rarely paramount to freedom of choice in the public interest,<sup>37</sup> or that the legislature had substantially abandoned the concept of "need" as a condition for notarial service in 1981 and completely eliminated it in 2009.

The Briefing Note did not seem to have much effect. The Notaries Society continued their work with the Attorney General's office on changes to their *Act* for another sixteen months. They had a personal meeting with Attorney General Bond on January 10, 2012 to discuss the revisions. E-mails from January, February and the first week of March, 2012 show the Notaries Society and the Attorney General's office exchanging drafts and information on a regular basis (British Columbia, Open Information, 2013, p. 65). Eventually, the CBABC became aware of the notaries'

<sup>34</sup> "Access to justice" had become buzz words for criticism of the clogged court system particularly in criminal matters, but did not usually refer to the mixed bag of legal services that rural lawyers provided. One of the early uses of the phrase "access to justice" was as the title of the Hughes report (Access to Justice: Report of the Justice Reform Committee) in November 1988. The Hughes report was concerned solely with "a court system that is accessible to all" (Province, 1988, p. 288). In the case at hand, "access to legal services" would have been more accurate.

<sup>35</sup> Licensing lawyers to provide the full spectrum of legal services has been controversial for years. The Law Society has studied specialized licences and restricted practices and has made some progress with the classification and scope of visiting lawyers, Canadian legal advisors, non-practicing and retired members, but practicing lawyers are still entitled to practice in every field. This issue is important but outside the scope of this research.

<sup>36</sup> In May 2014, Pecman, Commissioner of Competition, stated: 'We conducted a public consultation asking Canadians to identify sectors of the economy in which the Bureau could play a targeted role in advocating for increased competition. We were extremely pleased with the feedback we received from Canadians, including a validation that we are focusing our efforts on the areas that matter most to Canadians, including the telecommunications sector and regulatory restrictions imposed on competition between professions' (Pecman, 2014, np.).

<sup>37</sup> Even the evil firewater is now available from more than one source.

progress and in February 2012, delivered another twenty-seven page submission to the Attorney General, this time from the Solicitors Practice Issues Committee, expressing exasperation with the notaries and the process:

In 2011 the Society of Notaries Public renewed its call to the Ministry for an expansion of notarial services. The CBABC learned of this renewed effort and continues to want to be involved in this process and dialogue on any changes made. The CBABC offered to participate in such a dialogue, and did in fact host a meeting with the Society after many months of effort to achieve it, and asked for additional information that was not forthcoming. In order to ensure that the public protection concerns were raised with government, this Submission was prepared. (Canadian Bar Association BC, 2012, April, attachment 2, p. 8)

The CBABC responses in 2010 and 2012 exemplify the Competition Bureau (2007, January 27, np.) concern that:

When one group of professionals is reliant upon another group of competing professionals for the ability to practice its profession and the scope of authorized activities, the Bureau is concerned that unfounded quality of service arguments may be used to artificially restrict access to the market in which the professionals compete.

Nevertheless, in March 2012, work stopped on revisions to the *Notaries Act*. On April 2, 2012, the Attorney General's office arranged a day long meeting for April 4 among representatives of the Attorney General (Assistant Deputy Minister plus three, one of whom was to act as facilitator of the meeting), the Notaries Society (President, CEO and counsel), the CBABC (President, Past President and Executive Director), and the Law Society (President, CEO and Chief Information and Planning Officer). The sole purpose of the meeting was to discuss the notaries' scope of practice proposals. On April 3, the CBABC delivered to the Attorney General two things: a letter from Ms. Matthews, CBABC President, advocating that "any expansion of notarial services should be work that is done by notaries under the supervision of lawyers, and notaries should be regulated by the Law Society," and another submission about why notaries should not be given more jurisdiction, this one from the Family Law Working Group of the CBABC (Canadian Bar Association BC, 2012, April, attachment 3).

The meeting the next day did not go well. Two of the twelve participants were notaries. Nine of the participants were lawyers, only one of whom was there on behalf of the Notaries Society. As one of the notary participants put it:

So we had this meeting and the Ministry hired a facilitator to try and move the meeting along because they knew it was going to be confrontational. And it was. To the point where even the president of the Law Society apologized to me afterwards for the way it was conducted. And my view was that if that's the way we're going to be meeting then we just wouldn't be meeting any longer. And I think that then led the AG to get together the Law Society and the Notaries Society. In my view, in my opinion, the government recognized that the BC branch of the CBA would never agree with increasing scope of practice and so it was more important that the Law Society and the Notaries Society get together and see if we can work a settlement. (interview, November 12, 2013)

By July 11, the Attorney General had met separately with the President of the Notaries Society and the President of the Law Society. She recorded the outcome of her meetings in a letter addressed to both Presidents, saying:

I am writing to confirm my request to each of you during our respective meetings that the Society of Notaries Public and the Law Society work together to develop a proposal for my consideration regarding direction for regulatory reform of legal and notary services in the province by September 28, 2012. Any recommended proposal must:

- ensure, and preferably enhance, the protection of the public interest in the provision of legal services;
- increase both affordability and access to legal services and/or access to justice; and
- create efficiencies in the regulation of legal services. (British Columbia, Open Information 2013, p. 78-79)

At this point, the Notaries Society was at a cross-roads: they could concede to the Attorney General's wishes and engage in co-operative dialogue with the lawyers, or, they could take a stand, reject the AG's request and take a risk that decisions would be made for them. The notaries chose to concede to the Attorney General. The following four reasons for that choice were identified in the interviews:

### ***Respect for Attorney General Bond.***

Both lawyers and notaries openly admired the Attorney General. They described her as:

... very well organized very well briefed, understood the role of the notaries, understood the role of the law society, and ultimately wanted to make sure that any policy decision was based on strong factual background not on political decisions necessarily. She was wonderful. She was terrific. She was a do something person, not a talker. (interview with lawyer, February 28, 2014)

I have lots of time for Shirley Bond she's not a buddy of mine but god bless her, she powered through this. (interview with lawyer, February 4, 2014)

... the day Shirley Bond told me the judge decided in her favour<sup>38</sup> was the day I sent her flowers. I like Shirley Bond. I thought she was a very good AG but she was not a lawyer. (interview with notary, November 12, 2013)

Well I think that notaries frankly, really didn't have much choice. There's a letter that people have seen from Shirley Bond saying that I think the idea of having a single regulator is a good one, and I really want the two organizations to sit down. I don't think the notaries had a choice and if they did have a choice they made the right decision. Because to sort of have blinders on and want to keep your own little profession, never is a good thing no matter who you are. So I'm not surprised they came to be part of the group. In coming to the group, they might have said this is a terrible idea. You can never make decisions without information. So if they didn't come they'd be the fools for not coming. So their leadership was very smart. They said we need to be involved in this and everyone came with an open mind and they ended up unanimously agreeing on this proposal. (interview with lawyer, February 4, 2014)

### ***Trust.***

The leadership of the Law Society and the leadership of the Notaries Society had been developing a relationship:

Bruce LeRose [chair of the Legal Service Providers Task Force discussed in section 4.4.2] and I have a great relationship. We trust each other. Absolutely. (interview with notary, November 12, 2013)

I was there when Tim [McGee] was hired as CEO [of the Law Society] and I know that since Tim's been there, the relationship is continually

<sup>38</sup> Bond's right to serve as Attorney General was challenged by a Ms. Askin on the basis that Bond was not a lawyer and acting as Attorney General would be practicing law. The Law Society rejected the complaint, the Supreme Court dismissed the petition and the Court of Appeal likewise dismissed the appeal (Santry, 2013, np). Legally it was not necessary for the Attorney General to be a lawyer (although by convention, most had been lawyers).



improving. He and the CEO Wayne Braid have an excellent relationship. (interview with lawyer, February 28, 2013)

### ***Opportunity for self benefit.***

It was a chance to loosen the chokehold that lawyers held on the jurisdiction of notaries:

... So the Law Society is finally starting to talk ... This could turn out to [allow] ... far more legal service providers in different areas than just notaries and lawyers ... This our opportunity right now because access to justice is in such a mess, that this is our opportunity to really look at it and really get some other alternate legal providers. (interview with notary, November 26, 2013)

### ***Status.***

Being invited to work on a committee of the Law Society, with the possibility of joining the Law Society was viewed by some as an elevation in status. As one lawyer put it:

I think the notaries will get more credibility by being members of the law society, I think they'll have more options, they'll be exposed, they'll start to become partners of lawyers, you'll have a notary and a trial lawyer having a practice together when you're starting out a young lawyer may say I don't want another lawyer as a partner, I'd rather have a notary because notaries can do the work that I don't want to do, I just want to do court work. I think it will be all kinds of business arrangements that no one's ever thought about. So I think for notaries, instead of having their own little practices, as most of them do, they might start to be cross pollinated by the legal profession. (interview, February 4, 2014)<sup>39</sup>

Not everyone agreed with the notaries' choice to participate as evidenced by the following comments:

So let me get this straight. The Notaries Society has just signed on to their demise? Well that strikes me as a giant political miscalculation. I mean, unless they are fine with that. Maybe the notaries are saying 'hey no problem let's be regulated by the Law Society.' I'm surprised

<sup>39</sup> This is another example of the link between pursuit of jurisdiction and pursuit of status that Adams (2004, p. 2251) identified.

by that. But you know it's [a] basic politic[al] strategy [to] mak[e] sure you're in the game and you have somebody on the committee that's dominated by the Law Society, I completely understand that, that makes sense to me ... If I was the Notaries Society I would have wanted to make sure that whoever was on there, if necessary, dissented, or that we knew what exactly they were doing. (interview with lawyer, December 20, 2013)

The spin that comes from downtown [is] this is mandated by the government ... which I think is garbage. I don't think it's coming from there. I think what you're looking at is the lack of finances and somebody's need to set up a trade organization. And the carrot being dangled will be expanded powers. (interview with notary, December 3, 2013)

How do you philosophically reconcile that the lawyers come at it and say we want to be the sole regulator, should we consider being the sole regulator. And the notaries society comes at it with we want to expand our powers. Those two are so diametrically opposed positions. How do you reconcile that? Somebody tell me. I'm sitting at the table going ok I'd like to expand my powers and the other side is going we want to control you. I'm like are you kidding me. How do you reconcile that discussion at any level. And my question is, how do you reconcile that from a task force that has one notary and four<sup>40</sup> lawyers. (interview with notary, November 29, 2013)

Within a month of the Attorney General's request, the Law Society and the Notaries Society responded in a joint letter. The President of the Law Society at the time revealed that:

Prior to the task force even being organized, I had a number of meetings, lunches that sort of thing with John Eastwood [then President of the Notaries Society], Wayne Braid, Tim McGee and at least among the four of us, when we actually sat down and debated the issues, there were more similarities than there were dissimilarities, that there was more positive that could come out of this than negative that could come out of this. So when the four of you are of like mind, then you drive the process to a conclusion ... (interview, February 28, 2014)

<sup>40</sup> Of the seven members of the LSPTF, three were lawyers and one was lay bencher of the Law Society. In addition, there were usually three or four Law Society staff lawyers present at the meetings, although there was one meeting where only two staff lawyers attended.

In the joint letter, Presidents of both societies agreed that a single regulator of legal services was the “optimum model,” that the Notaries Society could be “subsumed in the operations of the Law Society” as that single regulator, and that there might need to be “co-regulation” during the subsuming process, followed by “unified” regulation thereafter (personal communication, March 6, 2014). Furthermore, the letter said, the Notaries Society agreed to join a task force of the Law Society that, as requested by the Attorney General, would come up with a plan and recommend how legal services in BC should be regulated (personal communication, March 6, 2014). Given the extent of the agreement between the four “like minds” including the two Presidents in August 2012, some might say the task force was more form than substance, and its recommendations in December 2013, foregone conclusions.

#### **4.4.2. “None of this would ever have happened”: The Legal Service Providers Task Force (LSPTF)**

For many years, the Law Society had been creating committees and task forces that directly or indirectly made recommendations to the benchers about how to improve access to justice.<sup>41</sup> The Delivery of Legal Services Task Force (DLSTF) was one such task force. Its work included commissioning an Ipsos Reid survey of how BC residents dealt with their serious legal problems. The survey showed that consumer problems dominated. Seven out of ten surveyed did not seek help but decided to handle their serious problem alone. Those who did get help had no clear preference for a lawyer or a non-lawyer, although non-lawyers were perceived as avoiding litigation, “less expensive” and “more accessible” than lawyers (Ipsos Reid, 2009, p. 4). The survey results indicated significant gaps in the public understanding and acceptance of the legal system, not good news for a budding public interest regulator of legal services.

The DLSTF completed its work and delivered its final report on October 1, 2010, recommending that lawyers delegate more of their work to supervised paralegals and articling students. The justification for its recommendations was that it would “enhance

<sup>41</sup> For example, there were the Paralegals Task force in 2006, the Unbundling of Legal Services Task Force in 2008 and the Lawyer Education Advisory Committee in 2011.

the public's access to competent and affordable legal services" (Law Society, 2010, October 1, p. 2). This meant increasing the powers of supervised paralegals and articling students, a move that could significantly change the nature and quantity of work performed by many lawyers. The task force only considered paralegals and articling students as supervised employees of lawyers and did not consider how independent paralegals could affect access to justice. There was no mention of notaries in the DLSTF report.

The LSPTF was designated by the benchers in 2012 (but not empanelled)<sup>42</sup> as the follow up to the DLSTF. The new LSPTF was mandated to recommend to the benchers whether and how non-lawyers should be regulated.<sup>43</sup> Its primary focus was going to be working with the courts to see what functions could be performed by "supervised paralegals," as recommended by the DLSTF (Law Society, 2010, p. 7). "My expectation is that if and when we start to license paralegals there's going to be a lot more paralegals than notaries" (interview with lawyer, February 28, 2014). In the winter of 2012, the Law Society announced its two year pilot project with "designated" paralegals who were supervised by lawyers and specially trained to appear in certain family matters ("Designated paralegals," 2012, np). This more or less coincided with the release in November 2012 of the five year review of paralegal regulation in Ontario. Morris (2012)<sup>44</sup> found that "by any objective measure, the introduction [of paralegal regulation] has been a remarkable success" (p. 2) in terms of raising the status and reputation of paralegals and satisfying the paralegals' expectations. However, the education, training, competence and conduct of paralegals were deficient enough that

<sup>42</sup> The task force was originally called the Legal Service Provider [singular] Task Force in the August joint letter to the Attorney General. When the LSPTF was empanelled and unveiled to the public, the singular "provider" had become plural. This small change may indicate two things: first, that the Law Society regarded paralegals and articling students as subordinate to lawyers who were the only proper regulated "provider" of legal services, and second that the Law Society's original intention for the task force had not included notaries.

<sup>43</sup> The Law Society's Futures Committee in 2008 raised the question of who should regulate non-lawyers (Law Society, 2013, December 6, p. 11), and the strategic plan formulated in 2011 included an initiative about whether or not the Law Society "should regulate just lawyers or ... all legal service providers" (Law Society, 2013, December 6, p. 8), so the Law Society had been considering the issue of expanding its role as regulator for some time.

<sup>44</sup> Ontario's *Law Society Act* required an independent five year report from a non-lawyer or paralegal. Morris holds an MBA.

notwithstanding the warning from the Competition Bureau (2007, January 27),<sup>45</sup> Morris recommended against expanding their scope of practice until the deficiencies were corrected.

Morris (2012) also commented on how adopting paralegals had changed the role of the LSUC and that the issue of expanding the scope of paralegal practice remained outstanding:

As the regulator of two complementary professions, the duty expressed in section 4.2 (2) of the Act – “to facilitate access to justice for the people of Ontario” – does not simply expand upon the role of the Law Society as Ontario’s centuries-old, self-regulating college of lawyers, it profoundly alters it.

... It is now incumbent upon the Law Society to drive the provision of legal services to the most accessible, appropriate level of the professions it regulates. Its challenge is in doing so without compromising its function ... or its duty to protect the public interest ...

... With the mechanics of paralegal regulation firmly – and admirably – established, the opportunity presents itself for the Law Society to perhaps more directly address the challenge inherent in its legislated duties. (p. 13)

Morris specifically mentioned correcting any unfairness in representation in governance, saying:

Approximately 44,000 licensed lawyers elect 40 voting members of Convocation – a ratio of 1,100:1. Approximately 4,300 paralegals elect two voting members – a ratio of 2,150:1. This under-representation of paralegals is widely acknowledged, and is attributable to the underestimation of the number of practicing paralegals at the time of the introduction of regulation.

Proportionally equitable representation is not simply just from a governance perspective, it is critical in allowing the Law Society to act impartially as it drives the provision of legal services to the most accessible, appropriate level of the professions it regulates – as its duty-bound obligation to facilitate access to justice requires of it (p. 14).

<sup>45</sup> These were the concerns about lawyers using unfounded quality of service arguments to artificially restrict scope of service as discussed in section 4.3.4.

Even with the representation changes recommended by Morris and the inclusion of paralegals as licencees of the LSUC, lawyers still hold control over what happens at every level of the LSUC including the Paralegals Standing Committee, the front line regulator for paralegals. Furthermore, Morris recommended proportional representation at convocation based on the number of members in each profession. This method of representation does not address the concerns of the Competition Bureau (2007, January 27) and is a far cry from the concept of co-regulation where the balance of power is not in lawyers' hands, as described by Semple et al. (2013, p. 277) and recommended by Cory, and as practiced in Australia and England (Rhode and Woolley, 2012, p. 2).

In terms of credentials, the education, training and other prerequisites of BC notaries significantly surpassed the independent Ontario paralegals both before and after the LSUC took over regulation. Yet as recently as 2012, the CBABC continued to maintain that BC notaries should not be permitted to practice independently but should be supervised by lawyers (Canadian Bar Association BC, 2012, April, attachment 2, p. 26). The implication is that despite their superior credentials, BC notaries are less competent and reliable than Ontario paralegals. It is difficult to reconcile the CBABC position as not being turf related, and possibly the very thing the Competition Bureau (2007, January 27) warned the LSUC about in regulating the subordinate Ontario paralegals.

There was no indication in benchers' minutes, task force reports or other material that, prior to the events in April and July 2012, the Law Society had any intention of including the notaries in the LSPTF or any faint notion that the notaries were interested in the possibility of giving up their autonomy to join and be regulated by the Law Society.

Several lawyers blamed the notaries' unrelenting ambition for the Attorney General's edict in July 2012 to work it out with the lawyers:

Well if there were no changes whatsoever, and there hadn't been renewed interest on the notaries' part to expand their scope of practice, it's quite possible that none of this would ever have happened. (interview with lawyer, February 18, 2014)

The recent stuff got propelled by [the Notaries] Society wanting to go for legislative reform. (interview with lawyer, December 11, 2013)

The edict occurred as the lawyers were considering (again) whether to regulate paralegals whom lawyers regarded as non-lawyer legal service providers like notaries (Law Society, 2013, December 6, p. 8). The Law Society recognized the opportunity to combine their original access to justice initiatives with solving a problem - the notaries - that had plagued the lawyers since 1922 thereby realizing their long-touted claim that notaries should not have self-regulatory power or more jurisdiction, but should be supervised and regulated by lawyers (interview with lawyer, February 18, 2014).

The Notaries Society sent one representative to serve on the LSPTF of seven members. There were three lawyers, one lay bencher of the Law Society, one notary, one paralegal and the President of the Land Title Survey Authority who was ostensibly a neutral voice. Three or four additional lawyers in the form of Law Society staff supported the task force and attended meetings.<sup>46</sup> Consequently, there were at least six lawyers and one notary at all the LSPTF meetings. The task force began meeting in December 2012 and met at least monthly throughout 2013 (except for January and August). In terms of substance, they reviewed materials compiled by Law Society staff concerning legal regulation in BC and other jurisdictions nationally and internationally, as well as materials about the recent unification in the accounting profession. They devised “advantages and disadvantages of a single regulator model” (Law Society, 2013, December 6, p. 14). Then the task force conducted a private consultation with one of the paralegal associations (the one represented on the task force), an online survey on the Law Society website and “public consultations” in person in Victoria, Vancouver and Prince George which were open to the public. The Notaries Society conducted a series of separate, private consultations with members at its fourteen chapters (a chapter is the local branch of the Notaries Society). The notaries also conducted an online survey of its members.

<sup>46</sup> The meeting in July had only two staff lawyers in attendance.

The results of the two online surveys were significantly different. First, a full 41% (137 of 330) of the members of the Notaries Society responded, compared with less than one half of one percent (47 of 11,000) of the lawyers.<sup>47</sup> The lack of lawyer response to the Law Society survey<sup>48</sup> prejudiced the credibility of the results as representative of the members of the Law Society. Clearly the issues facing the task force were more compelling to notaries than to lawyers, suggesting not just an attitudinal difference between the professions but also a cultural difference. Second, while only one third (35%) of the notaries agreed that a single regulator would be a good idea, 93% did not want that regulator to be the Law Society. Although the notaries' survey results were robust, they did not sway the task force. The task force published a "summary" of the notaries' survey as an appendix to their final report, but then when describing the results in the body of the report, failed to disclose the remarkable 93% of surveyed notaries against the Law Society in the role of single regulator (Law Society, 2013, December 6, p. 16-17).

Just before Christmas in 2013, the task force unanimously recommended to the benchers as follows.

***"Protect the public from unqualified individuals."***

After 25 years of deliberation and waffling,<sup>49</sup> "public interest" dictated that the Law Society should assume responsibility for regulating legal services provided by non-lawyers unless the services were provided under supervision of regulated providers (i.e. lawyers or notaries). The argument for expanding the regulatory jurisdiction of the Law Society was that lawyers were already sharing their monopoly with other regulated service providers, that the high costs of lawyers had left an opening in the market for legal services, and that the participants in the consultations and surveys wanted legal

<sup>47</sup> The Law Society survey was open to the public and only 157 responses were received, 30% of them from lawyers, 60% from paralegals and the rest from others, 6% of whom did not identify as legal service providers.

<sup>48</sup> The lawyer response to the public meetings was also not overwhelming. The task force report admitted that only three lawyers showed up in Prince George (p. 33) and in Victoria, the vast majority of attendees were paralegals (personal record, September 16, 2013).

<sup>49</sup> Between 1988 and 2013, the Law Society had either advanced toward or retreated from formally recognizing and regulating paralegals ten times.



services to be regulated “to protect the public from unqualified individuals”<sup>50</sup> (Law Society, 2013, December 6, p. 15). Those working under supervision of lawyers “or a regulated service provider” like notaries did not need further regulation. Regulation of the supervisor was adequate protection for the public, said the report (p. 15).

***“Public confusion” no, “public trust” yes.***

According to the report, a single regulator was preferable to discrete regulation by profession. The rationale for this conclusion was more argumentative than evidentiary. The task force claimed that it was “not in the public interest to permit two different legal professionals to provide the same service to the public but have them subject to different standards of professional responsibility and regulatory oversight” (p. 16). They claimed the single regulator would reduce “public confusion,” improve “public trust in the administration of justice” and “increase the types of services various professionals could provide” (p. 16). There was no support for these assertions, particularly when notaries and lawyers have co-existed for over 150 years with no evidence that the public was confused or distrustful because there were two regulatory bodies and not one. It is plausible that by bringing notaries into the Law Society, lawyers were hoping to benefit from association with the notaries’ favourable public perception. One poll showed the public’s preference for notaries over lawyers and:

- The majority of those aware of notaries rate their impression of them as favourable (77%), with about one-third who rates them as “very” favourable. When it comes to the impression of lawyers almost two-thirds of residents rate them favourably, but only 19% rate them as “very” favourable.
- Of those aware of notaries, more than two-thirds have used their services, with almost all who say they are satisfied with the service they received (94%), and most (88%) who would recommend their services to a friend or colleague.
- Approximately two-thirds (65%) of all residents would like to see more choice of professionals qualified to provide legal services, besides lawyers (Mustel Group, 2010, p. 2-3).

<sup>50</sup> As previously mentioned, the results of the Law Society consultations and survey were questionable from an empirical and representative perspective.

The Mustel poll did not ask the question about whether there was confusion or distrust because of separate regulation, but nevertheless, the answers would not support such a conclusion.

The LSPTF report did not elaborate on the idea that a single regulator could increase the types of services allocated to their regulated entities but left to implication that the regulator would control who did what. In other words, the scope of services for notaries would no longer be decided by the elected Members of the Legislative Assembly, but rather by the Law Society. If this shift of responsibility were approved and legislated, it would substantially increase the power and jurisdiction of the Law Society and commensurately reduce the power and jurisdiction of the government and the notaries. The notaries would lose their direct connection to the legislators and instead of having two avenues to deal with their issues (the Law Society and the government), the notaries' fate would be solely in the hands of the Law Society. Instead of the politicians' perspective on public interest being the final word, the notaries would be left with the Law Society's definition of public interest. Most lawyers in my research staunchly defended the Law Society's ability to assume an arms-length, independent, unbiased viewpoint in determining public interest, but their record shows otherwise. First, there is the insignificant duration and questionable intent of adopting changes in their legislation so they could claim to be solely a "public interest regulator."<sup>51</sup> It is barely more than a year since the changes were effective which seems too soon to tell how the Law Society will cope with its new role as a public interest regulator. Second, there is the consistent combative and deprecatory position of the CBABC and the cross-pollination from that organization to the benchers' table.<sup>52</sup> Third, with "thousands and thousands of lawyers all over the province who want to do that work [that notaries are doing]" (interview with lawyer, February 2, 2014), there is bound to be pressure on the Law Society to keep a

<sup>51</sup> See discussion following in this section under "Solely a regulatory body."

<sup>52</sup> For example, Sharon Matthews as President of the CBABC wrote the letter to Attorney General Bond in April, 2012, and, when her term as President was up, she became a bencher of the Law Society (Law Society n.d., *Benchers*, np.). Another example of the close relationship comes from a report to the benchers on the 2010 CBA annual meeting where the President of the Law Society advised: "I must say that our colleagues at the BC Branch [the CBABC] ... are wonderful hosts who bend over backward to make the benchers in attendance feel a part of their team" (Law Society, 2010, Agenda of Benchers, p. 18004).

tight rein on the notaries. And fourth, there are approximately 150 years of the Law Society fiercely defending its turf and seeking to abolish the notaries. None of these points supports the lawyers as trustworthy with the public interest in maintaining and promoting a viable independent notarial practice in BC.

***Consistent standards.***

The LSPTF report expressed “concern that ... competing regulatory frameworks created too much of a risk of driving standards down in order to gain competitive advantage” (Law Society, 2013, December 6, p. 17). This argument assumes that there is a higher standard and a lower standard, and the former is the only correct one. The report did not offer any evidence of such a double standard. It may be that the standards are the same or, the standards are substantially similar.<sup>53</sup> In any event, the lawyers’ gold standard as the golden rule is exactly what technology and the BC notaries have been challenging. There is a less costly, more efficient way to go from A to B, say the notaries, for “simple,” non-contentious matters, and technology has assisted and enabled such a journey. As Rhode (2013) says about the USA, “The diversity in American legal demands argues for a greater diversity in educational structures” (p. 255).

The fact that two independent professions have co-existed in BC for 150 years, with the lawyers fully duplicating the notaries’ services, undermines the argument for a single regulator as the only way to ensure consistent standards. When asked what was wrong with notaries and the way they have been doing business, not one of the interviewees thought notaries were providing inadequate or negligent services. Furthermore, the LSPTF report’s concerns over consistency did not reconcile the obvious, sophisticated and extensive overlap of jurisdiction and standards between accountants and lawyers in tax, estate and corporate matters. Consistent standards may sound like it should be in the public interest, but, a single regulator may have nothing to do with producing standards that are appropriate for the particular task and consistent enough for the public interest. Rhode (2013) would agree. She is critical of

<sup>53</sup> The Notaries Society had a habit of piggybacking the Law Society’s business moves, such as establishing a foundation to collect interest on trust accounts, practicing through a corporation and instituting TAF.

the ABA and their “one size fits all” education as “stifling innovation and [leaving] many students both under-prepared and over-prepared” (p. 255). In a capitalist democracy like BC, competition could be the prescription for both raising and lowering standards. The notaries’ record over the study period shows a consistent elevation of standards to compete with the Law Society,<sup>54</sup> not the reverse as suggested by the task force report.

***“Economies of scale.”***

The report suggested that it would be cheaper for notaries to be regulated by the Law Society in terms of practice fees and insurance among other things. This is obviously not a public interest justification but a self-interest one. The task force report described the economies of scale as a “key advantage” (p. 16). Economies of scale or saving money, is often a compelling reason for change, particularly for an entrepreneurial group like the BC notaries. The business aspects of the proposed merger are outside the scope of this research, but, there was evidence in the interviews that, for example, practice fees and insurance for notaries could be cut in half (the figures quoted by one lawyer were from \$7000 down to \$3500 per year). Despite the extra size, sophistication and bureaucracy of the Law Society’s organization, it was still cheaper per capita to support than the smaller Notary Society. Even with the non-mandatory membership costs of the CBABC factored in (approximately \$800 per year), the cost of practicing for a BC lawyer appears to be several thousand dollars less than for a BC notary. If after proper investigation of the financial impact of merger, it turns out to be significantly economically advantageous to notaries, the question for them will become how much is independence or autonomy worth?

***Avoiding bias.***

The task force report proposed that a single regulator governing more than one profession arguably avoids the public perception that the regulator favours its own members. However, the report admitted that multiple regulators would better meet this goal, saying:

<sup>54</sup> For example, the regular upgrading of educational requirements and the extraordinary participation by notaries in continuing education.

... less risk of actual or perceived conflicts of interest on the part of the regulator when it does not need to balance competing professions under one roof. Multiple regulators may foster greater innovation through competition than might be the case in a single regulatory model. A multiple regulatory system insulates each profession from the special interests of the other and consequently can focus on protecting the public interest rather than managing potential disputes between different categories of membership (p. 16).

**“Solely a regulatory body,” “more robust” and cheap.**

According to the LSPTF recommendations, the Law Society should become the single regulator for lawyers, notaries and paralegals. The supporting arguments included:

- The Law Society is “solely a regulatory body” (p. 18). In 2010, the benchers finally and after much debate resolved to drop from their enabling legislation the requirement that the Law Society “uphold and protect the interests of its members” and in doing so, began to refer to themselves as a solely regulatory body. The Law Society regulated in the public interest, they said, and had no conflict of interest anymore because they no longer had any duty to advocate on behalf of members. The CBABC would do the advocacy. However, the minutes of the 2010 benchers’ meeting revealed that the change was characterized as no change at all and that the Law Society would still have the power to look out for its members (Law Society Benchers, 2010, September 2, p. 4-5). The minutes seem to contradict the task force claim as well as the plain meaning of the legislation. In addition, the task force report failed to mention that this critical change to the LPA was not effective until January 1, 2013, after the LSPTF had begun its work. This potential slight of hand does not enhance the Law Society’s claim as protector of the public interest.
- The Law Society had “more robust legislation” while the *Notaries Act* would need an overhaul to enable notaries to act as a single regulator. The report did not mention that the notaries had spent the past decade negotiating revised legislation to emulate the LPA and draft legislation was at hand presumably with all the extra bells and whistles of the LPA (interview with lawyer, January 16, 2014, and with notary, November 12, 2013).

- It would be cheaper to use the Law Society as the single regulator because all the necessary regulatory systems were already updated and in place (p. 18).

The task force rejected the idea of an independent single regulator because notwithstanding any concerns that “the influence of lawyers would dominate the single regulator,” an independent regulator would prejudice the “independence of the bar”<sup>55</sup> (p. 18). This sounds like the Canadian equivalent to the “inherent jurisdiction” argument in the US described by Rhode, 2013, p. 245. The logic has little relevance for notaries who have never handled anything contentious and have never asked to expand their scope in that direction. It is unlikely that notaries will be challenging the government on behalf of clients. In essence then, the report was advocating that if there was to be a single regulator and if the lawyers were to be regulated, then the single regulator had to be the Law Society because only the Law Society could govern lawyers. The LSPTF report went on to express their belief that when the Law Society became the single regulator, they would no longer be “associated only with lawyers” (p. 19). It is difficult to see how merger of 11,000 practicing lawyers (13,500 members in total) with 330 notaries will accomplish any re-branding at all. The number of paralegals appears to be more substantial (700 members of the one paralegal association represented on the task force) but it is still dwarfed by the number of lawyers, and, at least in the foreseeable future, all paralegals will continue to require supervision by lawyers and will not have a separate, independent identity. The task force belief that the Law Society would be “viewed by the public as an independent body that exists to protect the public interest” seems to be a prediction based on aspiration, not evidence.

The recommendations were delivered to the benchers’ December 6 meeting where the Attorney General attended with all the LSPTF members as special guests. The benchers unanimously approved the recommendations. The Attorney General said:

It is encouraging to see our justice partners work together to transform the regulation and delivery of legal services to the citizens of our

<sup>55</sup> The independence of the bar pertains to the fundamental principle that in order to provide justice without governmental influence and with freedom to challenge government, lawyers cannot be regulated or subservient to the government or any third party appointed by government.

province. The Law Society has shown tremendous leadership and the recommendations made today signal that progress is being made to improving access to justice for British Columbians. (Law Society, 2013, December 9, np)

The Attorney General's response is surprising since the report expressly admitted that there was no evidence or guarantee that the recommendations would improve access to justice<sup>56</sup>. At best, proceeding with the recommendations was a leap of faith in terms of access to justice (Law Society, 2013, December 6, p. 21-23). Somehow, that message was ignored and three days later the President of the Law Society told the *Vancouver Sun* that "The changes are going to help access to justice tremendously." The Chair of the LSPTF echoed with "Access to justice is slipping out of reach for many British Columbians. It is critical that the Law Society look for ways to reverse that trend, and these ideas could be a big part of that" (Mulgrew, 2013, np.). Is it possible they did not read the LSPTF report? Or were they counting on others not reading it, and using the media to advance their own interests in being perceived as acting in the public interest?

Despite the 90 year record of BC lawyer/notary conflict up to and including 2012, and an increasing trend from other common law jurisdictions to prioritize consumer values over professional self-interest, the BC government appears to be willing to enhance the monopoly of the Law Society and to rely on it to take a neutral, unbiased position as regulator of all legal services providers under provincial jurisdiction including notaries. The government's reliance on the Law Society and minimization of the public interest in competition was demonstrated when the Minister abandoned the diminutive notaries in 2012 to work out their differences with the Law Society "juggernaut." It is hard to believe that the Minister thought the notaries and the lawyers were equally matched for fair negotiations and that the results from two SROs would be more in the

<sup>56</sup> Conclusion 102 of the LSPTF said: "The Task Force cannot conclude with certainty that a single-model regulator of a number of different groups of legal service providers will improve access to justice, and it is uncertain that one would be able to create empirical evidence to prove this end. However, as in Washington State, there is no way to find the answer without trying it. The Task Force concludes that it should be tried" (Law Society, 2013, December 6, p. 23).

public interest than what might have been achieved if the Minister had remained involved.

In January 2014, the CEO of the Law Society and the CEO of the Notaries Society began meetings about merging the two organizations.

## **4.5. Themes and Trends from the Findings: Lots of Turf and a Couple of Weak Sisters**

The data produced an abundance of themes. Because each player or group in the research (that is, the lawyers, notaries, CBABC, courts and government) had differing roles and goals that shaped the events during the study period, I discuss the predominant themes and trends by player.

### **4.5.1. The lawyers: public interest, power, turf and status**

Themes for lawyers centered around defending their turf including their status as a SRO, as exemplified by the following.

#### ***Embracing public interest.***

By deleting protection of members' interests from the duties of the Law Society and relying on the CBABC to do that job, the Law Society was in a position to claim it was a "public interest regulator." The weakness for any SRO in Canada today including the Law Society is whether the public and the government will perceive their actions as unbiased, unconflicted and in the public interest. Feinberg (2011) was blunt, saying lawyers, like any other business persons, were motivated by self-interest and had abandoned any historic altruistic notions of service to others (p. 95, 97). The standards for unbiased, unconflicted performance changed over the study period and by the end of 2013, the Law Society was still discovering problems and moving to deal with them. For example, in 2010, the Law Society decided to fix a conflict by formally separating the investigative functions from adjudicatory functions in discipline hearings. In May, 2014, the revised process was being reviewed for efficacy (Law Society, 2014, p. 14). Notwithstanding the Law Society's efforts, the heart of the problem remained: lawyers



making decisions about other lawyers. The essence of self-regulation is itself a conflict of interest.

The data show that lawyers firmly believed the benchers were unbiased:

At the end of the day from the Law Society's perspective, it's all about ensuring we have an honourable and competent profession. So if there's something wrong with being honourable and competent, somebody will have to teach me that (interview February 28, 2014).

And I know at the bencher table where six of thirty-one are not lawyers, [the non-lawyer's] vote was as important as my vote and when [he] spoke people listened, and no one at that bencher table said you're not a lawyer you don't know what you're talking about. He was treated as respectfully as someone from Faskin Martineau downtown (interview February 4, 2014).

Several lawyers were somewhat offended by the suggestion that because lawyers in BC were educated and trained in basically the same way, it might be difficult for lawyers to know if they were biased. Rhode and Woolley (2012) were explicit about the issue of bias:

No matter how well intentioned, no occupational group is situated to take a disinterested perspective on matters that implicate its own status and livelihood. Nothing in the history of bar self-government suggests that lawyers are an exception. Recognition of this fact has led to reformers in Australia and England to develop structures in which the profession shares authority with, and is accountable to, non-lawyer regulators (p. 2).

The data show lawyers as sincere in their efforts to become a public interest regulator but the data do not show that they have succeeded.

### ***Plugging holes, elevation and more power.***

The lawyers maintained or gained power over legal services through pursuit of unauthorized practice (Witz's demarcationary strategies) and increasing the services that could be provided by non-lawyers under lawyer supervision thereby elevating the status of lawyers and decreasing the status of their subordinates (Witz would call this de-skilling). Lawyers also acquired greater administrative powers and reduced government oversight (amendments to the LPA in 1998 allowed benchers to

independently make rule changes without going to Victoria for consultation, approval or legislation).

### ***No means no.***

Lawyers further defended their turf by rejecting notaries' claims for greater scope (initially through Law Society committees and latterly through the CBABC).

### ***Tolerant or opportunist?***

Several interviewees suggested that lawyers in BC were remarkably tolerant of notaries since in every other common law jurisdiction in the country, lawyers had drummed the notaries out of business long ago.<sup>57</sup> Whether or not that is true, the data clearly showed that lawyers were anything but tolerant when notaries attempted to expand their services. The recent machinations surrounding the LSPTF and its recommendations point toward the ultimate intolerance, namely the subjugation of notaries. Perhaps BC lawyers never had the right opportunity to get rid of the notaries until it fell in their lap with a little push from Attorney General Bond in 2012.

Over the study period, the data revealed four trends for BC lawyers:

### ***Business as usual.***

Lawyers moved towards practicing law as a business. By the end of the study period, law as a business had become the norm, albeit not to the extremes described by Feinberg, 2011 and Flood, 2011.

### ***Keeping up with the Joneses.***

During the study period, another traditional profession, the accountants, consolidated and reorganized their members and their regulation to meet the national, international and global demands of clients, many of whom were also clients of lawyers. The accountants were becoming the GPSFs described by Flood (2011). Although the relationship between lawyers and accountants is not part of this study, Abbott (1988) would suggest that lawyers were affected by the accountants' changes and Adams

<sup>57</sup> For example, in 1915, notaries in Manitoba were reduced to the usual functions for notaries in common law jurisdictions – “administering oaths, attesting to documents and giving notarial certificates” (Brockman, 1997, p. 202).

(2004) might contend that lawyers would attempt to maintain their clients, their work flow and their social status in response to the elevated sophistication of the accountants. The accountants' organizational changes may have influenced lawyers in BC in their dramatic increase in support for the Federation of Law Societies of Canada (FLSC). The FLSC assumed responsibility for (among other things) a national mobility agreement for lawyers, setting national standards for entry to bar admission programs, and creating "National Competency and Good Character Standards" (Federation, 2013a, n.p.). In the data, one lawyer used the complexities of the future to advocate the notaries merging with the Law Society. He said:

You're going to have the Walmart's and the Costco's delivering legal services whether they're notary services or lawyer services or both. It's going to happen. It's being done in England; it's being done in Australia. So how do we best prepare ourselves, how do the notaries best prepare themselves, for the new world order that's coming? I say to you the best way to prepare yourself is to be part of a well recognized regulator, statutorily authorized to ensure the public is well served and protected. And that's where you're going to survive on a go forward basis. (interview, February 28, 2014)

So far neither the Law Society nor the BC government has granted any GPSF-like superpowers, although the mobility movement is only recently gaining momentum and may bring the issue to the surface. Mobility has already had a dramatic effect on notaries through TILMA in 2009, as previously described in section 4.3.6.

### ***Spreading wings.***

The Law Society made tentative but consistent steps toward recognizing specialization and the role of non-lawyers in delivering legal services.

### ***Making friends in high places.***

Finally, the Law Society cultivated government reliance and respect by cooperating on access to justice initiatives and taking over administrative work that previously was supervised by government.

#### **4.5.2. CBABC: turf war commanders**

During the study period, the CBABC went from an entitled, dependent organization funded lushly by mandatory annual dues paid by members of the Law Society, to an entirely voluntary membership organization in 2005 (Law Society, 2005, np.). The CBABC had to find a way to reclaim and retain members, and they did. CBABC's role as advocate for lawyers became entrenched. Aggressive positions were justified on the basis of lawyers' best interests, such as the CBABC's perplexing attack on notary qualifications and competence in 2010 and 2012 as if the Master's degree from SFU had made no difference. The CBABC had one simple theme with respect to notaries during the study period. It was "no."

#### **4.5.3. Notaries: ambition for turf and status**

Themes for the notaries were dominated by their ambition. Despite the waxing and waning of their popularity with government over the years, the notaries kept expansion of their scope "always on the table." These two characteristics, ambition and tenacity are reflected in Abbott's (1988) concepts for the system of "greedy" professionals, always "on the prowl" for more jurisdiction (p. 98). The notaries' record demonstrates the "broader professionalization process" combining enhanced social status and privileges with greater work jurisdiction, as described by Adams (2004, p. 2551). The impediments for the ABA described by Rhode (2013, p. 244-5) (regulatory independence, resistance to non-lawyers and competition, single standard education) are the same impediments to BC notaries gaining expanded scope, status and professionalization. When confronted with rejection or attack, notaries responded cohesively and convincingly, like the full-barrelled responses in numerous fora in 1981 and 1989, and the tenacity to stand firm for 22 years in order to acquire jurisdiction to prepare representation agreements. Notwithstanding their ambition, vigour and tenacity, neither of their self-initiated proposals for increased jurisdiction was successful.

Notaries demonstrated two trends during the study period: they increased the quality of education and the standards of competence in practice, and, they tagged along on other's good ideas. The good ideas usually came from the Law Society such

as creating a foundation to scoop interest on trust accounts, TAF, and using corporations as practice vehicles.

#### **4.5.4. Courts and government: relying on the big dog**

As for the courts and government, the data indicate that they were “weak sisters” in that they generally were not supportive of notaries unless the lawyers were passive, for example the *Gravelle* and *Siegel* cases and the recent years of negotiations with notaries over new legislation that only stopped when the Law Society objected loudly enough. There was also a trend for government to delegate increased power to the lawyers and with that, increased reliance on the Law Society to regulate and make decisions about the public interest that previously had been the purview of the elected Members of the Legislature. This trend is in stark contrast to the reduced governmental involvement in the professions envisioned by Feinberg (2011). The BC government has no apparent intention of nullifying the monopoly or regulation of legal services as proposed by Feinberg (2011), having just accepted the LSPTF report placing the notaries and the paralegals squarely in the hands of lawyers. But Feinberg suggests a freedom that would eliminate the need for notaries (or anyone else) to “professionalize” beyond independently established standards and turns “inter-professional conflict” before the courts and government into inter-professional competition in the marketplace that, according to the Competition Bureau, is what Canadians ought to have. It looks like legal services in BC will continue to have tension between self-interest and consumer protection identified by Iacobucci and Trebilcock (2008, p. 37) for a while longer.

## **Chapter 5.**

### **Conclusions: How to Get Invited to the Benchers' Table**

In this final chapter, I propose answers to the research questions, followed by a response to the title question: can BC notaries survive sitting at the benchers' table? Final thoughts pertain to how this research contributes to knowledge about developing and maintaining professional status.

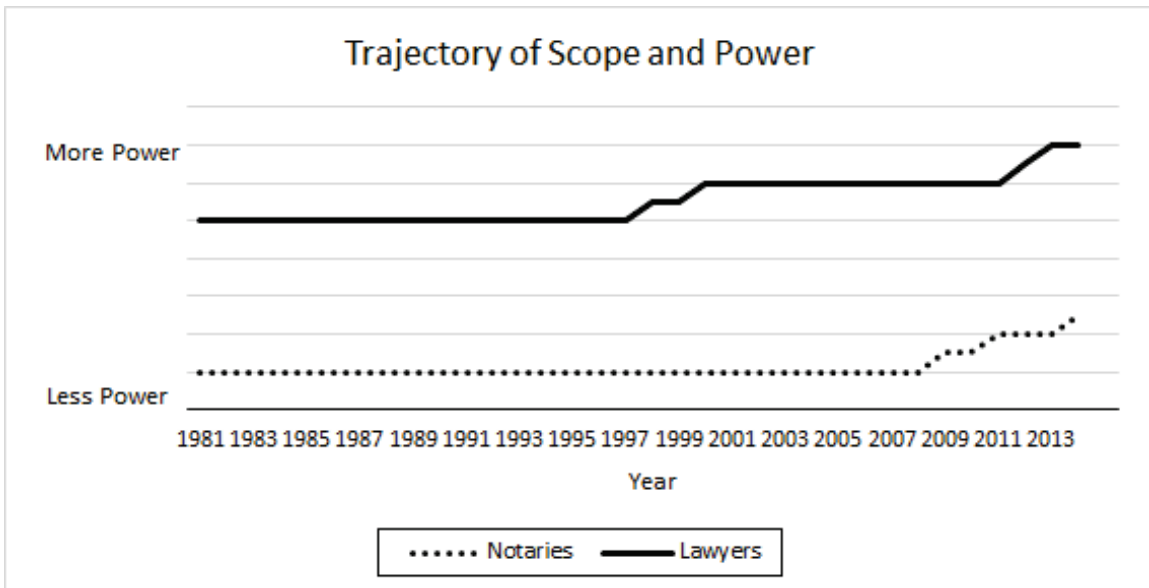
#### **5.1. What Happened Between 1981 and 2013 in British Columbia to Foster the Fundamental Changes in the Role and Academic Program for Notaries, as Well as the Modest Changes in Their Jurisdiction?**

In 1981, notaries were limited in numbers and territory. These limitations were lifted in 2009 as a result of the government's obligations under TILMA, an agreement signed in 2006 by the governments of Alberta and BC. TILMA was not a product of the Attorney General (the Ministry responsible for lawyers and notaries where both professions had ongoing connections), but of the Ministry of Economic Development and had implications and impact well beyond lawyers and notaries. As a result of TILMA, notaries in BC became free agents to conduct their business wherever they chose and the Notaries Society acquired status as the sole gatekeeper for entrance of qualified notaries to the ranks of those practicing in the province. This is a link between the jurisdiction and status of a profession, but not resulting from or related to inter-professional conflict as contemplated by Adams (2004, p. 2251). Instead, this bundle of increased jurisdiction and status for the notaries was a by-product of a seemingly unrelated government initiative without influence from lawyers or notaries. It was a

windfall. Lawyers could see no advantage to resisting the change, so when asked for comments a year after TILMA was signed, the Law Society was “not opposed” (personal communication, March 27, 2014).

The changes to the academic program for notaries followed decades of criticism and denigration from the lawyers, and were sparked by a fortuitous opportunity. The notaries had responded to criticism by upgrading their education program twice before the final giant leap across town from UBC and up the mountain to SFU into the MAALS program. As described in the findings, the connection between Mr. Braid and Dr. Gordon was fortuitous because both were working on revision of the adult guardianship legislation. Their relationship started the momentum that culminated in the Master’s program for notaries at SFU. If the lawyers had not been critical in the first place, and if Braid and Gordon had not met and connected in a collegial way, the notaries’ education program and the notaries themselves might have had a different trajectory. Although the MAALS program did not lead directly to any increase in the notaries’ scope of practice, it removed the lawyers’ central objection, which arguably led to the confrontation over turf between the professions in Minister Bond’s office in 2012, the ultimate resolution of which remains outstanding at the time of writing. The notaries’ consistent steps toward ever better education regardless of their success on the jurisdictional front illustrates “the complex web of relations and ongoing drive for status, social authority, and privilege that characterize professionalization” (Adams, 2010, p. 67).

As for the modest changes in notaries’ scope of practice, continuous efforts by notaries since 1981 produced no increase in their powers until 2009. Table 5.1 illustrates the trajectory of lawyers and notaries during the study period.



**Figure 5-1 BC Lawyers and Notaries: Scope and Power Over 33 Years**

During the study period, there were only two changes in the notaries’ scope of practice, and only one change (TILMA) that increased the notaries’ status or powers of self-determination. The two changes in scope were representation agreements added in 2011 and international wills passed by the legislature in 2009 but not enacted until March 2014. None of the notaries’ direct usurpatory claims to jurisdiction in any arena were successful other than their claim to representation agreements. The representation agreement change took decades of exemplary tenacity and commitment from the notaries in the face of promises made and broken by a progression of legislators. Like the subordinate women that Witz (1992, p. 67) studied, the legislative sphere for notaries in BC may have offered a better chance of success for their professional project, but it was not a guarantee. Lawyers’ influence in this sequence of government decisions was not clear from the data, except for delay tactics inherent in the Law Society’s Notaries Committee assurance to lawyers in 1993 that it would make sure the government knew lawyers were opposed to any increase in scope for notaries (“Other motions,” 1993, p. 8), and the lawyers’ open support of Dosanjh’s rejection of the notaries in 1997. As for WESA, the interviews suggest that it was not a significant enough increase in scope to warrant lawyers taking a position. Consequently, the notaries acquired the right to prepare international wills more by default than by design.



Both representation agreements and WESA involved new knowledge, one of the triggering factors in Abbott's inter-professional disturbances. In the former case, the disturbance took 22 years to settle by way of Brockman's (1997) concurrent jurisdiction (p. 198). In the latter, disturbance was avoided when the lawyers deemed the significance as negligible.

## **5.2. Why Were the Restrictions on the Number and Location of Notaries Lifted?**

As outlined above, the restrictions were lifted because of TILMA. In addition, data illuminate the rationale behind lawyers' and notaries' acquiescence to lifting the restrictions. For lawyers in 2007, their primary concern was to protect their self-regulatory powers and therefore it was "important" that the Law Society act "demonstrably in the public interest and not simply [to protect] lawyers' interests" (personal communication, March 27, 2014). The lawyers did not have a reasonable public interest basis to object to lifting the restrictions, because there was none. Objection would have been purely a matter of turf. The Law Society's response appears to be cognizant of the Competition Bureau's criticism of lawyers' monopoly (2007, p. 70) including their public warning to the LSUC that its governance of paralegals was problematic from a competition perspective (Competition Bureau, 2007, January 27, np.).

As for the notaries, the interviews indicate that although some of them valued the competitive advantage derived from exclusive territories, notaries in 2007 were generally dubious about the sustainability of their territorial limits in post-*Charter* Canada (interviews with notaries November 12, 2013, December 3, 2013 and January 24, 2014), particularly in the face of the Competition Bureau's (2007) criticism of competition in the legal profession. Like the lawyers, the notaries had no reasonably valid public interest basis to object to lifting the restrictions.

### **5.3. What Prompted Notaries to Improve their Standards of Education and Seek to Broaden the Scope of their Legal Services?**

The findings suggest that there were three reasons: first, consistent with the predictions of Adams (2004 and 2010), the notaries never lost their perennial, intertwined ambition for greater scope and status for their profession; second, indicative of the dominant group's demarcation strategy from Witz (1992), the lawyers' were consistently and publicly critical of the quality of education and competence of notaries; and third, the notaries with their small business, entrepreneurial perspective recognized and pursued the golden opportunity represented by Dr. Gordon.

### **5.4. How Have Lawyers and the Government Continued to Justify Restrictions on Notaries' Jurisdiction and Why?**

The data do not expressly reveal government policy on this question. From the government's record, it appears that successive Attorneys General ignored the anti-competitive restrictions on notaries until another Ministry shone a light on them with TILMA. From the lawyers' perspective (and demonstrating Witz's (1992) dominant demarcation strategy to foreclose the notaries quest for more jurisdiction), the main justification was that notaries were qualified and competent within their existing scope of services, but not beyond that. The CBABC claimed they were protecting the public from charlatans. Given the prospect of notaries becoming qualified and competent in a new area of practice by appropriate education and training through the Master's program at SFU, reactions from lawyers were varied. Some said "if they want to do more, they should go to law school," or "there are thousands of lawyers who want to do what they do ... they don't need to expand their services." Others said if they were properly qualified and competent, then they should be allowed to expand their practice, but only under the regulation or supervision of lawyers. In the end, all these justifications are essentially anti-competitive and turf related justifications to preserve lawyers' exclusivity over all legal services not allocated to notaries, in true Abbott (1988) style, and not exactly the reasons the public expects to hear from the people who elect and populate an aspiring public interest regulator.

## **5.5. What Role Do Notaries Play in Public Interest Issues Like Self-Represented Litigants and Access To Legal Services?**

Notaries in BC have a negligible role with access to justice and self represented litigants (SRLs). Access and SRLs are problems with the litigation process. Notaries do not fight battles in court. Notaries provide only non-contentious legal services. Even if the notaries' 2010 proposal to expand into uncontested divorce proceedings is considered an adjunct to the access to justice problem, the number of notaries is presently too small to make a substantial difference in how quickly and effectively the court filing process would work for those non-litigious parties. Paralegals may be a more hopeful prospect to assist in the real access and SRL problems because there are more of them to start, and they have no history or reason holding them back from working in the low-end litigation market where service accessibility is wanting.

In terms of public interest generally, the data show the notaries' keen awareness of their role in providing British Columbians with a choice of legal service providers for everyday needs. Lawyers in the study downplayed the public interest in choice as secondary to the public interest in protection from substandard services, but the literature does not support the lawyers. Regulation does not affect quality of, or satisfaction with, legal services (Brockman, 1998, p. 596-597; Maroto, 2011, p. 110, 114) as much as experience and specialized training (Moorehead Patterson 2003, as referenced in Rhode, 2013, p. 249), both of which are distinguishing features of notaries. As for the notaries' continued viability as a distinct choice for consumers if the LSPTF proposed merger proceeds, the study findings do not foresee the future. But, the findings do provide a record of the open animosity, unequal bargaining power and

cultural differences between the two professions, none of which bodes well for a merger where the notaries retain their distinction, autonomy and education programs.<sup>58</sup>

## **5.6. What is the Role of the Self-Regulated Professions in the Legal Arena in British Columbia Today?**

The literature and the data suggest that self-regulated status in the professions is becoming a rarity as more jurisdictions take steps toward the “consumerist-competitivist” mode of regulation defined by Semple et al. (2013, p. 276) where regulatory control is vested with non-lawyers, and competition and consumer rights are core values (p. 280). For example, in 2013, the CBA’s Legal Futures Initiative acknowledged the “risk of protectionism” inherent in self-regulation (p. 37) and suggested that lawyers needed to redefine their role in society. “Rather than resisting paralegal and other new competition, lawyers could build their strength by focusing on a core group of products and services” (p. 38). The Smedley Report from 2009 in the U.K. “recommended differentiated types of regulation depending on the size of the law firm and the sophistication of the clients” (as cited in Terry, Mark, and Gordon, 2012, p. 2689). In September 2012, the Nova Scotia Barristers Society announced a comprehensive review of its manner of regulation, saying that “the ‘one size fits all’ regulatory model currently in use may no longer be appropriate (Moulton, 2013, p. 1, 23). There is a great deal of literature and evidence that jurisdictions around the world are re-examining how professionals are regulated. In British Columbia, the Law Society’s bid for regulatory expansion over notaries and paralegals, and the LSPTF’s recommendation for uniform standards could be interpreted as an attempt to fortify their historic, existing status as a self-regulated profession, in their own self interest and not necessarily in the public

<sup>58</sup> In a January 21, 2014 bulletin, the Notaries Society President reported that the discussions following the recommendations of the LSPTF were “contingent” on the notaries getting increased powers for probate and incorporation. He also said that autonomy, identity and the entrance and education process would not be changed (personal communication, February 4, 2014). Data were clear that there were no promises made to the notaries going into the merger discussions. The President’s reference to “contingent” discussions may indicate that the notaries have indeed negotiated for increased powers and retention of their education program and entrance procedures. Alternatively, it might simply reflect the notaries’ negotiating position at the time.

interest alone, and at odds with the trending concepts of professional regulation in other jurisdictions.

In my research, both lawyers and notaries expressed awareness that if they wanted their respective society to keep their autonomy, then they must change their duty to regulate not in the best interests of their members, but only in the best interests of the public. The Law Society was able to get their legislation changed to that effect in 2013,<sup>59</sup> and the data show that the notaries were intending to include such a change in their new *Act* under negotiation with the Ministry. Beyond the words in the legislation, the actions of the self-regulated profession must also be perceived as being in the public interest, and both the archival and interview data indicate awareness of this responsibility from lawyers and notaries alike.

Looking ahead, if regulation of the notaries is merged with the Law Society, then there will be no role for notaries as a self-regulated legal service provider in BC and their “concurrent jurisdiction” settlement identified by Brockman (1997, p. 198) would be lost. Instead the merger could qualify as Abbott’s “full and final settlement” of exclusive jurisdiction over legal services in favour of the Law Society (1988, p. 70). The notaries may form a trade association to do self-promotion but their role as an SRO will end. The Law Society would become the only provider of legal services in BC. Widening the Law Society’s scope of regulation has at least four possible outcomes: it would give the Law Society commensurately greater power and responsibility; it may put greater pressure on the Law Society to appear to act without bias and in the public interest; it would remove the government from direct responsibility and oversight of the “subsumed” professions; and, it would increase the governmental reliance on the Law Society to regulate. Instead of notaries standing shoulder to shoulder with lawyers as self-regulated professionals under the supervision of the government, notaries would be demoted to the back of the line, hidden behind the lawyers who alone would remain under the ever decreasing supervision of the government. The merger would also move BC closer to the system described by Flood (2011) where government trusts the

<sup>59</sup> A question about the intention of the Law Society in making that change has been discussed previously in section 4.4.2.

organization to act in a manner consistent with or superior to government standards and as a result, government supervision becomes superfluous and unnecessary (p. 521). Similarly, the merger would move BC farther from the concept of professional knowledge as public property espoused by Tuohy (1976), the GSBs controlling the professions as reported by Brockman (1996), the Clementi (2004) recommendations for an independent LSB to regulate legal services, and the consumerist-competitive mode of regulation identified and christened by Semple et al (2013).

## **5.7. What Happened To Seed the Reversal of Public Animosity Between Lawyers and Notaries in 2013?**

The findings indicate that the opportunity for lawyers to capture the notaries was more kismet than intentional, and the animosity might have been temporarily silenced but not extinguished.

In the summer of 2012, Attorney General Bond's Ministry was the right time and the right place for convergence of the right people, each with their own aims and motivations but also with the right mindset for change. First, there was the Minister herself who, unlike predecessors, was not willing to take sides or arbitrate a dispute between lawyers and notaries. In a novel strategic move, she exerted the power of her office to force the combatants to settle between themselves. By doing so, the Minister had effectively abandoned the notaries, bullying them into agreeing to participate on the Law Society task force. She left the notaries with no graceful, self-preserving way to say no to the lawyers, or to her.

Since taking office in 2001, Mr. Braid on behalf of the notaries had made it his mission to cultivate a friendly working relationship with the CEO of the Law Society. At the same time, he continued to pursue the notaries' professionalization goal of expanding their services and improving their legislation, a goal that extended over the entire study period. In 1981, Dr. Hoeter had attempted unsuccessfully to slide improvements into the new *Act*. Mr. Nicol continued with the 1989 proposal that he pursued through the media and a public petition, ultimately faltering at the feet of Mr. Dosanjh in the legislature. When Mr. Braid arrived in 2001, his quiet persistence with

the Ministry staff was simply carrying on the tradition and moving the notaries closer to their goal of greater scope and better administration. He got away with it, flying under the lawyers' radar, until the spring of 2012.

There are three more possible reasons for the notaries' change of heart about lawyers. The study data do not include financial information, but it is possible that the notaries had a financial motivation to co-operate. The financial aspects of any merger are significant if not determinative, particularly if there is inequality between the merging parties. In this case, the notaries are dramatically smaller and less bureaucratic than the Law Society, so the notaries' financial situation could be relevant to explaining why the notaries would be interested in merger now when they have resisted any kind of takeover by the Law Society for 150 years. The notaries' financial situation could also be relevant to the Law Society's willingness to proceed with the merger, for example, significant uncovered liabilities or claims might deter the Law Society from merger. Alternatively, significant assets or cash flow might motivate the Law Society.<sup>60</sup> The Notaries Society does not publish their financial information and the research is limited in that regard. The interviews included a question about whether there was any financial motivation for the proposed merger, so some qualitative data were collected, but not enough to assess with any certainty the potential impact of the financial situation, benefit or loss on the decisions currently under consideration by the parties. For example there were indications in the interviews that the annual licence and insurance fees for notaries would be significantly reduced with the Law Society as their regulator. That alone could have been reason to sit down with the lawyers. Also, the Notaries Society had launched litigation over a conveyancing software program and was counter sued for millions. The validity of the lawsuit and the exposure of the Notaries Society are unknown. If the exposure was substantial from this or any other potential unanticipated liability, it is

<sup>60</sup> The parties have characterized the transaction between the lawyers and notaries as a "merger" and a "subsuming" of the notaries' regulatory function into the Law Society. The actual form of the transaction is under negotiation, and the government's role in the transaction is unknown, so the terms have been interpreted here with caution. Some notary participants pointed to the high volume of real estate transactions and the concomitant generous pool of interest on trust accounts and proceeds from TAF as a significant, tangible financial contribution by the notaries to any potential merger.

possible the notaries viewed talking to the Law Society as an avenue of support for their exposure.

It is also possible that the notaries co-operated because they trusted the lawyers. Notaries are not trained adversaries, but specialists in non-contentious arrangements. In their day-to-day business, they rely on the word of other notaries and lawyers. Interview participants confirmed that “no promises were made” to the notaries about whether their participation in the task force would include increasing their scope of practice. But at the same time, both notaries and lawyers were clear that the issue was on the table for discussion. One lawyer put it this way:

... if they are qualified to do so and if they have the education there's no reason why they should not be able to practice in those areas. Despite the fact that there isn't a public cry for them to be able to expand their scope in those areas, ... we now accept that you have the educational background to get involved and you will have the educational background to do the expanded scope, but why do we need two regulators for 330 notaries ... (interview, February 28, 2014)

It is possible that when the lawyers said they accepted notaries as qualified to expand their scope, the notaries believed them and trusted that regardless of the outcome of the task force, the lawyers, as a public interest regulator, would not object to their expansion in the public interest.

For notaries, based on the historical relationship between the two professions and data from the study period, the prospect of joining the Law Society is either risky or brave. It is the former if notaries harbour any expectation of retaining their autonomy. It is the latter if notaries join the Law Society because there is no alternative, that is, they join the Law Society because their members either cannot afford or no longer want to do the work to maintain their self-regulatory status.

As for the lawyers, co-operating with the notaries (let alone contemplating a complicated move like a negotiated takeover) was “not on the radar” until they were confronted with the notaries' usurpatory claim to greater scope and the CBA's failure to squelch the notaries continued engagement with government on their revised legislation. As the summer of 2012 approached, there was a chance collision of the



ambitious notaries, the lawyers who wanted to keep their power and independence as a self-regulated organization, and a government that was not prepared to take sides. The CBABC's usual arguments criticizing the notaries' competence and education were no longer valid and if the lawyers were to maintain their exclusive scope of services against the notaries' claims, then they needed to find a new public interest justification. Someone came to the conclusion that inclusion (rather than the usual demarcationary rejection) could be a viable option and a natural extension of the Minister's edict to sort it out amongst themselves. There is some indication in the interviews that the lawyers first broached the idea of inviting the notaries to join a Law Society task force. If so, the notaries' had little choice but to go along. Refusing to co-operate would have been tantamount to rejecting the new-found friendliness between CEOs. Refusal also would have rejected the Minister's request and prejudiced the likelihood of any foreseeable resumption of discussions about extended scope and legislative revisions. Refusal would have put at risk ten years of work that was close to completion. On the other hand, co-operating on the task force kept open the possibility of realizing the notaries' aims.

From the lawyers' perspective, inviting the notaries to join a task force that was already on their agenda to study how to govern non-lawyers was a low risk solution to the Minister's request. There was little prospect that a single notary on the task force could affect the outcome or derail the process, especially if the lawyers stopped ignoring the notaries and behaved respectfully toward them. In addition, bringing a notary representative inside the Law Society premises into a collegial environment (including paralegals who were already captive to the lawyers and likely to see being licenced by the Law Society as a good, status-improving idea), would give lawyers an opportunity, on their own turf, to convince the task force and the notary representative that a single regulator was a good idea. It gave lawyers an opening to "fix" the niggling notaries problem that had been flaring up regularly since 1922.

The lawyers' move to include the notaries in discussions and eventually to subsume them could be interpreted as an example of one profession, the lawyers, seeking the "optimal balance" between abstract and concrete knowledge (Abbott, 1988, p. 104). It is arguable that lawyers' knowledge and work have become increasingly

abstract and expensive, out of reach for many, and that lawyers generally are not servicing the lower, routine end of the legal needs market. Merging with notaries would recalibrate the balance in favour of concreteness and thereby (according to Abbott, 1988, p. 104) strengthen the lawyers' professional jurisdiction. However, Abbott would also recognize potential problems with the proposed merger in the "distinctly professional heritage and tasks [that] prevent a unified cognitive and social structure" (p. 105). Both lawyers and notaries in BC take pride in their unique history and contribution to development of the province. Abbott would point to the success-threatening lack of "common knowledge"<sup>61</sup> among "interchangeable members" of the proposed merging parties.

If things do not go as recommended by the task force, the lawyers are confident in their power to prevail over the notaries and their influential status with the government:

What happens if the notaries say no? If I were still the president of the law society which I'm not, I would say to the attorney general of the day, I did my part. What you do from this point on with the notaries is entirely up to you. I tried. I tried to be inclusive. I tried. We worked hard, long, we looked at other jurisdictions, what's going on around the world; we looked at the impact on legal services and what's going to change over the next years. We came up with some concrete recommendations and if they're not adopted, we did the best we could. Now you decide what you want to do. (interview with lawyer, February 28, 2014)

Depending on how much work the law society had done towards implementation and how widespread and engaged lawyers, paralegals and notaries had been on that, it is possible that if there was enough will within those groups, even if the notaries formally said no, if there's enough will there, I think the law society could take that to the attorney general and say make it happen. We've worked on this and this is the solution and we are far down the road in operationalizing it and it still is a solution that is viable and we have a lot of people uptake on this, make it happen ... I think it will happen one way or the other. I don't know that it will happen as it's been put forward. But I'm glad to hear that so far so good. (interview with lawyer, February 18, 2014)

<sup>61</sup> The area of overlap between the two professions is narrow as is the body of common knowledge.

Comments in the interviews indicate that distrust and old hostilities are still alive, such as:

The CBABC's position is that [notaries] shouldn't be expanding their services without regulation by the law society (interview February 18, 2014).

[Notaries] are technicians ... completion of forms ... if you want to keep them technical then you marry them with areas that are technical. (interview February 18, 2014)

They don't need to expand their scope. (interview February 2, 2014)

If the notary wants to do more, go to law school. (interview February 18, 2014)

If there are individuals who would like to do more then they should apply to law school and become a lawyer. (interview December 20, 2013)

I know there's been a lot of concern at the bar. My own partner said to me what the hell are you doing? I went to law school for three years and why should this happen? (interview February 28, 2014)

Lawyers are cats. You make a fundamental mistake if you assume that they're all speaking with one voice, or all meowing with one voice when they're not ... By nature lawyers tend to be tigers ... Advocacy causes it. They'll tear the throat out. (interview, December 2, 2014)

Well certainly if they [notaries] come under the wing of the law society which is implied here, I would expect they would be pretty short lived ... I would expect the lawyers probably have some kind of a plan in mind that would see them you know become less and less available to the public. They'd find some way of watering it down. (interview, January 24, 2014)

In summary, the reversal of the animosity was partially intentional, probably unavoidable and possibly superficial. The notaries intended to cultivate co-operation between CEOs. But once the Minister stepped out of the confrontation, the notaries and lawyers had no realistic option but to co-operate. There is evidence in the data that the notaries remain distrustful of the lawyers, and animosity and arrogance toward the notaries still lingers with lawyers.

## 5.8. The Benchers' Table

When this research began, there was no inkling that by the end of the study period, notaries and lawyers would be considering a voluntary regulatory merger. Although the outcome of those deliberations is presently unknown, the data and the literature include some indication of what might happen to notaries at the benchers' table.

First, as to structure for the merged organization, it is possible that the Law Society will adapt some version of the LSUC framework for paralegals since it has been operating for six years and recently received a glowing five year independent review. Essentially there would be an advisory committee of notaries (no decision making power) and a right to elect from among themselves a proportionate number of voting members to the benchers' table.<sup>62</sup>

Second, as to assimilation of notaries and lawyers, the data indicate a wide cultural gulf between the two professions that Abbott (1988) counts as weighing against successful merger, as previously discussed. The difference in size has potential to significantly affect the relationships among members and between the regulating society and its members. Abbott (1988, p. 152-3) notes that both "size and bureaucracy confer competitive advantage within the profession," favouring lawyers over notaries in the post-merger professional organization. Mr. Braid characterized the intra-professional relationship of notaries as: "Of all my notaries (there are only 330 of them), I can tell you every one of their names, I can tell you every one of their spouse or partner's names and most of their children, you know ... that's just who we are" (interview, November 26, 2013). The notaries' magazine, *The Scrivener*, demonstrates the personal nature of

<sup>62</sup> Unless the number of elected benchers is increased, the notaries' proportion does not entitle them to one whole member at the benchers' table. Presumably some acceptable solution could be negotiated if merger proceeds and if this method of determining representation is chosen. Interestingly, in the most recent changes to the paralegals' governance in Ontario, the number of paralegal seats on the standing committee has been fixed at five elected by licenced paralegals (along with five lawyer benchers and three lay benchers), and, rather than using a proportional concept for their voice at the benchers' table, all paralegals on the standing committee are also benchers at Convocation (Law Society of Upper Canada, 2014, np).

their intra-professional relationships with folksy reports and photos of social events, recipes and stories from notaries traveling abroad. There are features concerning practice matters, too, but the glossy, colourful magazine is definitely a “light read.”

Contrast that with the Law Society formal corporate organization, the size and sophistication of their administration, and the size of their membership. It is doubtful that the CEO of the Law Society knows everyone. The Law Society’s periodical, *The Advocate*, is the antithesis of *The Scrivener*. The *Advocate* cover is glossy and full colour, but inside is not. The contents are predominantly learned articles about legitimate issues facing the profession. There is a section about lawyer comings and goings but it is buried at the back and photographs are exceptional. It is not a “light read.” The CBABC publication, *BarTalk*, is less formal with more colour photos and a chatty, usually funny column from the prolific Tony Wilson, but it is still predominantly business, printed on stiff, dull paper, and, the current format is relatively new. It used to be a three hole punched two colour affair, similar to the *Benchers’ Bulletin*. Not folksy. No recipes.

Given the size difference alone, it is likely that the merging notaries would be overwhelmed by the lawyers, and possible that notaries would lose their intra-professional closeness. One lawyer was quick to point out that the regulator should not be affected by any relationship with the members, but should always (and only) act in the public interest (interview February 28, 2014). Assuming that was the case today in both the Notaries Society and the Law Society, there would still be a significant change for notaries because before merger, chances were high that notaries under review knew the people making decisions about them and had an opinion about the extent to which the notaries could trust the decision makers’ discretion. After merger, decision makers will likely be unknown to the notaries. The point here is that decisions both before and after merger may be based on exactly the same public interest principles, but after merger, the notaries will likely perceive those decisions with less confidence. That in turn affects the relationship between the notaries and their profession, and ultimately the collective culture of the profession. If merger proceeds, the notaries’ culture may become less personal and more detached, like the lawyers’. It is unlikely that the lawyers’ culture will change much, if at all, in response to the notaries.

Third, admission to practice as a notary has been one of the fundamental regulatory functions of the Notaries Society and ought to be a focal point in any subsuming regulatory merger discussions. There are fundamental differences between the Law Society and the Notaries Society in their policies about education as a requirement for admission. The Law Society has nothing to do with admission of students to law schools. The first BC law school opened in 1945. There are currently three law schools in the province, admitting an aggregate of approximately 360 students every year. In contrast, the Notaries Society prerequisites are the first hurdle for applicants to the MAALS program and include detailed background inquiries. Only those who pass muster are eligible for consideration by SFU. The MAALS program at SFU admits 25 to 30 students annually, is barely six years old and is the only notary education program available in the province. From the interviews, there appears to be a mutual understanding between Mr. Braid on behalf of the Notaries Society and Dr. Gordon on behalf of the university, as the originators of the MAALS program, about its purpose, standards and evaluation. The content of law school and the content of the MAALS program are obviously different, as reflected in the interviews in this research. If the lawyers are serious about having a single standard govern everyone doing the same work as recommended by the LSPTF, then logically, either the law schools or the MAALS program, or both, will have to change.

Lastly, the data indicate that lawyers intend to fully take over regulation of notaries. Any notary representation at the benchers' table would be a minority and would not control decision making. The final report of the LSPTF mentioned the possibility of transitional "co-regulation" without defining that term. Given the data from interviews with lawyers, it is unlikely that lawyers intend to co-regulate (if at all) in the manner contemplated by Semple et al. (2013) where regulatory control is vested independently. Consequently, it is possible that notaries will concede every aspect of regulation from admission to practice standards, complaints and discipline, expulsion and penalties. If they do so, they will have given the Law Society the power to either maintain and expand the notarial practice in BC, or extinguish it.

Lawyers had several reactions to the proposition that merger might result in the notaries demise, ranging from shock: "not once did we ever hear that comment, that this

might be the end of notaries, never once” (interview February 4, 2014), to indignation: “I don’t see that in the foreseeable future...I say to you the best way to prepare yourself is to be part of a well recognized regulator ... and that’s the way you’re going to survive” (interview, February 28, 2014), to agreement: “So let me get this straight. The notaries society has just signed on to their demise?” (interview December 20, 2013). Can the notaries survive a merger? They can. But whether they will depends on whether notaries retain any regulatory autonomy and if not, whether the lawyers, for the first time in their history, actively, consistently and perpetually support and promote the notaries by “driv[ing] the provision of legal services to the most accessible, appropriate level” of the professions regulated by the Law Society (Morris, 2012, p. 13), and that remains to be seen.

## **5.9. And in the End**

This thesis begins with the notaries battling for survival against the lawyers and the courts. It ends with the notaries on the verge of falling under the Law Society’s rule and losing their power, control and status as an SRO. From beginning to end, the BC notaries have been in peril. This study raises a number of public policy concerns about the delivery of legal services. The study also adds credibility to existing theories about inter-professional conflict and reveals the quintessentially human nature driving decisions and controlling perceptions about professionalization and inter-professional conflict.

The public policy issues arise tangentially to the research and further investigation or discussion is beyond the scope of this thesis.<sup>63</sup> The public policy issues pertain to basic inconsistencies in our social contract with the media, the government and the monopoly of legal services providers. First is the perennial question about the role of the media. Is the free press working adequately to inform the public and affect

<sup>63</sup> There is a current discussion of the public policy concerning monopoly on legal services in the US in the Symposium articles in the May 2014 publication of the *Fordham Law Review* 82(6), p. 2563-3090.

the legislators, or do only morally driven or sensational professionalization efforts receive publicity?

Second are questions about the responsibility of government to govern. Is there presently reasonable justification for government to continue delegating decision-making power about public interest to an occupational organization whose leadership and members have a stake in the outcome? Is it reasonable to expect impartiality in those circumstances? Would a public interest regulator's decisions be impartial if the decisions were simultaneously in some manner beneficial to the regulator or its members?

Third are questions about the relative importance in our society between competition (including freedom of choice for workers and consumers), and public protection from the dangers of improperly qualified advisors. If there is little or no evidence of public harm, what is the justification for monopoly with its inherent restrictions on worker and consumer choice? If notaries have access to appropriate education at SFU for additional services in the low end of the market that lawyers have already deskilled (like private company incorporations and registered and records office functions), what is the public interest in preventing them from going ahead? If there is no such public interest justification, has government failed to act, or delayed acting on the notaries' requests for greater jurisdiction for the reasons identified in the interviews: that lawyers are a powerful profession and resistant to change, so astute legislators are unwilling to provoke them?

Public policy aside, this study adds credibility to existing theories about inter-professional relationships. For example, as proposed by Abbott (1988) and Brockman (1997), the microcosmic system of professions that has delivered BC's legal services fluctuates between periods of relative peace in their concurrent jurisdiction, and eruptions of rancour over the subordinate notaries' intrusive quest for greater jurisdiction. Similarly, the data show lawyers and notaries striving to defend or acquire status with the same vigour and at the same time as the drive for jurisdiction, as suggested by Adams (2004, 2010). The dominant demarcationary strategies described by Witz (1992) are exemplified by the dominant lawyers who, upon realizing that their usual forceful,



confrontational style of demarcationary strategy had ceased to work, nimbly shifted to a more collaborative style. The style may have changed, but the strategy and the sites did not. Throughout the study period, the lawyers' moves against the notaries have been aimed at demarcating their exclusive jurisdiction to regulate legal work, and have been played out in public and government venues. The move to annex notaries and paralegals (if it comes to pass) will not only expand lawyers' regulatory jurisdiction and elevate their status (Adams 2004 and 2010), but it will also, for the first time, give lawyers the exclusive control over provincially regulated legal services (exclusivity being a hallmark of Abbott's theory, 1988).<sup>64</sup> As suggested by each of Rhode (2013, referring to studies in the US and UK at p. 249) and Maroto (2011), the influence of informal factors on work quality was evident in the notaries' remarkable improvements in education at both the entry and practicing levels that were self-initiated repeatedly as a result of inter-professional competition and criticism, not through formal regulation.

This research demonstrates the precariousness of pursuing Witz's professional projects as a small autonomous organization with non-exclusive jurisdiction in a subordinate position in Abbott's system of professions. The notaries' efforts to expand their scope of practice were fruitless. None of their proposals was successful. They made progress only in the absence of opposition from lawyers, when it was someone else's idea (TILMA lifting the restrictions on numbers and territory), or when there was a moral issue at stake (like the 1981 problem with codifying the gentlemen's agreement, and the 22 year long problem with honouring the notaries' extraordinary contribution to the development of representation agreements). One week in 2012 the notaries were happily exchanging drafts of their new governing legislation with the Attorney General's staff, lobbying in the most promising site for success by a subordinate group according to Witz (1992), and the next week, they were abandoned by government to fend for themselves with their much bigger, more sophisticated, more adversarial competitor. As I write, the ultimate disposition of the notaries as an SRO is unknown. If the notaries' leadership is able to negotiate a merger that increases their scope of practice and promises appreciable financial benefit, then perhaps the notaries will be convinced that

<sup>64</sup> According to the LSPTF report, BC lawyers are unwilling to challenge the accountants' intrusion into lawyer's monopoly so the lawyers' monopoly would be exclusive (for provincially regulated entities) if the accountants don't count.

some form of licence or membership in the Law Society is an improvement worth the price of the loss of autonomy and SRO status. However, the notaries' ostensibly voluntary participation in merger discussions represents a reversal in their historic role as the one, fully independent and distinguishable choice for British Columbians' everyday legal needs in a market otherwise monopolized by lawyers. Benefits for the BC public are unclear.

Finally, the interviews in the study along with the record of legislative debates provide a glimpse into the human influences that generate the turning points in the lawyer-notary-government relationships, or attempt to mould or "spin" public perception of events. For example, the game-changing decision to take the notaries' education to the Master's level at SFU can be traced back to the mutual admiration between two leaders who had the capacity to make it happen. Similarly, the reports from attendees at the pivotal all-parties meeting called by the Attorney General for April 4, 2012 tell us about the volatile behaviour in the room that alienated the parties until patient personal persuasion from the Attorney General convinced them to try again. For the lawyers, recasting the Law Society as a "public interest regulator" necessitated abandoning a century and a half of protecting members' interests. The controversial remarks around the benchers' table as the decision was being made demonstrate the difficulty in retracting that commitment.

There are many examples of "spin" such as a former President of the Law Society who insisted that lawyers recognized they could no longer maintain a complete monopoly over legal services, despite the newly issued LSPTF recommendations doing just that by bringing all legal service providers under the Law Society's regulatory control. The same former President claimed that lawyers accepted that education and training had ceased to be justification for objecting to notaries' expansion of services, yet did not mention the CBABC 2010 to 2012 attacks on notaries' credentials. Attempts to mould public perception were evident from government, too. Attorney General Williams' 1981 explanation for not making the schedule of notarial districts and seals a regulatory matter for ease of amendment as population shifted was that he was simply following the notaries' wishes, when it was clear from comments of others in the House that notaries had no choice in the matter and leaving the schedule as part of the legislation meant the

notaries would be stuck with those restrictions until enough support could be gathered to raise the issue again in the legislature. As it turned out, notaries were stuck with it for almost 30 years until extraneous interests (TILMA) arose to abolish the restrictions. More recently, Attorney General Anton announced the benefit of access to justice in the LSPTF recommendations when that benefit was expressly disclaimed in the report. Perhaps the most blatant example of moulding public perception was the circumstances preceding the constitution of the LSPTF, a potentially critical turning point in the regulation of the legal professions in BC. The interviews revealed those private luncheons among the key leaders of the two professions and the joint letter to Attorney General Bond, both of which arguably pre-empted the LSPTF before its first meeting. The task force went ahead anyway, conveniently supporting the pre-agreed merger recommendation with a publicly acceptable formal process as back up.

Now, I wonder how this cliffhanger will end.

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### **Caselaw**

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### **Legislation**

- Legal Profession Act*, S.B.C. 1998, c. 9
- Notaries Act*, R.S.B.C. 1981, c. 23
- Notaries Act*, R.S.B.C. 1996, c. 334

## Appendix A.

### Sample Interview Schedule

[name, date, time, location]

OK with recording audio? \_\_\_\_\_ OK with consent form? \_\_\_\_\_

*Check a few facts:*

Called/Got seal:

Practice area / Non-notary part of business:

Bencher / Director of Notaries when:

Other offices with LS/Notaries:

\*\*\*

***Basic question for study: What has been happening between notaries and lawyers since 1981?***

What can you tell me about the eight key events since 1981? Nature of your involvement with changes: How initiated, by whom, when, exactly what was proposed? Purpose of change: goals, advantages/disadvantages? **Why did lawyers allow notaries to succeed?**

***Eight key events since 1981 (\* means notaries successful):***

1. **\*1981 – new Notaries Act** codifying gentlemen’s agreement of 1955 with cap on number of seals, geographic territory for each seal and deleting the requirement for a “needs” test
2. **1989-90 Notaries’ proposal to expand jurisdiction** to include probate of simple wills and incorporation of non-reporting companies (among other things).
3. **\*2000 McCallum report and 2002 McClean report** recommending that notaries be empowered to draw **representation** and other health care agreements (passed in 1993, 2003 BC Law Institute committee, revised legislation passed 2007, enacted 2011).
4. **\*2007-2008** Notaries announcement of overhaul of education requirements and the first cohort are admitted into the new **Master’s of Arts in Applied Legal Studies** at SFU.
5. **\*2009:** geographic restrictions and numbers cap deleted (TILMA).
6. **\*2009:** international wills added to scope (proclaimed March 31, 2014)(WESA).
7. **2010 Notaries’ proposal to expand jurisdiction** to include probate of simple wills, incorporation of non-reporting companies and simple uncontested divorce proceedings, and subsequent developments (see 8.).
8. **2013**, Notaries represented on Law Society’s **Legal Service Providers Task Force** starts January, final report December recommending LSBC as the sole single regulator for notaries, lawyers and paralegals; Benchers approve immediately and move forward.

- Other events?
- Do you think there is a problem with the quality of education for notaries? Why?
- Do you think there is a problem with the quality of services provided by notaries? Why?
- What (else) is wrong/broken with the notaries? Poor regulation, administration, admission standards, practice standards, discipline standards?
- Why has the CBA been so adamant against notaries expanding scope of practice?

### ***Legal Service Providers Task Force***

- The report talks a lot about public interest in uniformity among service providers, but it doesn't talk much about monopoly. How would you respond to the criticism that a single regulator is not supportive of the public interest in **competition and freedom of choice**, and is simply an opportune power grab by lawyers?
- I have seen the survey of notaries and I've heard from notaries that they would be OK with a single regulator if they were able to "maintain their autonomy" (survey: not in favour if LS was the single regulator). Are there any guarantees that have been given to the notaries – verbal or otherwise? **scope of services or autonomy?**
- What about **culture clash** between lawyers and notaries – will there be one and how will it be handled? (small org. vs. big org., "junior" in numbers vs. overwhelming majority, personal nitty gritty vs. elite lawyers)
- How important are the notaries to the recommendations of the task force? ie. if they don't agree, no impact on access to justice.
- Why do you think the notaries are involved in LSPTF? Why now after 100+ years of resistance? Was it voluntary or a directive from the AG?
- What do you think will happen if the notaries are regulated by and merged into the LS? Do you think notaries will continue to exist substantially as is? (free standing, not under supervision of lawyers).
- How would notaries be involved in the responsibilities of regulation?
  - admission
  - removal
  - standards of quality
  - discipline
- How do you see the future of notaries in BC? What does it look like? Status quo? Abolished?
- Anything else? Who else should I talk to?
- May I contact again?



## Appendix B.

### Interviews by Date and Capacity

<b>Date</b>	<b>Capacity</b>
November 12/13	notary, former director and immediate past president of Notaries, member LSPTF
November 26/13	notary, current CEO of Notaries
November 29 & December 11/13	notary, former director and former president of Notaries
December 2/13	academic, founding director of MAALS
December 3/13	notary, former director of Notaries
December 11/13	lawyer, counsel to Notaries
December 20/13	lawyer, former Attorney General, adjunct professor for MAALS
January 16/14	lawyer, counsel to Notaries, adjunct professor for MAALS
January 24/14	lawyer, former Attorney General, former Court of Appeal judge
January 24/14	former notary, former director, former president and former CEO of Notaries
February 2/14	lawyer, bencher of Law Society, adjunct professor for MAALS
February 4/14	lawyer, bencher and former president of Law Society, chair of DLSTF
February 18/14	lawyer, former president CBABC, member of LSPTF
February 28/14	lawyer, former bencher and former president of Law Society, chair of LSPTF