IN SEARCH OF THE ETHICAL LAWYER

STORIES FROM THE CANADIAN LEGAL PROFESSION

Edited by Adam Dodek
and Alice Woolley

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Foreword

PAUL WELLS

Here is a book of the sort of stories that used to be the very stuff of Canadian newspapers. News coverage of Canada's courtrooms used to be measurably richer and more complete than it is now. A big trial would attract as many reporters as the room could fit, not only for the arraignment and decision but also for every twist and turn in the proceedings. Even less monumental cases would attract sustained attention in the local paper, illuminating for a general audience the judgment calls of lawyers and their clients and thereby contributing to a general understanding that the law is something more complex, and at times more troubling, than a set of rules straightforwardly applied.

It's not wickedness, venality, or bias that has brought those old days to an end. It's Craigslist. News organizations' traditional revenue base has collapsed. Social media have replaced the paid classified ads that we used to run by the hundreds in thick sections. Almost every big news organization has a fraction of the reporters that it once fielded. Keeping a reporter or two at the courthouse, with reinforcements in the main newsroom ready to call in on an hour's notice, is a luxury that few can afford. When reporters do show up, they are not courtroom regulars. They are novices and generalists, fresh from the city council meeting or the garbage strike. There is no room in their harried noggins for insight into nuance or the incremental evolution of a complex story. Much more often than even in the recent past, we simply report the verdict. If that.

So this book fills a lately expanded vacuum in our popular understanding of the moral challenges at the heart of the practice of law. There's so much in the craft that resists code and theory. We fail the humanity in law when we skip lightly over its human conflicts and imperfections. Yet, while I've focused, as a reporter would, on the growing inability of the popular press to capture the human subtlety in so many cases, I'm not particularly surprised to learn from Adam Dodek and Alice Woolley's introduction to this volume that it's much the same situation in the formal study of law. A courtroom is a machine for translating chaos, willy-nilly, into a measure of clarity. Of course, teachers would prefer, in many cases, to pay less attention to the messy inputs and more attention to the satisfying conclusions. But in real life lawyers are parts of the machine, and it would be surprising indeed if they could forever toil in it without getting the messy inputs all over themselves.

By the evidence of the tales told here, what you get when that happens is often a lesson worth contemplating. Consider Kenneth Murray, an earnest small-town lawyer of no great experience who accepted, in 1993, a collect call from Paul Bernardo. The rest of that harrowing tale is related in "Putting Up a Defence: Sex, Murder, and Videotapes," by Allan C. Hutchinson. Murray comes to possess disturbing evidence in a notorious case of multiple rapes and murders. In deciding what to do with the evidence, he must choose between the public interest and the interest of his client. His instincts fail him. The cost is heavy. Hutchinson suggests a different course that Murray could have followed. I found at least some of the advice that he gives unsettling. But that's a feature, not a bug, of these essays: they raise questions that don't have easy answers, and nobody should expect every reader to come down on the same side of each question.

One of the hallmarks of this volume is the variety of stories and experiences canvassed. I was taken with the tale of Gerry Laarakker, a sole practitioner in small-town British Columbia who lost his temper when a client showed him a threatening letter from a law firm about the client's teenaged daughter, accused of shoplifting. This was nothing but "extortion by letterhead," Laarakker decided, and he fired off a scathing (and really quite funny) letter to the offending firm. The firm took umbrage, Laarakker was hauled before a disciplinary panel, and …well, read on. The story, told with real flair by Micah Rankin, turns out to be about the limits on a lawyer's obligation to treat colleagues with civility – and the limits of a good man's ability to tolerate outrage.

Readers might find themselves asking why some of these chapters belong in a book on legal ethics. I think that's habit talking, not any inherent incongruity in these stories. We have grown so used to discussing law as evidence and precedent that, when skilled and sympathetic practitioners and academics remind us of another dimension (which Faulkner called "the problems of the human heart in conflict with itself"), we're unsure how to assay its value. But these ethical dilemmas can inform, inspire, or derail lawyers' work as surely as any other aspect of law. All the more reason to ponder the questions posed herein.

Introduction

ADAM DODEK AND ALICE WOOLLEY

Legal Stories and the Law

American judge Oliver Wendell Holmes famously quipped that "the life of the law has not been logic: it has been experience."[1] Nearly a hundred years later another American highlighted the division between the life of the law and the study of it: "The study of law can be disappointing at times, a matter of applying narrow rules and arcane procedure to an uncooperative reality; a sort of glorified accounting."[2] This statement, written by Barack Obama in 1995 several years after graduating from Harvard Law School, might resonate with many students of the law.

All too often the common law appears to be pedantic. It is a system based on cases. It is a hierarchical system in which greater weight is placed on the cases higher up in the hierarchy. Students focus on the rules and "the ratio." Yet, when they have to think about the application of those rules and ratios, whether to a real situation or to a hypothetical examination, they face the "uncooperative reality," which submits uneasily, if at all, to logical analysis.

The paradox of the common law arises from the contrast between its origins in real-life disputes between ordinary people or between citizens and their government and the translation of those disputes into causes of action. Cases arise from disputes between a rancher and his wife, who claims a right to share in the profits from the sale of the ranch that she contributed to through her labour;[3] between a mother and the state, which

wishes to take a child away from her;[4] between a woman and her ex-boyfriend, who wants to stop her from getting an abortion;[5] between a fifteen-year-old African Canadian boy and a white policeman;[6] and myriad other circumstances ranging from the mundane to the almost unbelievable. But as the cases move up the common law's hierarchy, the stories of the people are all too often pushed aside. The higher a case goes, the less it becomes about the people and dispute that gave rise to it. Lawyers, judges, law students, and legal scholars read, remember, distill, and use the cases for the law that they contain, not for the people whose lives they affected. In one of the most famous cases in Canadian law, the *Persons* case, the five women who spearheaded the case – known as "the Famous Five" – are mentioned only once.[7] No reference is made to their struggles or how the case came to be decided by the Judicial Committee of the Privy Council in London.[8]

Casebooks are used to teach law, and the treatises written to explain it further excise the facts. In both, it is not uncommon for cases to be reproduced or presented with no reference to the facts. The people and their stories – the facts of the case – are unwelcome distractions.

But any lawyer will tell you that in a courtroom the facts do matter. Indeed, they may determine the outcome to a far greater extent than an articulation of the legal rules abstracted from those facts. Moreover, when one considers the very concept of law, its purpose and its structure, the centrality of facts is inescapable. Without application to people, disputes, corporations, organizations, social structures, governments, or the goals of public policy, the law would have no meaning or purpose; it would be no more comprehensible than the random strokes of monkeys on a keyboard.

It is our belief that the facts – people, circumstances, disputes, entities, culture, and social structures – also matter in the consideration of ethical issues for the Canadian legal profession. Without a rich and rigorous understanding of the personal, social, structural, and cultural circumstances in which they arise, one cannot have a meaningful conversation about the ethical challenges of legal practice; the interpretation and significance of the rules of professional conduct; what it means to be a "good" lawyer; the solutions to vexing problems such as access to justice; the meaning of "professionalism"; or, indeed, any other issue of legal ethics and professional regulations.

Our goal in editing this book was thus to tell the stories around some of the most important and interesting issues in Canadian legal ethics, to put the people and their circumstances and stories back into the discussion. As President Obama also said after his observations of law's tendency toward

"narrow rules and arcane procedure," "[b]ut that's not all the law is. The law is also memory; the law records a long-running conversation, a nation arguing with its conscience."[9] This book is part of that conversation, part of the argument with our collective conscience and our individual consciences about the meaning of ethical and unethical behaviour, both specifically and generally.

This is not to suggest that the law governing lawyers – the rules of conduct, case law, and statutes that determine lawyers' obligations to their clients and to the legal system – is less rigorous or doctrinally important than other areas of law. As the recent flourishing of legal ethics scholarship in Canada demonstrates,[10] the law relating to questions such as solicitor-client privilege,[11] conflict of interest,[12] and lawyer civility[13] merits analysis and critique. However, as was observed about the law in general, divorcing it from its factual context undermines the effort to understand it.

Furthermore, one of the specific challenges of the law governing lawyers is that the codes of professional conduct, which contain many of the central obligations of lawyers to their clients and to the legal system, are enforced relatively infrequently,[14] or their enforcement does not lead to a reported judgment setting out how the provision applies to a given set of facts. It can thus be difficult to understand the true import of their provisions, since their terms are divorced from any factual context. Indeed, one of us often tells his students that, if an ethical issue can be resolved by reference to a provision in the *Rules of Professional Conduct,* it is not worth discussing. This is an oversimplification, but the point is that, given how those rules have (or have not) evolved, most of the vexing issues of legal ethics cannot be easily resolved solely by reference to their terms. The rules might be a starting point or a way station in the discussion, but they are not usually the beginning, middle, and end of the debate. The stories of people, social structures, policy, and history in this book contribute to filling out that debate.

The stories in this book are not stories of "great men"[15] (though some are stories of men and women of greatness), nor could such a book provide the necessary context for understanding the obligations and challenges of ethical legal practice. The important background for ethical legal practice is the stories of ordinary women and men and the social and cultural contexts in which they lived. Those are the stories that provide the necessary personal, social, and cultural contexts for Canadian legal ethics.

In telling those stories, our book is part of a larger tradition of legal storytelling. Other works of authors featured in this collection – Constance Backhouse and Allan Hutchinson – have used stories to inform law,

jurisprudence, and legal history.[16] And our book was inspired in significant part by David Luban and Deborah Rhode's *Legal Ethics: Law Stories,*[17] which describes the backgrounds and contexts of ten of the most significant legal ethics cases in the United States.

The case thus made for *In Search of the Ethical Lawyer* asserts the importance and utility of knowing the contexts and circumstances surrounding the law governing lawyers. But a non-utilitarian case can also be made. Many great tales arise in the law, tales of sadness and joy, of triumph and failure. This book tells a few of them.

Defending the Guilty, Defending the Innocent

Law mediates between the state and the citizenry, both legitimizing and constraining government power. This is true generally but is most obviously the case in the context of criminal law, in which the state exacts consequences on individuals found to have violated the law's requirements. Criminal defence lawyers practise at this intersection between the state and the citizen, helping to ensure that the law's consequences apply only where warranted and to protect the dignity of the accused.

The high stakes of criminal defence work heighten the ethical challenges faced by those lawyers. On the one hand, protection of the accused's dignity in the face of state power mandates zeal and advocacy; on the other, the morally wrongful conduct of the clients whom those lawyers represent can make that zeal seem monstrous rather than meritorious. As Allan Hutchinson says in his chapter, "[p]eople tend to identify defence lawyers with their unsavoury clients and their unforgivable deeds. However, when individuals are in trouble, they want the best and most dogged lawyer on their side and their side alone; they need to be assured about the unquestioned loyalty of their lawyer to their cause."

Furthermore, and significantly, unquestioning loyalty can lead lawyers astray, past the point of protecting a client's dignity, and ensuring that state power is exercised only when legitimately merited, to violations of the law and morality. And it can create challenges for regulators and legislators, who have to articulate the rules and boundaries of advocacy.

The opening chapter of this book – Adam Dodek's "Keeping Secrets or Saving Lives: What Is a Lawyer to Do?" – illustrates both of these problems. Dodek describes the people and circumstances underlying the Supreme Court's decision in *Smith v. Jones,* in which the Court held that a lawyer can disclose privileged information when there is an imminent threat of serious bodily harm or death to an identifiable group or person. In that case, the

Court permitted a psychiatrist retained by an accused's lawyer to reveal the violent criminal intentions that the accused had disclosed to the psychiatrist. As Dodek shows, while the Court articulated a relatively clear rule to govern the conflict between duty to the client (of confidentiality) and duty to the administration of justice (to protect the public from harm), that rule does not reduce the tension experienced by a criminal defence lawyer faced with the choice of disclosing information. That lawyer might still feel, as does the lawyer who represented the accused in *Smith v. Jones,* that "it was not my place to unilaterally displace solicitor-client privilege," even as he knows that the non-disclosure of information can place people in harm's way; the discretionary nature of the Court's rule leaves him with that ethical choice to make and its consequences to bear.

The dual challenges of articulating the appropriate rules to govern lawyer advocacy, and for the individual lawyer to identify the appropriate limits on resolute advocacy, are also illustrated in Allan Hutchinson's "Putting Up a Defence: Sex, Murder, and Videotapes." His chapter tells the story of one of the most infamous and controversial episodes in the annals of the Canadian legal profession. Lawyers still talk about it fifteen years after its occurrence and likely will continue to debate its merits for decades. Ken Murray's decision to take videotapes from the home of murderer and rapist Paul Bernardo, and not to reveal the existence of those tapes to the authorities for fourteen months, led to his being charged with obstruction of justice. In describing the circumstances of Murray's representation of Bernardo, the decision that Murray made about the videotapes, and the consequences that he faced, Hutchinson shows the difficulty for Murray in balancing the need to represent his client's interests, including protection of his client's confidentiality, with the need not to interfere with the administration of justice. Murray's resolution of this dilemma was wrong, but as Hutchinson notes, the dilemma that Murray faced was real, and no response would have been entirely satisfactory; his case "highlights the fact that the challenges to the criminal bar in meeting its ethical and professional responsibilities are difficult and many." Indeed, as Hutchinson describes, so difficult is the problem of how criminal defence lawyers ought to handle physical evidence received from their clients that the law societies have arguably failed to articulate rules to govern it.

One might think that the ethical challenges of the defence lawyer who represents an innocent person are less acute; in that instance, advocacy and the administration of justice ought to orientate toward the same end – acquittal. But "'No One's Interested in Something You Didn't Do': Freeing

David Milgaard the Ugly Way," David Asper's account of his attempts to free Milgaard, after his wrongful conviction for sexual assault and murder, illustrates the false oversimplification of that thought. Asper discovered that the intense advocacy that results from knowledge of a client's innocence, the resistance of individuals in the government to establishing that case, and the structural impediments to demonstrating innocence after conviction create their own ethical challenges. Ordinary zeal did not suffice; only extraordinary zeal, employing judicial and extrajudicial mechanisms such as the media, was enough to obtain the exoneration of his client. Although Asper believes that his actions were justified given the result, he also recognizes in hindsight the absence of malice in many of his opponents, the difficult and sometimes troubling decisions that his advocacy required, and that extraordinary zeal will inevitably create disquiet in those subject to it. It might be worth it, but it is not easy.

Lawyers in Social Context

Criminal defence lawyers work for the cause of law and justice and for the protection of the accused persons whom they represent, whether innocent or guilty.[18] But the causes that inform the work and lives of lawyers range widely.

Of course, not all lawyers define their careers and practices through the pursuit of a particular vision of justice, but for those who do, legal practice brings a unique set of rewards and challenges – rewards, because legal practice reflects an alignment between those lawyers' moral beliefs and their discharge of their role in the legal system that other lawyers may not enjoy in the same way. At the end of her career, the justice-pursuing lawyer might think that through her work she has helped to make the legal system more fair and just. Challenges arise, however, because a system of laws is not always a system of justice, and lawyers who seek to move the law toward justice may personally bear the brunt of that system's resistance. Agents of social change are not always welcome by the society that they are changing. This is particularly so when they themselves belong to the legally and socially marginalized group whose circumstances they seek to make more just.

In "'Begun in Faith, Continued in Determination': Burnley Allan (Rocky) Jones and the Egalitarian Practice of Law," Richard Devlin describes the life and work of Rocky Jones, one of the first Black lawyers in Nova Scotia and a man who worked tirelessly against racism. His efforts accomplished social change, working with Dalhousie Law School to create a program for

Indigenous, Black, and Mi'kmaq students and being one of the first graduates of that program. He also achieved legal victory in "one of the most significant Supreme Court of Canada decisions on race in Canada," obtaining an acquittal for a young Black man who had been charged with assault and resisting arrest. That acquittal, based in part on the judge's observation that "police officers do overreact, particularly when they're dealing with non-white groups," was challenged to the Supreme Court, where it was ultimately upheld.

Jones's work also resulted, though, in his spending seven years defending himself from a defamation action. The action arose as a result of statements made in his representation of three Black girls who had been searched by a police officer investigating a minor robbery at their school. As Devlin notes, Jones had the support, admiration, and collaboration of some members of the Nova Scotia legal profession, while "others resented and reviled him." As an egalitarian lawyer, his efforts effected real social change but also sparked social resistance, much of which Jones himself had to bear.

Similar instances of success and difficulty affected the women portrayed in Janine Benedet's chapter, "Feminist Lawyering: Insiders and Outsiders." Benedet recounts the professional accomplishments of Carole Curtis, now a justice of the Ontario Court of Justice but formerly a bencher of the Law Society of Upper Canada. Curtis was notable for her leadership in the areas of family law and small firm practice. Yet her career was nearly derailed by a complaint brought to the Law Society and a hearing in which it was alleged that Curtis had advised a client to violate the law. That allegation was unanimously rejected in "a complete vindication" for Curtis; however, as Benedet describes, Curtis can justly claim that the Law Society prosecuted the case aggressively, pushing for ethical obligations to be imposed on her that have never been viewed as part of a lawyer's duties.

Benedet also tells the story of Beth Symes and her legal challenge of the tax treatment given to child care expenses incurred by businesswomen, in this case partners in law firms. Benedet notes the complexity of this sort of litigation, how it can be framed as an attempt to instantiate certain types of privilege, but also the failure of that framing to recognize changes to the unfair treatment of women by the law that the litigation sought to accomplish.

Benedet links these stories together, and with her own experiences as a feminist lawyer, by noting the complex place that feminist lawyers occupy: they both challenge the legal system and operate within it, occupying positions of privilege and power. She suggests that the challenge – and the

opportunity – for feminist lawyers is allowing those two positions, insider and outsider, to exist together in pursuit of "bettering both the lives of women and the legal profession."

Benedet's and Devlin's chapters describe lawyers in a world of social change in which they could move the law toward greater justice. Their experiences were not unambiguously positive or wholly successful, but as Benedet notes there is a real sense in which those lawyers became part of the establishment as they challenged it. That aspect of their experience sets them apart from lawyers from an earlier time, whose struggles to enter the profession were met with fiercer resistance and overt discrimination. That history of the legal profession, and of those men and women, is described by Constance Backhouse in "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives." She suggests that the very idea of professionalism cannot be properly invoked without "successfully grappling with the gendered, class-based, ethnoracist, heterosexist, or able-bodied presumptions welded onto the concept of professionalism at the outset." Backhouse supports her claim with a description of the challenges (and successes) of Delos Rogest Davis, Canada's first Black lawyer; Clara Brett Martin, its first female lawyer; and Andrew Paull, an Aboriginal man who never managed to obtain admission to the legal profession. She also notes the discrimination experienced by some of the first female judges, including Bertha Wilson and Claire L'Heureux-Dubé, the first two women appointed to the Supreme Court of Canada. Backhouse concludes her chapter with a challenge to lawyers to move past "professionalism" and "civility" to focus on "different ideals, such as anti-racism, gender equality, respect for Aboriginality, religious tolerance, reduction in wealth disparity, and social justice."

Backhouse provides important context for considering lawyers' ethics and duties. She demonstrates the limits that cultural and social contexts can place on creating a society that reflects the legal and moral norms that it purports to embody, reminding us that our own efforts to ensure the ethics of Canadian lawyers are surely more limited in their accomplishments than we appreciate. She also pushes lawyers to consider which ethical principles truly matter: the principles of social justice that, in the end, are the most critical for ensuring that lawyers help to accomplish a just society.

Lawyers and Access to Justice

The importance of Backhouse's exhortation to lawyers to focus on social justice becomes clear when viewed in the light of Canada's growing problem

of access to justice – what Trevor Farrow refers to in his chapter as the "divide between what legal services people need and what they can afford and access." The problem of access to justice necessarily implicates the legal profession, whether because lawyers or regulation of the profession might be held responsible (in whole or in part) for the inaccessibility of legal services, whether because lawyers participate in trying to solve the problem of access, or whether because the focus on lawyers distracts us from the true nature of the problem or its solution.

The chapters by Lorne Sossin and Trevor Farrow consider access to justice and the role that lawyers can – and cannot – play in resolving it. Sossin's chapter – "The Helping Profession: Can *Pro Bono* Lawyers Make Sick Children Well?" – describes the initiative to provide *pro bono* legal services to families with children at the Toronto Hospital for Sick Children – "PBLO at SickKids." Sossin uses the *pro bono* initiative at SickKids to illustrate the important role that lawyers can play in helping families with complex social needs while also using that initiative to assess some of the ethical dimensions of legal practice. He explores some of the ethical challenges of *pro bono* work – such as the choice of clients to represent – as well as the question of whether *pro bono* work truly creates ethical opportunities for the profession. Sossin notes the different ethical standards that can apply to *pro bono* work and addresses the broader moral question of whether it ought to be viewed as truly altruistic or whether, like other legal work, it is tainted by a lawyer's pursuit of self-interest. Ultimately, Sossin concludes, *pro bono* work does present an ethical opportunity for lawyers and the profession in general: "If lawyers can help to heal sick children, and act in the interests of vulnerable groups without expectation of personal benefit, there might be hope yet for the legal profession."

In "A New Wave of Access to Justice Reform in Canada," Trevor Farrow puts access to justice in perspective, identifying the true nature of the problem, in which legal problems and social issues are inextricably connected, and neither can be understood if we do not see the relationship between them. Moreover, law and justice are not the same; to provide access to justice requires a much broader focus: "We need to start seeing our role as providers of justice in terms of the real stuff of life: help with addictions, food, housing, empowerment, and dignity." Farrow describes the initiatives of the Action Committee on Access to Justice, its collaborative approach, and its attempt to begin a fundamental shift in how we approach justice reform, and he articulates a "concrete plan for action" on the problem of access. He describes how that plan ultimately involves the legal profession,

seeking "to encourage innovation and creativity at the bar (and in all legal sectors) so that clients and their problems are handled by the right people, at the right time, in the best way possible."

On Being a Lawyer

Lawyers' lives and work can be part of broader social movements, causes, and contexts but are also their own experiences, accomplishments, and challenges. The final section of the book describes the lives of three lawyers with widely varying practice experiences and public renown, but all of whom found purpose and meaning through the practice of law. Their stories provide a portrait of the possibilities and opportunities that a legal career presents, even if lawyers are viewed, as Hutchinson puts it in his chapter, as being "among the least trustworthy and least respected of all professionals."

In "Michelle's Story: Creativity and Meaning in Legal Practice," Alice Woolley considers this question directly: can being a lawyer be constitutive of a meaningful life? She does so through the life and legal practice of Michelle, an employment lawyer who lost her ability to practise law after being diagnosed with multiple sclerosis. The ways in which her legal practice fulfilled her, and the nature of the loss that she experienced when she was no longer able to practise law, illustrate how the practice of law can be something that a person can love, that is worthy of love, and that can be actively pursued – i.e., can be a source of meaning. As described by philosophers such as Bernard Williams and Susan Wolf, meaning is a part of the accomplishment of an ethical life, a part distinct from morality: that is, doing "the right thing." Michelle's life in law was an ethical life in that broader sense, and the loss created by her forced retirement was existentially difficult.

Ian Scott, the lawyer portrayed by Brent Cotter in "Ian Scott, Renaissance Man, Consummate Advocate, Attorney General Extraordinaire," also accomplished an ethical life in the fullest sense. His career both in private practice and in public service as an attorney general was noted for its accomplishment of justice; Scott worked as counsel for several public inquiries into matters of public importance, and as an attorney general he spearheaded a truly remarkable number of reforms to law and the legal process. Scott also pursued his legal career with passion, commitment, and an orientation to excellence. Cotter places Scott's work, including Scott's writings, in the context of the ethical obligations of the government lawyer, noting the tension between that lawyer's orientation to the political goals of the government of the day and maintenance of the rule of law, focusing on