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Introduction to Lawyers in Canadian History

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Introduction to Lawyers in Canadian History

[introductory chapter to
The Promise and Perils of Law: Lawyers in Canadian History
 (edited by Constance Backhouse and W. Wesley Pue)
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<http://www.irwinlaw.com/books.aspx?bookid=573>]

By W. Wesley Pue

Lawyers.

Everyone loves them.

Or hates them.

Only physicians and cops compete for domination of prime time television. From Perry Mason through Rumpole, L.A. Law, Night Court, Street Legal, Ally McBeal, and Court TV, television portrayals of lawyers seem ubiquitous. Our cultural obsession with the profession is also reflected in a seemingly unending array of movies, books, talk-radio, news reports, and other media. The cumulative cultural impact of even these few high-impact TV shows alone is enormous. TV lawyers are, to varying degrees, smart, principled, eccentric, beautiful, or goofy, but always interesting. Some of the wealthiest and most powerful, it seems, are also witty, beautiful, and relatively unencumbered by the tedium of work. Motion picture lawyers and those in novels more frequently reveal a darker side. News coverage reveals the good, the bad, and the ugly. Not infrequently, one person's hero is the other's villain.

Accountants, Engineers, Dentists, and Mechanics, it seems, just don't capture the popular imagination in the same way.

A sort of lawyerly omnipresence in popular consciousness is also revealed in the wide proliferation of lawyer jokes. Rarely as complimentary as television portrayals, these circulate at a great rate of speed. Some spoof the ethical standards of a profession duty-bound to represent repulsive individuals or unpopular causes:

The devil visited a lawyer's office and made him an offer. "I can arrange some things for you," the devil said. "I'll increase your income five-fold. Your partners will love you; your clients will respect you; you'll have four months of vacation each year and live to be a hundred. All I require in return is that your wife's soul, your children's souls, and their children's souls rot in hell for eternity."

The lawyer thought for a moment. "What's the catch?" he asked.¹

Others play on the gap between law and common sense:

A man went to a brain store to get some brain to complete a study. He sees a sign remarking on the quality of professional brain offered at this particular brain store. He begins to question the butcher about the cost of these brains.

"How much does it cost for engineer brain?"

"Three dollars an ounce."

"How much does it cost for programmer brain?"

"Four dollars an ounce."

"How much for lawyer brain?"

¹ Entire websites are dedicated to lawyer jokes. This joke and others can be found online: <http://www.lawyer-jokes.us/modules/mylinks/viewcat.php?cid=3>

"\$1,000 an ounce."

"Why is lawyer brain so much more?"

"Do you know how many lawyers we had to kill to get one ounce of brain?"

Marc Galanter, who wrote a scholarly tome on the topic, told the *Wisconsin Lawyer* that "lawyer jokes often mock lawyers as being arrogant, shifty, pushy, and so on", emphasizing "the flip side of lawyers' virtues: their focus, resourcefulness, persistence." Recurrent themes, he says portray lawyers as "liars, economic predators, allies of the devil, fomenters of strife, and enemies of justice" or as "betrayers of trust, morally deficient, objects of scorn", and, ominously, "targets for extinction."² Though there is a high degree of interchangeability with jokes aimed at politicians (frequently lawyers in any event) and with ethnic jokes (where the humour in speaking of 6,000 people at the bottom of the sea as a "good start" is much less apparent), the urge to satirize lawyers or to spoof them has been surprisingly persistent over the centuries.³

Lawyers are at least as interested in themselves as other people are. The profession of law predates all other professions, excepting only the clergy and the profession of arms. Lawyers have often found themselves at or near to the centre of the defining struggles of their era. Some, though rarely the majority, have found themselves

² "'What's up with that?'" Lampooning Lawyers" (March 2007) 80:3 *Wisconsin Lawyer*, online: http://www.wisbar.org/am/template.cfm?section=wisconsin_lawyer&template=/cm/contentdisplay.cfm&contentid=63864. See also Marc Galanter, *Lowering the Bar: Lawyer Jokes & Legal Culture*, (Madison: University of Wisconsin Press, 2005)

³ David Sugarman and W. Wesley Pue, "Introduction: Towards a Cultural History of Lawyers", in W. Wesley Pue and David Sugarman, *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart Publishing, 2004), 1-24.

cast in heroic roles in defence of enduring ideals such as constitutionalism, fair play, the rule of law, and civil (or human) rights. Lawyers have contributed much to the historic struggles that wrestled constitutional government from the shadow of absolute monarchy in the United Kingdom. Their ideals gave definition to the American revolution, shaped the movement from which Indian independence was born, and played significant roles in the emergence of liberal constitutionalism throughout Europe. Canada's founding Prime Minister was a lawyer, so were many of the great protagonists of Canadian history. The Canadian Bill of Rights was ushered in by a Prime Minister who was a Saskatchewan Barrister, the Canadian Charter of Rights and Freedoms was conceived and brought into being by a Montreal lawyer, and the North American Free Trade Agreement was implemented by yet another lawyer Prime Minister. Lawyers opposed Stuart despotism, sought responsible government in British colonies, defended individuals from oppression by kings, dictators and overbearing Prime Ministers, and have been present in great moments of constitutional transformation. Around the world today lawyers risk status, wealth, limb and life in order to defend the unpopular, assert the values of the rule of law, and resist the drift to authoritarianism, corruption, or despotism.⁴ Less gloriously - and less celebrated by the legal profession - some lawyers have also always worked against all these causes. Corrupt lawyers, authoritarian lawyers, servile lawyers, and unprincipled lawyers also exist – and always have.

The 175th anniversary of the opening of one of Toronto's land-mark buildings provides an opportunity for reflection on the history of the legal profession in Canada.

⁴ See, for example, W. Wesley Pue, "Death Squads and 'directions over lunch': A Comparative Review of the Independence of the Bar", in Lorne Sossin, ed., *In the Public Interest: The Report and Research Papers of the Law Society's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007)

Toronto's "Osgoode Hall" - not to be confused with York University's Osgoode Hall Law School – has provided a home for the Law Society of Upper Canada and an important locus of legal education since February 6, 1832, as well as a home for Ontario's courts since the 1840's.⁵ Ontario's Law Society, known still as the Law Society of Upper Canada, dates back another thirty-five years, to its creation by the *Act for the Better Regulation of the Practice of Law* in 1797. Though a good deal younger than its English counterparts – by some 400 to 500 years in the case of the English Bar and many years younger than the antecedents of the Law Society of England and Wales⁶ - the Law Society of Upper Canada is an historic professional body and its home an important part of the historic fabric of Ontario. 1797 is almost prehistoric times in the time-scale of British Canada.

Northrop Frye famously had it that we “move in time with our backs to what's ahead and our faces to the past, and all we know is in a rear-view mirror.... and in fact all our really urgent, mysterious and frightening questions have to do with the burden of the past and the meaning of tradition.”⁷ Parsing the burdens of the past and discerning the meaning of tradition for the legal profession turns out to be a difficult task. Though the importance of the enquiry seems obvious, things quickly become more complex. What

⁵ Deidre Rowe-Brown, “An Introduction to Osgoode Hall on its 175th Anniversary: More than Bricks and Mortar”, Paper presented at 175th Anniversary Celebration of Osgoode Hall, Law Society of Upper Canada Symposium on the History of the Canadian Legal Profession, Osgoode Hall, Toronto, Ontario (12 October 2007).

⁶ See Philip Girard, “The Independence of the Bar in Historical Perspective: Comforting Myths, Troubling Realities,” in Lorne Sossin, ed., *In the Public Interest: The Report and Research Papers of the Law Society's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007); W. Wesley Pue, Legal Profession, History of, in Peter Cane and Joanne Conaghan, eds., *New Oxford Companion to Law*, (Oxford: Oxford University Press, 2008).

⁷ Northrop Frye, “The Rear-View Mirror: Notes Toward a Future” in N. Frye, *Divisions on a Ground: Essays on Canadian Culture* (Toronto: Anansi, 1982) 181 at 183.

are we to make of the antiquity of the legal profession, its historic importance, and its contemporary cultural resonances? Is long history in and of itself a source of pride or, perhaps, embarrassment? Or, contra. Frye, is history irrelevant to contemporary circumstances? Should *this* anniversary be cause for celebration, for earnest reflection, for affirmation, or for rupture? There seems to be something important here, if only because lawyers have a special relationship to the idea of law and to legal ideals, both of which define our political culture. The fact that a very high a proportion of political leaders, intellectuals, activists, opinion makers, business leaders, and rabble rousers, have been drawn from or strongly influenced by the legal profession shows, at a minimum and for good or ill, that the legal profession has mattered immensely to Canada.

The phrase “the legal profession” points, ambiguously, to both the organized legal profession in the form of provincial law societies or their equivalents and the activities or actions of individual lawyers or groups of lawyers working in their professional roles. “The legal profession” is simultaneously a trade organization, a corporate ideology, an important cultural actor, and an aggregation of individuals known both for their zealous pursuit of their clients’ interests and for their assertive individualism. This book offers essays that seek to add to the understanding of Canada’s legal professions and their historic roles in each of these aspects.

Scholars who have sought to understand the legal profession as a collectivity or as an institutional structure have found themselves torn between two powerfully competing interpretations. This mainstream through most of the twentieth century emphasized the positive role of autonomous legal professions in maintaining professional standards of competence and ethics, thereby creating the conditions allowing lawyers to zealously

advance the interests of their clients without doing damage to the public good. This interpretation was more or less inverted in a powerful body of scholarship emerging in history, sociology, and law during the 1970's and 1980's. The *very* traits of professionalism celebrated in the one approach were cast in negative light as markers of a "monopoly" cleverly structured so as to dupe the public, restrict competition, inflate prices, and pad the pockets of lawyers.⁸ Everything the legal profession collectively takes pride in, from its antiquity through self-regulation, an ethic of service, enforced ethical codes, and high educational attainment was presented as further evidence of a conspiracy against consumers. Curiously, the literature of this era focused almost exclusively on economic monopoly, overlooking the much more important "cultural" monopoly that lawyers sought to create. More recent scholarship emphasizing the alignment of professional practices relating to admission, training, and ethics enforcement with the world view of cultural elites (in English Canada, often Conservative or Liberal British middle-class males) has brought sharp focus to issues relating to cultural authority. The exclusions of women, First Nations peoples, minority groups, and people from less advantaged backgrounds arises from larger cultural projects. Canada's most energetic and transformative leaders of the legal profession in the early twentieth century, for example, sought to restrict entry to individuals pre-adapted by class background, ethnicity, or in some other way, to their own mental world. Manitoba's distinguished jurist, H. A. Robson, for example approved the "pious fraud" by which one U.S.A. law school used the argument for higher admissions standards with the explicit,

⁸ The contours of this scholarly debate are outlined in W. Wesley Pue, "Trajectories of Professionalism: Legal Professionalism after Abel" in Alvin Esau, ed., *Manitoba Law Annual, 1989-1990* (Winnipeg: Legal Research Institute, 1991), 57-92 [reprinted from (1990) 19 *Manitoba Law Journal*, 384-418].

though hidden-from-view, objective of deterring men of "an undesirable class" from entering the profession.⁹ Such currents recur in a wide array of literature focusing on "cultural history" approaches to the legal professions.¹⁰ Deidre Rowe-Brown's contribution to this volume provides a framework for understanding the organized legal profession in Canada, while the essays in the "Historical Perspectives on Legal Education" section emphasize the relationships between the legal profession and legal credentialing processes with notions of public service, on the one hand, and with exclusions of women and disadvantaged individuals on the other. Paradoxically, as Bell points out, the very meritocratic criteria that elevated the legal profession, made it better qualified for public service, and opened the door (eventually) to female enrollment in law school *simultaneously* had the effect of "slamming the door on brains" in the sense of creating barriers to the profession that individuals from less advantaged backgrounds found almost insurmountable.

Cultural practices of exclusion are also revealed in the section on "Historical Reflections on the Practice of Law," but these essays open up another important area of enquiry in the history of the legal profession. The relationship of the practice of law to "the market" and to market principles presents one of the thorny issues in interpreting professional history. On the one hand, lawyers earn an income from the provision of professional services in an open market and in return for the payment of fees. On the other hand, the ideals of law have it that justice is available to one and all without regard to ability to pay, that the provision of legal services is a high calling, and that the mere pursuit of profit is unseemly. So pervasive is this ethos that it finds reflection in the

⁹ Memo, Robson to MacLean, (22 April 1914), [Manitoba Legal Archives, UA20, Box 10, Folder 5].

¹⁰ See, for example, W. Wesley Pue and David Sugarman, eds., *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart Publishing, 2003).

formal dress of lawyers to this day. Canadian barristers' gowns incorporate the remnants of a pouch, located at the middle of the back, safely outside of the barrister's range of vision. Its original was there to provide a means by which clients could discretely provide payment of an honorarium, *not* a fee, without causing affront or embarrassment: a professional man would never be so crass as to exchange his services for payment. Though this seems impossibly quaint and unrealistic from the perspective of the twenty-first century's most market-oriented continent, the culture of legal practice has traditionally been shot-through with an anti-commercial ideology expressed in the etiquette of the English Bar, the codes of professional conduct of Canadian legal professions, and long-standing traditions of *pro bono* (free) legal services to the disadvantaged, participation in legal aid schemes, value-billing practices, and so on. In this volume, Philip Girard and Jeffrey Haylock explore the corrosion of cultural monopolies and the evolving economic structures that transformed the Halifax legal profession in the first half of the twentieth century. Christopher Moore's article on "Megafirms" picks up the story of the economic transformation in another city and another time. Whereas Girard and Haylock treat as "large" firms with 4 or more partners, Moore reports an average of sixteen lawyers in Canada's ten largest firms in 1952. By 1992 this had grown to 241 lawyers, and the most significant changes in scope and structure of practice were yet to come. The profound tension between market and professionalism is well captured by Moore, in questioning the extent to which "professional ethics and professional independence of the lawyer can endure in ... [a] .. legal environment in which law firms become businesses like any other." (m/s. 29)

The legal profession's relation to markets traces, to some extent, larger transformations in the political economy of Europe and its colonies. Highly regulated pre-modern economies, in which guilds played significant cultural and economic roles, gave way to liberalized trade principles during the period conveniently labeled the "industrial revolution" and within the time frame that produced Adam Smith, John Stuart Mill, and the transformations wrought by ideas such as theirs. The subsequent overlay of mega-industries and monopoly capital on the riotously democratic competitive environment Smith imagined ultimately produced its corollary in the mega-firm and the challenges to inherited professional traditions that it represents. It is important to recall that there is a *political* economy here, not an economy innocent of politics. The corollary of a liberal market economy was the development of a liberal state, understood as involving moderate government, regularity and transparency of law, guarantees of some minimal civil rights and, eventually, democracy. Legal professions were central in these great historic transitions, sometimes dramatically and deliberately, but sometimes merely incidentally, as an inevitable consequence of legal representation.¹¹ The chapters in this book addressing "Quebec: A Distinct Legal History" and "The Rule of Law, Impeachment, and Bureaucratic Regulation" each pick up on themes related to this larger transformation. In each case some portions of the legal profession found themselves aligned with the political transformations that "modernization" (the creation of a liberal political economy) seemed to require. Chitty's defence of property rights and conventional civil liberties in the face of wartime authoritarianism cast him in the role of

¹¹ Terence Halliday and Lucien Karpik, eds., *Lawyers and the Rise of Western Political Liberalism: Legal Professions and the Constitution of Modern Politics* (Oxford: Oxford University Press, 1997).

a rear-guard defender of previously assumed principle, in opposition to lawyers “who don’t give a damn about the law, just want to get things done.” (cited m/s 2)

The other two sections of this book simultaneously address questions related to the cultural monopoly asserted over the legal profession by certain types of lawyers and the fundamental principle of the rule of law that the profession should be open to “all the talents.”¹² Shocking manipulations of state authorities designed to deny even elementary legal rights of representation to First Nations peoples – all the while flouting the virtues of “British Justice”¹³ – are documented by Foster. The effect is to locate Canada’s colonial practices much closer to those of British colonists in Africa than we might like to think.¹⁴ The subject of Foster’s study, however, gave “a damn about the law.” Priest-lawyer Arthur Eugene O’Meara’s heroic – quixotic, even – efforts to hold British Canadian authorities to the standards that the rule of law demands in their treatment of Canada’s original sovereign peoples is a stunning tribute to his values as both Priest and Lawyer. This marked him as an outsider.

Lionel Cross too was an “outsider” who sought to uphold principles of British Justice in inter-war Toronto. The fourth Black known to be called to the Ontario Bar, Cross was prominent in defence of those on the outside of Ontario’s power elite until he

¹² Dean George Curtis, as cited by W. Wesley Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia & Faculty of Law, University of British Columbia, 1995) 223.

¹³ The concept of “British Justice” and its meanings to a previous generation of Canadians is well captured in Greg Marquis, “Doing Justice to British Justice: Law, Ideology, and Canadian Historiography,” in W. Wesley Pue and Barry Wright, *Canadian Perspectives on Law and Society: Issues in Legal History*, (Ottawa: Carleton University Press, 1987). See also, Carolyn Strange, “Discretionary Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1890-1920”, in Carolyn Strange, ed., *Qualities of Mercy: Justice, Punishment and Mercy* (Vancouver: UBC Press, 1996) 134.

¹⁴ Chidi Oguamanam and W. Wesley Pue, “Lawyers’ Professionalism, Colonialism, State Formation and National Life in Nigeria, 1900-1960: ‘the fighting brigade of the people’”, (2007) *Social Identities*, 769-785; Grace Li Xiu Woo, “Canada’s Forgotten Founders: The Modern Significance of the Haudenosaunee (Iroquois) Application for Membership in the League of Nations” in “Postcolonial Legal Studies” *Journal of Law, Social Justice & Global Development* (Symposium Issue, April, 2003)

http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/woo

was disbarred in 1937. The pattern of individuals who are “outsiders” in one or other fashion playing significant roles in sustaining the legal system’s integrity is a common one in professional history. Indeed, on reflection, the point is so obvious as to be almost tautological. Insiders, *by definition*, never challenge the power-elites they serve. The languages and institutions of law are powerful, however. Unlike purely political fora, they are bound by standards of integrity, procedure, consistency, and propriety that render them particularly susceptible to influence by outside demands calling, in one form or another, for consistency with articulated principle, or pointing to system-failures.¹⁵ It is no surprise, then, that organized legal professions have often sought to exclude from their membership individuals whose identity makes them suspect, whether on grounds of political belief, racialized background, class, “foreignness,” faith, or gender.

Participation in the legal profession is a matter of civil liberties and career advancement for individuals *and* is as one factor – amongst many others – that determines the evolving contours of the legal system as a whole. The chapters on gender bring this into focus. “In the rough of things”, addresses the pioneering first cohort of women in the legal profession in British Columbia, in the years between 1912 and 1930, emphasizing both the resilience of a vanguard generation and the challenges they faced, not only because of misogyny – and there was some – but also, more subtly, as they confronted an “historical male mould of legal education and practice.” (m/s 23). It was to be another four decades before the number of women entering legal education

¹⁵ See Terence C. Halliday and Lucien Karpik, “Politics Matter: a Comparative Theory of Lawyers in the Making of Political Liberalism” in *Lawyers and the Rise of Western Political Liberalism* (New York: Oxford University Press, 1998); L. Karpik, “Builders of Liberal Society: French Lawyers and Politics” in *Lawyers and the Rise of Western Political Liberalism*; W. Wesley Pue, “Lawyers and Political Liberalism in Eighteenth- and Nineteenth-century England” in *Lawyers and the Rise of Western Political Liberalism*.

approached a critical mass. It is salutary to recall the very different gender environment that prevailed even at the dawn of that new age:

When I started law school in 1970, I was one of (I think) 16 women in a First Year class of 240. It had only been a year or two since female students were allowed to use the student Common Room. Sixteen was an all—time high for admissions. I was an active and open feminist, and spent a fair amount of time either fighting certain issues or suppressing my feelings about them. Fortunately I had one classmate who could be counted upon to erupt like a volcano (that is, with an inexorable, fiery flow of words) if a professor or a guest speaker crossed certain lines of insult or belittlement of women. I shall forever be in her debt. When I was in First Year, two women (one of them me) attended the annual law students' retreat at Harrison Hot Springs. I believe it was the first time that any women had attended. It was not a pleasant experience in some ways, although I enjoyed the opportunity to meet some of my classmates in a social setting. My female classmate, I recall, refused to give her room key to a drunken third year male student, who then poured a bottle of beer over her head. The fact that others found this amusing did not startle me at the time. Neither she nor I had any notion that there might be norms of conduct to be invoked in that situation. That recognition startles me now.¹⁶

¹⁶ Lynn Smith, "Gender Equality-- Professional And Ethical Issues," paper presented at *Gender Equality--- A Challenge For The Legal Profession*, Conference of the Canadian Bar Association's Continuing Education Committee and Task Force on Gender Equality, Toronto, Ontario, (29-31 October 1992).

Constance Backhouse's contribution to this volume traces out the history of a second vanguard generation of women lawyers, who found community in the sense of their difference, and who knew they constituted a vanguard. Their motivations were diverse. One was inspired by the nuns who taught her in a Catholic school, while another engaged feminist lawyering *in reaction to* her Catholicism. Nonetheless, as a group they had the confidence to believe they could make a difference and they acted accordingly.

The tale of inclusions and exclusions – the difference that ‘difference’ makes – is not concluded as we approach the second decade of the twenty-first century. Neither are the other stories that pervade a history of the legal profession. Lawyers as a group have probably always been – and always will be – divided between those for whom law is an intensely important ideal and those who “don’t give a damn for law” and just want to get things done. The see-saw pulls of integrity as against the urge to authoritarianism, self-interest, or corruption are constant themes in human history.

Throughout this volume there are stories of more or less heroic individuals who stood up against powerful structures and powerful personalities in order to uphold enduring legal values. It is troubling that, more often than not, the organized legal profession *as such* has seemed incapable of acting on the side of the gods. Zealous advocates and heroic individuals have often been able to pursue their work only in the

shadows of the organized profession. One does not, apparently, look to venerable institutions for heroic leadership. Nonetheless, the structures, cultures, and traditions of legal professionalism are such as to provide some institutional protection for quixotic individuals within the fold. Even on the matter of outsider access to careers in law, there have always been a few established lawyers willing to sponsor and mentor newcomers, whatever the challenge. There is an immense difference here between a self-governing profession, whatever its flaws may be, and one regulated directly by state authorities. History's lesson here may simply be that we should be grateful for small mercies and, perhaps, not expect too much.

There is heroism too associated with business law and corporate practice. Such lawyers play instrumental roles in the history of the country, as the essays discussing their work shows. These are contributions of a different sort. Corporate law Mega-Firms are a new vanguard in professionalism. This vanguard, however, mimics the structures and values of other large economic entities more than those conventionally associated with the highest ideals of professionalism. The bulk of mega-firm work derives from solicitors' practice, a branch of professional work profoundly disconnected from the advocates' profession and the historic struggles that have defined it. Just as the single category "capitalist enterprise" captures imperfectly commonalities of eighteenth century cottage-industry weavers and Bombardier Inc., so too an expanding gulf separates legal aid lawyers or store-front real estate practices, for example, from the life and work of the Mega-law firm.

We end then, as we began, with questions rather than answers. History is good at interpreting the past and helpful in casting key issues in relief. It is however notoriously

flawed at prognostication. O'Meara, the priest-advocate for First Nations entitlements, seems prescient now. That he was viewed as dangerous during his life-time and, even by those he sought to help, as something of a flake for much of the next half-century, provides a lesson in humility for all of us.

What is to be valued within the legal profession and how its future should be shaped ought to be informed by an historical appreciation and by an understanding of the glory – and the blemishes – associated with professional tradition. While this volume provides a background to inform conversation about the “really urgent, mysterious and frightening questions” concerning “the burden of the past and the meaning of tradition” within the legal profession, it does so in order to open, not to foreclose, discussions.