Lawyers, Guns and Money: Lawyers and Power in Canadian Society

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Well, I went home with the waitress
The way I always do
How was I to know
She was with the Russians, too

I was gambling in Havana
I took a little risk
Send lawyers, guns and money
Dad, get me out of this

I'm the innocent bystander
Somehow I got stuck
Between the rock
and a hard place
And I'm down on my luck
Yes I'm down on my luck
Well I'm down on my luck

I'm hiding in Honduras
I'm a desperate man
Send lawyers, guns and money
The shit has hit the fan

- Warren Zevon

People of a certain (older) generation are likely familiar with the simple lyrics and the magnetic chords of Warren Zevon's 1978 classic song *Lawyers, Guns and Money*. Those of another (younger) generation can find videos of it on YouTube™ or download it as a ringtone for their iPhone.™ Zevon was somewhat of a cult figure, known more for his strange take on life and the unusual subject matter of his songs than for pop hits.[1] Some of his songs featured political undertones and *Lawyers, Guns and Money* has a ring

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[1] See Paul Beeston, "Life and Death on 'The Late Show'" *The American Spectator* (11 November 2002), online: http://spectator.org/archives/2002/11/22/life-and-death-on-the-late-sho.

of Graham Greene cold war intrigue to it. But there is no mistaking the title's reference: Zevon's trio of lawyers, guns and money represents a triumvirate of power.

Lawyers' relationship with power is a complicated and conflicted one. On the one hand, the law works to preserve the existing power structure in society. Lawyers play a critical role in this process. On the positive side, lawyers support the stability and integrity of our system of government and of our society. On the negative side, supporting the status quo through law has often resulted in the exclusion and continued discrimination against outsiders in Canada over the course of our history: women, religious groups, racialized minorities and other groups who are not part of the existing power structure. Both the law and the legal profession have been used as a tool of exclusion throughout Canadian history.

However, individual lawyers also challenge the status quo through the system. They are defenders of the individual against the massive power of the state and proponents of the rights of those without power. This is the essence of the plea in Zevon's song by "the innocent bystander" who is now "stuck between a rock and a hard place" and implores his father to send "lawyers, guns and money" to help him get out the jam, by legal (lawyers), illegal (money) or violent (guns) means.

In this chapter I explore the different ways in which lawyers exercise power in our society. Political Scientist Peter Russell has been at the forefront of recognizing and explaining the unique nature of the exercises of judicial power and the issues that arise with it.[2] This chapter is my attempt to apply this general idea to the exercise of "lawyer power". The specific ways in which lawyers exercise power and the nature of that power remains largely unexplained in Canada. In places, the exercise of power by lawyers clashes with the public interest and should be reconsidered, reformed and perhaps restrained. However, let me be clear: I am proud to be a lawyer and proud to be a member of the Canadian legal profession. I believe in the ideal of the legal profession as a community of persons of higher learning pursuing a learned art in the public interest.[3] I also believe that lawyers' exercise of power – collectively and individually -- is generally in the public interest. However, it must be subjected to critical scrutiny against the measuring stick of "the public interest".

I have divided lawyers' exercise of power into three categories: (1) lawyers' collective exercise of power as a profession in Canada; (2) lawyers' individual exercise of power through the lawyer-client relationship; and (3) the exercise of power by individual lawyers in the public sphere in Canadian society. In each case, I attempt to

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[2] See Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987).

[3] Cf. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (St. Paul, Minnesota: West, 1953) 5 ("The term [professionalism] refers to a group pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.").

explain the reasons and the tensions that accompany such exercise of power. At the end of this chapter, I reflect upon the exercise of power by lawyers more generally.

I. Lawyers' Collective Exercise of Power

A. The Rule of Law

Lawyers' collective exercise of power begins with the Rule of Law. John Adams famously declared that the United States was to be "a government of laws, not of men".[4] This was embraced in the Canadian conception of the Rule of Law that the exercise of all public power is subject to the law and that the Rule of Law requires the creation and maintenance of an actual order of positive law – a system created out of and based upon laws.[5] The content of the Rule of Law is often disputed[6] and at times appears malleable[7] if not manipulated.[8] However, the two core ideas expressed above – the existence of a system of laws that applies to everyone regardless of who they are – makes the Rule of Law is viewed as a great protector of individual liberty against the arbitrary exercise of power by the state.

Ted Sorenson, John F. Kennedy's closest and longest-serving advisor and a lawyer himself, remarked on the importance of the Rule of Law in an offhand manner in his memoirs:

> Throughout my life, I have reflected on my good luck; but never was I more fortunate than on the day of my birth. Among the hundred of thousands of babies born that day, I won what my fellow Nebraskan Warren Buffett has called the "great genetic lottery." My friend Khododad Farmanfarmaian was born the same day on the opposite

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[4] See John Adams, *Novanglus Papers*, no. 7 in Charles Francis Adams, ed., *The Works of John Adams*, vol. 4 (Boston: Little Brown and Company) 106. See also *Massachusetts Constitution, Bill of Rights*, article 30, in *ibid.* at 230. See also *Constitution of the Commonwealth of Massachusetts*, online: http://www.mass.gov/legis/const.htm.

[5] See *Reference re Secession of Quebec*, [1998] 1 S.C.R. 217 at para. 70 and *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 141-42 (per Rand J., Judson J. concurring).

[6] Compare the competing conceptions of the Rule of Law in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 347, [2006] O.J. No. 3285 (S.C.J.) and *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 721, 277 D.L.R. (4th) 274, [2006] O.J. No. 4790 at paras. 140-143.

[7] See generally P.W. Hogg & C.F. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715.

[8] See *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 at para. 62 quoting Strayer J.A. in *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 at para. 33 (C.A.): "[a]dvocates tend to read into the principle of the Rule of Law anything which supports their particular view of what the law should be."

> side of the world, in Persia. He was ultimately forced to flee for his life from his native country, hidden in a Kurdish hay wagon. I was born into a country protected by the Rule of Law.[9]

Together, these two conceptions – that there exists a system of laws and that all are subject to the law – explain Sorenson's statement that he was privileged to be born into a country protected by the Rule of Law.

In a society based upon the Rule of Law, it is evident that law will play an important function in that society. This may be an obvious point but it is demonstrated by Zevon's *Lawyers, Guns and Money*. At the time when Zevon wrote *Lawyers, Guns and Money,* Honduras was under military rule rather than subject to the Rule of Law. If Zevon's protagonist was hiding out in Honduras, he would be freed only through force or persuasion. In a society not committed to the Rule of Law, lawyers are unlikely to be of much use, let alone exercise power as lawyers.

The Rule of Law makes the role of law critical in society and hence facilitates the exercise of power by lawyers. As Allan Hutchinson has written, "law is a tool-box, how-to-manual, and raw materials…Law is one of the important activities and regimens through which society generates and maintains various 'collective goods', such as contract, property, family units, and the like."[10] The Rule of Law empowers lawyers. But while the Rule of Law may be necessary for lawyers to exercise power in society, it is not sufficient to explain the power of lawyers in Canadian society. Three cumulative factors help to explain lawyer's collective exercise of power in Canada: the existence of a virtual monopoly over the delivery of legal services in most Canadian jurisdictions; unchallenged self-regulation by the legal profession; and the increasing legalization of many important issues. Each is addressed below.

B. Monopoly over Legal Services

Lawyers have a near monopoly over the delivery of legal services, although there are recent breaches in this centuries old wall that has prevented others from competing with them. It is possible to have a society governed by the Rule of Law where lawyers do not necessarily play an indispensable part: the law would be simple, understandable and accessible to ordinary citizens; the judge would play a more active role in the courtroom; and an "expert" learned in the law would not be necessary. While to some this is an aspiration of access to justice,[11] it is not the operative system in Canada. The

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[9] Ted Sorenson, *Counselor: A Life at the Edge of History* (New York: Harper, 2008) 14.

[10] Allan C. Hutchinson, *The Province of Jurisprudence Democratized* (Oxford: Oxford University Press, 2008) ch. 7.

[11] See Roderick A. Macdonald, "Access to Justice in Canada today: Scope, Scale, Ambitions" in W.A. Bogart, Frederick H. Zemans & Julia Bass, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2003) 19 at 85-101, 106-07 ("Access to Justice will be

courts have always played an important adjudicative role in our society and in the courts lawyers are the key protagonists.

In the criminal sphere, the importance of lawyers is heightened and reaches constitutional proportions. The *Canadian Charter of Rights and Freedoms* provides that upon arrest or detention, everyone has the right "to retain and instruct counsel without delay and to be informed of that right".[12] In criminal cases, the state generally provides or pays for counsel for indigent defendants. Beyond the criminal sphere, the Supreme Court of Canada has recognized a limited right to state-funded counsel in certain cases where counsel is necessary to ensure the right to a fair trial in order to vindicate an individual's *Charter* right to "life, liberty or security of the person".[13] Lawyers and the Canadian Bar Association have attempted to assert that the Constitution requires state-funded legal counsel more generally in other civil cases. To date, they have not been successful.[14]

Legal proceedings have become increasingly complicated with the result that lawyers have become more indispensible to individuals caught up in the legal system. However, this complexity – along with the high cost of lawyers' fees – has contributed to the following paradox: the more lawyers are needed, the less affordable they are for ordinary citizens. As a result, the courts have witnessed a significant increase in self-represented or unrepresented litigants in recent years.[15] It is likely that the high cost of legal services serves as a deterrent to many citizens pursuing legal claims. While the increasing complexity of court proceedings has enhanced lawyers' power in the legal process, access to that power remains out of reach for many Canadians.[16]

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achieved by empowering a diverse citizenry to make, decide, and enforce their own law in the multiple sites where they actually find normative engagement.")

[12] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 10(b) [*Charter*].

[13] See *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 [*G.(J.)*].

[14] See *Christie v. British Columbia (Attorney General)*, [2007] 1 S.C.R. 873, 2007 SCC 21 and *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, [2006] B.C.J. No. 2015 (S.C.), appeal dismissed, 2008 BCCA 92, 76 B.C.L.R. (4th) 48, [2008] B.C.J. No. 350 (C.A.), leave to appeal dismissed with costs, [2008] S.C.C.A. No. 185.

[15] See Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) 44-52.

[16]See The Right Honourable Beverley McLachlin, P.C., "The Challenges We Face" (Remarks presented at the Empire Club of Canada, 8 March 2007), online: <http://www.scc-csc.gc.ca/AboutCourt/judges/speeches/Challenges_e.asp>. See especially Tracey Tyler, "A 3-day trial likely to cost you $60,000" *Toronto Star* (3 March 2007) A25. For other articles in this series see Tracey Tyler, "The dark side of justice" *Toronto Star* (3 March 2007) A1; Tracey Tyler, "Legal aid rules shut out thousands; Many earning under $16,000 face uphill battle trying to represent themselves in complex cases" *Toronto Star* (3 March 2007) A24; Tracey Tyler, "Ever-expanding trials; not our fault Defence lawyers" *Toronto Star* (5 March 2007) A8. See also John Intini, "No Justice for the Middle Class" *Maclean's* 120:35/36 (10 September 2007) 68; Canadian Judicial Council, "Access to Justice: Meeting the Challenge (2006-2007 Annual Report)" (Ottawa: Canadian Judicial Council, 2007).

A further manifestation of lawyers' collective exercise of power is the monopoly that the legal profession holds on judicial appointments. It is an obvious but important point that all judges are drawn from the ranks of lawyers. Most judges are persons who practiced law for 20-30 years. They are steeped in the culture of the law and of the legal profession. They may be expected to be sympathetic to and support the existing structures of power from whence they came.

Recent years have seen cracks in lawyers' monopoly over the provision of legal services.[17] Notaries have long operated alongside advocates in Quebec in relative détente. In British Columbia, a restricted number of notaries have been allowed to provide basic legal services and the B.C. Government has how lifted some of those restrictions. In other provinces, battles have raged between lawyers and "paralegals" -- a catch-all term that can refer to any person providing some sort of legal service from representing a person in traffic court or providing immigration advice. In recent years, the federal government moved to set up an independent regulatory structure for immigration paralegals – now referred to as immigration consultants.

For decades, the battles between lawyers and paralegals in Ontario resembled a legalized version of the Cold War between the West and the Soviet Union. Lawyers' position on paralegals was simple: prosecute them, don't regulate them. But like many protracted conflicts, lawyers eventually came to realize that they were not going to be able to defeat paralegals on the battlefield and that some accommodation would be necessary. In January 2004, the Attorney General of Ontario asked the Law Society of Upper Canada to take on the additional responsibility of regulating paralegals. To some, this move was criticized as having the foxes looking after the chicken coop while to others it was the birth of a new profession. The competing issues have always been access to affordable legal services and protection of the public. But beneath this the battle was a raw struggle over power.

The battle over paralegals in Ontario represents a microcosm of lawyer power and the justification for it. Lawyers' monopoly over the provision of legal services can only be justified on the basis of the public interest. Lawyers therefore could not oppose paralegals on the grounds that the latter group would be an unwelcome competitor but on the grounds of protection to the public. However, over time as paralegals became more entrenched and access to justice pressures increased, the legal profession in Ontario came to the realization that an accommodation was necessary. The public interest demanded paralegal regulation both in order to promote access to justice and to ensure that the public was protected. The role of the Law Society of Upper Canada morphed from the regulator of the legal profession to the regulator of legal services in Ontario.

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[17] See generally Julia Bass & Paul Saguil, "The Authorized Provision of Legal Services by Non-Lawyers: Paralegals and Others" in Adam M. Dodek & Jeffrey G. Hoskins, Q.C., eds., *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: Lexis Nexis, 2009) c. 13.

C. Self-Regulation

The decision by the Law Society of Upper Canada in 2004 was a significant role change which demonstrates the links and the strains between two monopolistic characteristics which contribute to lawyers' power in Canada. First, provincial legislatures have granted lawyers a monopoly over the delivery of legal services. We may analogize this to monopolies granted to public utilities at different points in time. However, unlike public utilities which are highly regulated by the state, lawyers are not. Provincial legislatures have generally granted lawyers a monopoly over regulation as well. Thus, the second monopolistic element is this grant of self-regulation to lawyers. Lawyers in Canada regulate themselves through Law Societies – lawyer-run regulatory bodies to which all lawyers in a province or territory must belong. Law Societies' mandate are to regulate the legal profession (or in the case of Ontario to regulate the provision of legal services) "in the public interest".

The public interest mandate of Law Societies is exemplified in the Role Statement of the Law Society of Upper Canada adopted in 1994. It provides:

> The Law Society of Upper Canada exists to govern the legal profession in the public interest by ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct, and upholding the independence, integrity and honour of the legal profession, for the purpose of advancing the cause of justice and the rule of law.[18]

The Role Statement links the justification for the two monopolistic elements: the public interest justification for lawyers' monopoly over the provision of legal services with the public interest mandate of self-regulation by the Law Society.

As is widely recognized in statutes, court decisions and statements of the regulatory bodies themselves, this grant of self-regulation is done in the name of "the public interest". The mandate of Law Societies is to regulate the practice of law "in the public interest" not in the interest of its lawyer members. The Law Societies are different therefore from voluntary legal associations like the Canadian Bar Association, the Criminal Lawyers Association, Trial Lawyers Associations, etc. which are created by lawyers to advocate for the interests of their members. Very often these voluntary associations work in the broader public interest as they view it, but they are not required to do so. It is their choice, not their duty.

The Law Societies exercise their regulatory powers over lawyers through establishing criteria for entry into the profession and by promulgating ethical codes which are then enforced through a complaints and discipline process. The regulatory effectiveness of Law Societies has frequently come under strong criticism.[19] In practice,

[18] Law Society of Upper Canada, "Role Statement" (1994).

very few provisions of these codes are actually enforced through the discipline process and questions have been raised about the selective enforcement of the rules against certain types of lawyers, focusing on the misdeeds of some and ignoring those of others.

Lawyers have guarded their monopoly over regulatory control in the name of the public interest. The legal profession has attempted to fuse the concept of self-regulation with the long-standing principle of the independence of the bar. It has then endeavoured to elevate independence of the bar to one of the "unwritten constitutional principles" in Canadian law which the Supreme Court of Canada recognized in the *Secession Reference* in 1998.[20] To date, the attempts to protect self-regulation through such interpretive efforts have not directly succeeded. However, lawyers have enjoyed mixed success in litigation against perceived intrusions on self-regulation.

Over the past decade lawyers have fought various court challenges against alleged incursions on Law Societies regulatory monopoly. All of the Law Societies in Canada banded under the umbrella of the Federation of Law Societies of Canada to challenge the federal government's plans to require lawyers to report "suspicious transactions" under money laundering reporting requirements.[21] Successful in court, the Federation reached a settlement with the federal government on this issue under which the Law Societies (as opposed to the federal government) would enact rules governing the handling of large cash payments from clients.

The Law Society of Upper Canada was less successful in its attempt to oppose the Ontario Securities Commission's (OSC) effort to investigate and discipline a lawyer for actions involving the Commission. The Ontario Court of Appeal held that the OSC could investigate and discipline lawyers whose actions came within its purview.[22] In the wake

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[19] See e.g. H.W. Arthurs, "The Dead Parrot: Does Professional Self-regulation Exhibit Vital Signs?" (1995) 33 Alberta L. Rev. 800; Richard F. Devlin & Porter Heffernan, "The End(s) of Self-Regulation" (2008) 45 Alberta L. Rev. 169; and Philip Slayton, *Lawyers Gone Bad* (Toronto: Viking, 2007).

[20] *Reference re Secession of Quebec*, [1998] 1 S.C.R. 217.

[21] See *Law Society of British Columbia v. Canada (Attorney General)* (2001), 207 D.L.R. (4th) 705, aff'd [2002] 207 D.L.R. (4th) 736 (C.A.), leave to appeal granted 25 April 2002 and notice of discontinuance of appeal filed 25 May 2002, [2002] S.C.C.A. No. 52 (QL); *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2001] A.J. No. 1697 (QL) (Q.B.); *Federation of Law Societies of Canada v. Canada (Attorney General* (2002), 203 N.S.R. (2d) 53; *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 57 O.R. (3d) 383 (Sup. Ct. J.); and *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 218 Sask. R. 193. The Federation of Law Societies launched an assault on the federal government's money laundering reporting requirements. After several court decisions in the Federation's favour, the federal government settled these actions with the Federation. See Kirk Makin, "Ottawa gives up forcing lawyers to tell on clients" *The Globe and Mail* (25 March 2003) A13. In 2006, the government passed Bill C-25, which exempts lawyers from the reporting requirements of this regime, but would require lawyers to record all transactions of $3,000 or more. The battle continues: see "Lawyers back on the hook in revised money laundering act" *Law Times* (16 July 2007), online: <http://www.lawtimesnews.com/ index.php?option=com_content&task=view&id=2503>

[22] See *Wilder v. Ontario (Securities Commission)* (2001), 53 O.R. (3d) 519, [2001] O.J. No. 1017 (C.A.). See generally Paul D. Paton, "The Independence of the Bar and the Public Interest Imperative: Lawyers as

of Enron and other corporate scandals in the United States, the American Congress enacted the Sarbanes-Oxley Act which included a mandate for the U.S. Securities and Exchange Commission (SEC) to enact rules governing lawyers. This was strongly opposed by lawyers in the United States and around the world, including Canada. While the initial proposed rule was weakened, the SEC did enact a rule governing lawyer conduct for lawyers that act before it. As a result, Canadian lawyers who deal with the SEC are now subject to its regulatory authority as well. All of these incursions on the collective power of Canadian lawyers find their source in the increasing globalized nature of our society including the practice of law. Pressures on self-regulation of lawyers in Canada due to globalization are likely to continue.

Canadian lawyers face practical hurdles in the battle against future incursions against self-regulation. This is because experience elsewhere demonstrates that lawyers' double monopoly does not necessarily need to go together. In the United States, lawyers enjoy a general monopoly over the provision of legal services but lost the battle over self-regulation long ago. In most states, lawyers are regulated through the courts which often delegate the function to a state bar association but still retain supervisory authority. In the United Kingdom and some Australian states, legislation has restricted or removed self-regulation.[23]

D. Legalization of Disputes

The frequency of lawyers' exercise of power is expanding because of the growing legalization of disputes. In Canada, as elsewhere in the world, there is an increasing tendency to characterize disputes in legal terms and seek their resolution in the courts rather than through political or other forums. Some have claimed that the *Canadian Charter of Rights* contributed to this "legalization of politics",[24] but the trend certainly

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Gatekeepers, Whistleblowers, or Instruments of State Enforcement?" in Law Society of Upper Canada, *In the Public Interest: The Report & Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law & The Independence of the Bar* (Toronto: Irwin Law, 2007) 175.

[23] See e.g. Paul D. Paton, "Between a Rock and a Hard Place: The Future of Self-Regulation - Canada between the United States and the English/Australian Experience" (Fall 2008) The Professional Lawyer 87.

[24] See Michael Mandel, *The Charter of Rights and Legalization of Politics in Canada*, rev. ed. (Toronto: Thomson Educational Publishing, 1994). See also Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); and F.L. Morton & R. Knopf, *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000). Mandel argues that the *Canadian Charter of Rights and Freedoms* has led to a "legalization of politics" in the sense of a transfer of policy making from the political to the legal sphere with concomitant anti-progressive results. Looking at the phenomenon on a global scale, Ran Hirschl asserts that constitutional reform has transferred power from representative institutions to courts. He contends that the constitutionalization process is the result of a strategic interplay among hegemonic yet threatened political elites, economic stakeholders and judicial leaders in order to lock in political gains and insulate them from democratic politics. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004). Robert Bork sees the same phenomenon as Mandel and Hirschl but draws opposite conclusions. He argues that around the world judicial activism has resulted in the judicialization of politics and morals with courts around the world siding with left-wing political causes in the

predated the enactment of the *Charter*. It dates back at least to the *Patriation Reference* (1981)[25] where the Supreme Court of Canada declared its willingness to opine and define constitutional conventions – the rules of the game that political actors have bound themselves to follow.[26] The *Charter* brought a whole range of new claims before the courts but the legalization of disputes extends far beyond such "Charter claiming". It involves the increasing willingness to characterize many clearly political issues in legal terms: the rules of succession for the monarchy;[27] the Senate appointment process;[28] and Prime Minister Harper ignoring his fixed election date legislation in the fall of 2008 by seeking an early dissolution of Parliament.[29] What is remarkable in the political crisis of 2008-09 is that it did not involve the courts, although it certainly did involve many legal arguments.[30] Other areas of public policy such as health care and the environment are witnessing increasing legalization. This legalization of political disputes transfers power from the political to the legal realm, resulting in an increase in lawyers' power. This trend is not without its limitations, however.

Despite all of these developments, lawyers' voluntary legal organizations exercise only limited power in Canada. The Canadian Bar Association is Canada's largest voluntary legal association with approximately 37,000 members in 2009,[31] representing about 36% of Canada's over 100,000 lawyers.[32] The CBA does not display the same power that the American Bar Association (ABA) has in the United States. In part, this

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international culture wars. Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002).

[25] [1981] 1 S.C.R. 753.

[26] Strictly speaking courts do not actually enforce constitutional conventions. See *ibid.* at 880.

[27] See *O'Donoghue v. The Queen* (2003), 109 C.R.R. (2d) 1 (Ont. S.C.J.), aff'd [2005] O.J. No. 965 (C.A.).

[28] See *Samson v. Attorney General of Canada* (1998), 165 D.L.R. (4th) 342 (F.C. T.D.) and *Brown v. Alberta* (1999), 177 D.L.R. (4th) 349 (Alta. C.A.) and Samson, Brown

[29] See *Duff Conacher and Democracy Watch v. The Prime Minister of Canada*, 2009 FC 920.

[30] On the crisis, see Peter H. Russell & Lorne Sossin, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009). For comments on the role of the courts in such a situation, see the remarks of Daphne Gilbert at "Crisis in Canada: Coalition Governments and Beyond", Presentation at the University of Ottawa, 4 December 2008, online: http://www.media.uottawa.ca/mediaroom/videos.html?movie=2008_12_04_Crisis_in_Canada

[31] See Canadian Bar Association, "About the Canadian Bar Association", online: http://www.cba.org/CBA/about/main/. CBA membership is mandatory for members of the Law Society of British Columbia and the Law Society of New Brunswick.

[32] See Federation of Law Societies of Canada, "2006 Statistics", online: http://www.flsc.ca/en/pdf/statistics2006.pdf (reporting 79,147 lawyers not including Quebec) and Barreau du Quebec, Rapport annuel 2008-09 at 38 online: http://www.barreau.qc.ca/publications/administratives/index.html (reporting 22, 989 members as of March 31, 2009).

may be attributed to its federal structure. But it also has no recognized role in judicial appointments in the way that the ABA had for many years. Nor is it a leading voice in public policy in Canada. It has focused on a number of discrete issues in recent years: Continuing Legal Education, the independence of the judiciary and conflicts of interest in the legal profession being chief amongst them. It has attempted to make access to justice a leading issue but its strategy of attempting to legalize the issue by litigating it in the courts has failed to date.[33]

From lawyers' collective exercise of power, we now turn to lawyers' individual exercise of power through the lawyer-client relationship.

II. Individual Exercise of Power through the Lawyer-Client Relationship

Individual lawyers exercise significant power through the lawyer-client relationship. While often there may be a significant power imbalance in this relationship,[34] at times the lawyer may become "captured" by a client or a client-employer and find him or herself unable or unwilling to exercise power through independent judgment.[35] In this section, I explore the nature of the lawyer's power in the lawyer-client relationship. The source of this power can be attributed to the discretion afforded lawyers (by the law created by lawyers) in that relationship.

The lawyer's power in the lawyer-client relationship begins with the lawyer's control over client selection, although a large discrepancy exists between the rules and the reality in this area. Lawyers power to exert control over the choice of clients is underappreciated both in terms of legal ethics and lawyers' power. Allan Hutchinson has called client selection "one of the most important and most neglected issues for lawyers…it is arguably the most important decision that any lawyer makes because, once a client is taken on, the lawyer has become committed to a whole host of ethical and moral obligations".[36] I differ from Hutchinson in that I see client selection as the third most important decision that a lawyer makes. It is trumped by the lawyer's decision as to what area of law to practice (criminal law, corporate law, environmental law, family law, etc.) and what setting to practice in (government, large firm, small firm, union-side boutique, etc.). Each of those prior decisions will restrict and in some cases dictate the lawyer's choice of clients.

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[33] See *Canadian Bar Association v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, [2006] B.C.J. No. 2015 (S.C.), appeal dismissed, 2008 BCCA 92, 76 B.C.L.R. (4th) 48, [2008] B.C.J. No. 350 (C.A.), leave to appeal dismissed with costs, [2008] S.C.C.A. No. 185.

[34] See Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (Transaction Books, 1977).

[35] For a dramatic illustration of client capture see the film *Michael Clayton* (Warner Bros., 2007).

[36] Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed. (Toronto: Irwin Law, 2006) 75.

Lawyers' rhetoric about accepting all clients, however unpopular, is trumped by the right to decline to accept any client for any reason short of unlawful discrimination.[37] Unlike other professionals such as doctors, lawyers in Canada are not required to take on all clients. In legal ethics, this is the subject of great debate. However, in practice, the greatest discrimination is exercised not on the basis of the morals or political opinions of the client, but on the client's ability to pay. Unpopular but wealthy clients have no problem getting representation.

Unpopular and poor clients have great difficulty obtaining counsel outside the criminal context. Christina Finney, an Anglophone schoolteacher of modest means, sued the Barreau du Quebec for regulatory negligence. She was unable to find a lawyer in her own province and represented herself at trial (she lost) and at the Quebec Court of Appeal (she won). In 2002, she took the bus from Montreal to Ottawa to attend a case at the Supreme Court of Canada similar to hers and she approached me for help during a recess. At the time, I was a lawyer at Borden Ladner Gervais LLP in Toronto acting pro bono for the Federation of Law Societies in that case with Gavin MacKenzie, a leader at the bar and future Treasurer of the Law Society of Upper Canada.[38] To its great credit, the Montreal office of Borden Ladner Gervais agreed to the retainer and actively supported it, helping Ms. Finney to achieve a significant victory at the Supreme Court of Canada.[39]

Once lawyers do accept clients, they maintain significant discretion within the lawyer-client relationship. It is said that lawyers take instructions but should not be dictated to by clients. One of Canada's greatest criminal lawyers, G. Arthur Martin, explained the role of defence counsel in the following terms:

> The role of the defence counsel is to provide professional advice and assistance to the client in accordance with the strict ethical standards that govern the role of defence counsel. The defence counsel is not a messenger, an alter ego merely to carry out the wishes of the client irrespective of whether they comport with professional standards. The role of defence counsel is to be the champion of the client's cause and to see that his or her rights are not strongly invaded from any quarter.[40]

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[37] See e.g. Canadian Bar Association, *Code of Professional Conduct*, c. xiv, cmt. 6 and c. xx (Non-Discrimination).

[38] The case was *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17.

[39] I left Borden Ladner Gervais before the case was heard by the Supreme Court. Guy Pratte led up the team of lawyers all working pro bono that represented Ms. Finney before the Supreme Court of Canada. Ms. Finney was ultimately successful 7-0 in a path-breaking judgment against the Barreau du Quebec. See *Finney v. Barreau du Quebec*, 2004 SCC 36, [2004] 2 S.C.R. 17. Ms. Finney's story is related in Philip Slayton's, *Lawyers Gone Bad* (Toronto: Viking, 2007) 208-18.

[40] The Hon. G. Arthur Martin, "Reflections on a Half-Century of Criminal Practice" in Edward L. Greenspan, ed., *Counsel for the Defence: The Bernard Cohn Memorial Lectures in Criminal Law* (Toronto: Irwin Law, 2005) 159 at 193.

Much of what Martin says applies to the role of all lawyers. There are cases where a reverse power imbalance appears to exist and the client is able to dominate or override the lawyer's independent judgment. Such may be the case where a lawyer is working for a large entity and loses a sense of professional detachment or independence or where a lawyer is working for a very strong willed client.

In the area of class actions the whole notion of having a client is problematic. A class action is premised on having a representative client who represents the interests of a larger class. Class actions often involve matters of great public interest such as environmental spills or tainted blood. They may and often do produce significant public policy changes that are in the public interest but the process is a problematic one in terms of checks on power. Some class actions are akin to a system of public regulation through law controlled completely by lawyers whose duty it is to act in their client's best interest in a particular lawsuit. When there are settlements – as is often the case – the whole adversary system breaks down and such actions become essentially public regulation without the transparency and accountability that the political process is meant to provide. Class actions are also problematic because of class action lawyers' inherent conflict of interest due to large contingency fees.

Solicitor-Client Privilege is another source of lawyers' power. Lawyers promise their clients confidentiality and the courts have afforded the highest level of protection to confidential communications between lawyers and clients through the lawyer-client privilege also known as Solicitor-Client Privilege. The Privilege is long-established in Anglo-Canadian law and said to be essential for full and frank disclosure between lawyer and client. It is afforded stronger protection than similar privileges for communications with doctors, therapists, or members of the clergy. While the justification for the lawyer-client privilege is virtually unquestioned in Canada,[41] the broad exceptions for lawyers own self-interests have not escaped negative commentary.[42] Lawyers may breach their ethical duty of confidentiality (and assumedly the client's right to solicitor-client privilege as well since the courts continue to allow such disclosures) in a variety of circumstances including to establish or collect the lawyer's fee, to defend the lawyer or the lawyer's associates or employees against any allegation of malpractice or misconduct regardless of whether in involves the client or not.[43] Moreover, while the Supreme Court has recognized an exception to the Privilege (and by extension to the duty) where there is

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[41] On challenging the accepted orthodoxy about the lawyer-client privilege see Adam M. Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35 Queen's Law Journal 493.

[42] See e.g. Gavin Mackenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, 4th ed. (Toronto: Carswell, 2006) at 3-15 to 3-17 ("[t]he public may be forgiven for suspecting that the legal profession may not be free from self-interest."). For American criticism see Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 3rd ed. (Newark: LexisNexis, 2004) 151-52 (characterizing these exceptions as a "mockery of an ideal that has been characterized as 'a sacred trust'") and Daniel R. Fischel, "Lawyers and Confidentiality" (1998) 65 University of Chicago Law Review 1.

[43] See e.g. Canadian Bar Association, *Code of Conduct*, c. 4, cmt. 4.

a threat to public safety, it has left the decision whether to disclose information in the hands of the lawyer rather than requiring it, thus championing lawyers' autonomy over the public interest.[44] Thus, lawyers' ability to control exceptions is also a source of power.

The Solicitor-Client Privilege is a great source of power for lawyers. It allows lawyers to exercise power through legal advice without being held accountable for that power. For example, behind every exercise of governmental power is legal advice supporting or perhaps expressing concern about its exercise. Most of this legal advice is virtually unobtainable unless the government decides to waive the Privilege. Thus, to take an example, in the deal reached between the Government and the Official Opposition and the Bloc Quebecois over the Afghan detainees documents, an exemption from disclosure was allowed for solicitor-client privileged documents. Previously, it was reported that there exist legal opinions regarding the applicability of the Geneva conventions on the laws of war to the conduct of Canadian forces in respect to the Afghan detainees. However, under the terms of the deal reached by the Government and the opposition, Solicitor-Client Privilege has effectively been used to protect lawyers' power and to shield them from inquiry. This is in stark contrast to the disclosure of the infamous "torture memos" in the United States, discussed below.

With an increasing recognition that legal advice itself is an assertion of power, there is a growing debate in Canada[45] which has been raging in the United States[46] over the extent to which lawyers are morally responsible for the legal advice that they give. As the above example with the Privilege demonstrates, legal advice may be an exercise of power without accountability.

One legal scholar famously opined that "legal interpretation takes place in field of pain and death. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulated her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[47] This scholar author focused on acts of judicial interpretation but the same point can be made respecting the work of lawyers in interpreting the law. The most notorious example has become the Torture Memos written by lawyers in the Bush administration to justify the imposition of torture through legal advice.[48] These lawyers used the law not as a constraint on power, but as "the handmaiden of unconscionable abuse."[49]

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[44] See Adam M. Dodek, "The Public Safety Exception to Solicitor-Client Privilege: *Smith v. Jones*" (2000) 34 U.B.C. L. Rev. 293.

[45] See e.g. Trevor Farrow, "Sustainable Professionalism" (2008) 46 Osgoode Hall L.J. 51.

[46] See e.g. Robert K. Vischer, "Legal Advice as Moral Perspective" (2006) 19 Geo. J. Legal Ethics 225.

[47] See Robert Cover, "Violence and the Word" (1986) 95 Yale L.J. 1601 at 1601.

[48] See David Cole, ed., *The Torture Memos* (New York & London: The New Press, 2009); Jane Meyer, *The Dark Side* (New York: Anchor Books, 2009). See also the chapter by Trevor Farrow in this collection.

We do not need to go outside of Canada for examples of the effects of legal advice by provided by lawyers. In a series of cases in the Federal Court, government lawyers have argued strenuously that the protections of the *Canadian Charter of Rights and Freedoms* do not apply to the actions of Canadian officials abroad. We can debate the merits of this position as a matter of policy but there is no question that it has a significant affect on the lives of those with whom Canadian officials interact with abroad, be they Afghan detainees or Omar Khadr. In another dramatic example, lawyers spearheaded a record $2 Billion class action settlement with survivors of residential school abuse. Press reports have linked at least 22 suicides in B.C. to the payouts from this lawsuit.[50] Should the lawyers involved in that settlement be morally responsible for the consequences of their actions? These cases demonstrate the power of legal advice in the lawyer-client relationship. That power also provides the opportunity for abuse.

The imbalance in the lawyer-client relationship provides the opportunity for abuse of that power. As one of the leading scholars of the legal profession in the United States has recently written, betrayals of trust by lawyers "have serious, sometimes catastrophic consequences."[51] In 2007, former Bay Street partner and Dean of Law Philip Slayton wrote a surprise bestseller entitled *Lawyers Gone Bad*.[52] It was catapulted to the bestseller list by a sensationalist *Maclean's* cover story. Slayton aroused the ire of the legal profession with many of its leaders rising to attack him and defend the integrity of lawyers. But rather than a wholesale denigration of the profession, the message from *Lawyers Gone Bad* is actually quite modest. It is that the practice of law provides opportunities for lawyers to take advantage of the power offered to them through that practice.[53]

Some of the abuses of power are well-known and age-old: the mishandling or outright theft of client funds. Others are less discussed and more controversial: such as sexual relationships with clients and the exploitation of business opportunities that arise through the lawyer-client relationship. In each of these and other types of abuse of

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[49] Cole, *ibid.* at 13.

[50] See "Native suicides linked to compensation" *National Post* (26 January 2009), online: http://www.nationalpost.com/news/story.html?id=1217433; "Yukon First Nations to count deaths linked to residential school payments" www.cbc.ca (24 April 2008), online: http://www.cbc.ca/canada/north/story/2008/04/24/cyfn-deaths.html

[51] Richard L. Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (New York: Oxford University Press, 2009) 1.

[52] Philip Slayton, *Lawyers Gone Bad* (Toronto: Viking, 2007).

[53] *See ibid*. at 1 ("Most of the stories in this book are about dishonest lawyers. These lawyers (so a tribunal or a court found) seized opportunities to behave badly, opportunities offered by legal practice…Only a few lawyers are dishonest. Most behave honourably, serving their clients, profession, and community well."). Slayton has a further point that lawyers band together to protect their own and how self-government is failing but that point is developed further below.

power, lawyers exploit their position of power and abuse the trust that is the defining characteristic of the lawyer-client relationship. The effects on the individual client or on others may be devastating.

There is also a cumulative effect to such abuses of power. The most massive legal fraud in Canadian history was committed by a B.C. lawyer named Martin Wirick who defrauded lenders of over $32 million.[54] According to Philip Slayton, the Law Society of British Columbia initially mishandled the investigation.[55] However, at the end of the day the Law Society arrived at the right decision for a body whose mandate is to promote and protect the public interest: it lifted the cap on its compensation fund against which defrauded clients could make claims and increased the annual levy that each lawyer in B.C. had to pay to the Law Society by $350 a year. British Columbia lawyers had to foot the bill for the abuse of power by one of their own. At the least, Wirick's massive abuse of power affected every lawyer in British Columbia financially. It may also have impacted public perceptions of lawyers' integrity. The Wirick affair impugned the reputation of the Law Society of British Columbia as members of the public were left asking how a fraud of such mammoth proportions could have been undertaken.

Ultimately, abuses of power by individual lawyers may have a cumulative effect on lawyers' collective power and on the integrity of the justice system as a whole.[56] The role of lawyers in Watergate in the United States led to a crisis of confidence in the American legal profession. We have had no single "defining cultural moment . . . in which lawyers were placed under national scrutiny and obligated to reconsider the legitimacy of their professional practices and norms of conduct."[57] The Canadian legal profession has been lucky to have escaped such scrutiny. Elsewhere, I have described the years 2006 and 2007 following the Wirick fraud as the *anni horribiles* – the horrible years – for the Canadian legal profession because of one high-profile scandal after another.[58] The Canadian legal profession may be nearing the tipping point, one scandal away from government intervention to curb their collective power. In 2009, the Government of Ontario introduced legislation which would give it the power to step in and appoint a supervisor to essentially take over the regulatory responsibilities of any of

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[54] See *ibid.* at 178-92.

[55] *Ibid.* at 184-87.

[56] Abel remarked that "the public may lose faith in the capacity of the legal system to produce justice." Abel, *supra* note 52 at 1 citing Tom R. Tyler & Peter Degoey, "Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions" in Karen S. Cook, ed., *Trust in Society* (New York: Russell Sage, 2001) c. 9.

[57] Hutchinson, *Legal Ethics and Professional Responsibility*, *supra* note 36 at 5-6.

[58] See Adam M. Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 Osgoode Hall L. J. 1 at 17.

the 23 health regulatory bodies in that province including the bodies that regulate doctors, nurses and dentists.[59] In an editorial supporting the move, the *Toronto Star* opined:

> Self-regulation, though, is a privilege, not a right. And given the potential impact on patient health from these colleges' decisions, it is reasonable for the province to seek greater oversight. There have been incidences when the colleges have been slow to fix problems.[60]

The same words could easily have been written about Law Societies. We now turn to the individual power of lawyers outside the lawyer-client relationship.

III. The Role of Lawyers in Public Life

If Laurier famously quipped that the twentieth century would belong to Canada, the truth is that in Canada, the twentieth century belonged to lawyers. As individuals, lawyers exert significant power in Canadian society. If we begin with the three branches of government – executive, legislative and judicial – lawyers have a monopoly over one branch (judicial), dominance over another (executive) and prominence in another (legislative). It bears repeating that all members of the judicial branch in Canada are drawn from the ranks of lawyers.

Beginning with the executive, every single Prime Minister in the 20th century had some legal training. All but three were practicing lawyers (Mackenzie King, Lester Pearson and Joe Clark).[61] In total, 16 of our 22 Prime Ministers have been lawyers (73%).[62] Prime Minister Stephen Harper is the first Prime Minister since Joe Clark (1979-80) who is not a lawyer. It also marks the first time since 1948 when none of the

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[59] See Bill 179, *Regulated Health Professions Statute Law Amendment Act, 2009* (Ontario), online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2189. See also Tanya Talaga, "Dalton McGuinty firm on health-college plans" *Toronto Star* (30 September 2009), online: http://www.thestar.com/news/ontario/article/703030#

[60] "Regulating the regulators" *The Toronto Star* (5 October 2009), online: http://www.thestar.com/Opinion/Editorials/article/705284#

[61] Pearson returned from World War I and thought he would embark on a career in law. A university law degree was not required at the time and Pearson commenced his articles at a firm in Toronto. "But he found the prospect of contracts, torts, and clerical work 'abhorrent'. He decamped after one week... [and] [i]n the summer of 1919, Pearson joined the semi-professional Guelph Maple Leafs as an infielder while punching a clock at Partridge tire and Rubber Company." Andrew Cohen, *Lester B. Pearson* (Toronto: Penguin, 2008) 27. Joe Clark studied first year law both at Dalhousie and at the University of British Columbia but never completed a degree in law, finding it too dull. See Library and Archives Canada, online: http://www.collectionscanada.gc.ca/2/4/h4-3406-e.html.

[62] In addition to the aforementioned Joe Clark, Lester Pearson and MacKenzie King, non-lawyers include Sir Charles Tupper (physician), Sir MacKenzie Bowell (editor, printer) and Alexander Mackenzie (contractor, editor). See Library of Parliament, "Prime Ministers of Canada: Biographical Information", online: http://www2.parl.gc.ca/Parlinfo/Compilations/FederalGovernment/PrimeMinisters/Biographical.aspx

party leaders in Parliament is a lawyer.[63] Harper is the first Prime Minister since Sir Charles Tupper (M.D.) who has no legal training, although Harper was an active litigant while he headed up the National Citizen's Coalition.[64]

Lawyers dominance continues through the ranks of the executive. Studies have shown that between 1867 and 1940, 48 percent of all federal cabinet ministers were lawyers. That number rose to 60 percent between 1940-60.[65] By my count, as of January 2010, twelve of the thirty eight (31.6%) members of Prime Minister Stephen Harper's cabinet are lawyers.[66] If junior ministers (Secretaries of State) are excluded, the percentage increases slightly to 33% (9/27). It should be noted than lawyers are serving in some of the most senior portfolios in the Harper Government including Finance (Jim Flaherty), Defence (Peter Mackay), Public Safety (Vic Toews), Environment (Jim Prentice) and of course Justice (Rob Nicholson). In comparison, only a slightly higher percentage (35%) of the members of President Obama's Cabinet is composed lawyers (including the President himself).[67] In addition, there are many lawyers serving as political aides and civil service.

Turning to the legislative branch, lawyers have historically been the most well-represented profession in the House of Commons. For the first fifty years after Confederation, lawyers made up 35-40 percent of the members of the House of Commons, dropping to one third during the 1920s to the 1940s and to about one quarter in the 1970s and the early 1980s.[68] In the 1984 federal election, the representation of lawyers dropped precipitously from one quarter to under one fifth. Since then it has

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[63] Stephen Harper (Conservative Party of Canada) is an economist. Michael Ignatieff (Liberal) is an author, journalist and professor. Gilles Duceppe (Bloc Quebecois) is a former union organizer. Jack Layton (NDP) is a former professor and municipal politician. See Parliament of Canada, Members of the House of Commons, Biographical Information, online: http://www2.parl.gc.ca/parlinfo/Lists/ParliamentarianAge.aspx?Menu=HOC-Bio&Chamber=03d93c58-f843-49b3-9653-84275c23f3fb. Elizabeth May (Green Party) is a lawyer but her party has no seats in the House of Commons as of 2009.

[64] See e.g. *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827;

[65] See studies cited in David A.A. Stager with Harry Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) 306.

[66] The Hon. Robert Nicholson, Peter MacKay, Vic Toews, Jim Prentice, Tony Clement, Jim Flaherty, Peter Van Loan, Christian Paradis, Lisa Raitt, Gary Lunn, Diane Ablonczy, and Rob Moore. All information taken from the official biographies on the Government of Canada website, online: http://www.pm.gc.ca/eng/cabinet.asp?featureId=8.

[67] Lawyers in President Obama's Cabinet in 2009 include the President, Vice President Joe Biden, Hilary Clinton (Secretary of State), Eric Holder (Attorney General), Ken Salazar (Secretary of the Interior), Tom Vilsack (Secretary of Agriculture), Gary Locke (Secretary of Commerce) and Janet Napolitano (Secretary of Homeland Security) and Ron Kirk (Trade Representative). See http://www.whitehouse.gov/administration/cabinet/

[68] Stager, *supra* note 65 at 305.

continued to fall, bottoming out at 11.6% in the 1994 election and then climbing back up in subsequent elections to its current level of 15.9% after the 2008 election.[69] Nevertheless, lawyers remain the most well-represented profession of elected members by an almost 2:1 margin.

Why there are so many lawyers in politics and government and what are its consequences? Frank McKenna was premier of New Brunswick for a decade. He felt that being a criminal lawyer had prepared him to be a provincial premier. While still Premier, he opined that "[i]t seems that almost everything I do, almost every skill I need as a politician, is enhanced in some way by the discipline and experience I had in the practice of law."[70] McKenna felt that the "indomitable will to win" that one needs as a criminal lawyer translated well into politics.[71] Both law and politics have a public interest claim. In law, the public interest is at times difficult to see or exists below several layers of arguments as we have seen above. In politics, the public interest is direct and open. I cannot help but wonder if some of the lawyers who enter politics are drawn to it because of their desire to do more for "the public interest" than they felt they were able to do in law.

In other government or regulatory agencies, lawyers frequently have headed up the Competition Bureau of Canada, the Canadian Radio and Telecommunications Commission (CRTC) and many provincial securities regulators. Lawyers are often Ombudsman and Integrity Commissioners. If we move outside of government, lawyers are playing prominent role in leading Canadian universities at U.B.C. (Stephen Toope), Ottawa (Alan Rock), Waterloo (David Johnston) and Saskatchewan (R. Peter MacKinnon), just to name a few.

Lawyers also control our national game. The President of the NHL Gary Bettman is a lawyer as our many people on his staff (Canadian Lawyer). The NHLPA was founded by a (now disgraced and disbarred) lawyer Alan Eagleson (LL.B., Toronto) who also brought us one of the most iconic events in Canadian history – the 1972 Canada-USSR Summit Series. Since Eagleson, lawyers have continued to head up the NHLPA: Bob Goodenow (J.D., Detroit), Ted Saskin (LL.B., Toronto), Paul Kelly (J.D., Toledo) and Ian Penny. According to lawyer turned super-agent Don Meehan, as of early 2009

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[69] See Marie Lavoie & Emilia Barbu, "A Parliamentary Career for Scientists and Engineers" (Autumn 2009) 32:3 Canadian Parliamentary Review 5 at 7 (Table 1: Representation of Occupations by Parliament).

[70] Frank J. McKenna, "From Defence to Offence: The Case for New Brunswick" in Edward L. Greenspan, ed., *Counsel for the Defence: The Bernard Cohn Memorial Lectures in Criminal Law* (Toronto: Irwin Law, 2005) 255 at 255.

[71] *Ibid.* at 255. McKenna further stated that his career as a criminal defence lawyer taught him to expect and be prepared for the unexpected (257), to be fearless when it comes to experimentation (259), to deal with pressure and stress and to keep one's dignity under pressure (259-60).

there were nine General Managers and fifteen assistant GMs with law degrees amongst the NHL's 30 teams.[72]

Not only are we seeing an increasing number of lawyers in important roles in hockey, but also an increasing legalization of various aspects of the game. Off the ice, negotiation, interpretation and application of the NHL's collective bargaining agreement has become critical. Its salary cap significantly affects teams' on ice performance. Increasingly, on ice actions are being subjected to legal scrutiny, with the criminal and civil cases against Todd Bertuzzi being the most dramatic example of that. In the summer of 2009, the most important hockey developments took place inside a Phoenix courtroom as RIM's Jim Balsille battled Gary Bettman and the NHL for control over the Phoenix Coyotes. One gets the impression that this was not the end of such legal proceedings as the litigation revealed many legal issues surrounding the NHL which were previously unknown. One wonders how long the NHL will be able to maintain its reliance on the rules of the rink instead of the Rule of Law that prevails in the rest of the country.

This survey is meant to give a broad impression of the breadth of lawyers' involvement in public life in Canada. An in-depth study would no doubt turn out more information and other expected findings. With the legalization of hockey, it seems an appropriate place to end the discussion of the influence of lawyers' power outside the lawyer-client relationship.

IV. Conclusion: Paradoxes of Lawyers' Power in Canada

Lawyers exercise tremendous power in Canada society collectively, through the lawyer-client relationship and individually through government and other public roles. If we review the analysis of lawyers' exercise of power, we see that it is always asserted in the name of others: clients, the administration of justice, the public, etc.

We can also see a relationship between what lawyers do in lawyer-client relationships and the collective power of lawyers. It is generally accepted that while the lawyer-client relationship provides great opportunity for abuse of power, very few lawyers actually do so. Most lawyers serve their clients diligently and honourably and contribute to a working justice system that is the envy of many countries. The collective power of lawyers through the double monopoly has remained largely unchallenged and is built on many unchallenged assumptions about the role of lawyers and about the operation of our justice system. Increasing recognition that access to justice has become unobtainable to a vast majority of Canadians, yet the collective reaction of lawyers and judges has been to lament and attempt to legalize a right to more lawyers rather than asking difficult questions and testing creative solutions to the problem. The first paradox is that it is not these systemic concerns that are likely to dislodge lawyers' power but rather the abuse of power by a relatively small group of outlier lawyers.

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[72] See Mark Caldwell, "He shoots, he scores" (Spring 2009) *Canadian Lawyer*, online: http://www.canadianlawyermag.com/He-shoots-he-scores.html

The second paradox is that while lawyers are strongly represented in public affairs, lawyers as a collective body are remarkably ineffective at getting legal issues on the public agenda. It was long ago remarked that being a lawyer does not seem to affect the behaviour of politicians[73] and there is little indication that collectively lawyers have received favoured treatment from their colleagues who have become politicians. It was said that in the United States the lawyer-politician does not differ appreciably from other politicians.[74] In Canada, lawyers collectively barely register on the political radar.

Warren Zevon's *Lawyer, Guns and Money* continues to resonate with listeners precisely because it conjures up such a stark image of the instruments of power. In Canada, the idea of lawyers as actors who exercise power in our society is underappreciated. People talk offhand about "powerful lawyers" but there is not much analytical content to such assertions. Lawyers act in many different capacities both in legal and non-legal roles. They use their power to help individual clients deal with concrete problems or difficult disputes, in Zevon's terms to help people who are "between a rock and a hard place". Criminal lawyers protect individuals against the massive power of the state and ensure the fairness of our criminal justice system. Many lawyers have chosen to use their power to work for the less powerful communities in legal clinics or in poverty law and human rights practices. Other lawyers work to protect the interests of the already powerful – privileged individuals and businesses in Canadian society. Some lawyers – by any account very few – abuse their power and violate the trust of their clients and the trust that society has given the legal profession. The theoretical source of lawyers' power lies in the idea of lawyers exercising their power "in the public interest". Whether lawyers in Canada are living up to that mandate remains an open question.

[73] See Heinz Eulau & John D. Sprague, *Lawyers in Politics: A Study in Professional Convergence* (Indianapolis & New York: Bobbs Merrill, 1964) 3.

[74] *Ibid.*