THE OSGOODE SOCIETY, LEGAL HISTORY AND BIOGRAPHY

Jim Phillips [1]

I have been asked to talk about the Osgoode Society, legal history, and legal biography - topics close to my heart. I will begin by telling you something about the Osgoode Society, and then relate some of the understandings that it has given us of our legal history to the principal theme of this colloquium, the legal profession.

The Osgoode Society for Canadian Legal History, to give it its full name, has been around since 1979, and is one of the many progeny of the remarkable Roy McMurtry, founded by him when he was attorney-general of Ontario.[2] I am delighted to say also that Roy has been our President for some twenty years. The Osgoode Society has two principal programmes. First, it records and collects oral histories of people involved in the legal profession, creating an archive for future historians of priceless original material nowhere else available. The sources available to historians are many and varied, and in the last few decades historians have come to see the value of oral recollections by individuals as a significant supplement to the documentary evidence traditionally relied on. Indeed many of the authors of our books have already utilised this collection. I have to say that it is a remarkable collection - to date over 500 individuals have been interviewed and those interviews have generated over 80,000 pages of transcripts, housed at the Archives of Ontario. We have sought to capture the memories of leading lawyers and judges, but have also targeted other categories of lawyers, some of whose members are also now among the leaders of the profession - women lawyers, aboriginal and black lawyers, legal aid lawyers - and we have recently started a programme aimed what I might term, without any condescension, the ordinary lawyers who provide a wide

---

[1] Professor, Faculty of Law and Department of History, University of Toronto; editor-in-chief, Osgoode Society for Canadian Legal History.

[2] For a more detailed discussion of the history of the Osgoode Society see J. Phillips, R. McMurtry, and J. Saywell, "Introduction: Peter Oliver and the Osgoode Society for Canadian Legal History," in Phillips, McMurtry and Saywell, eds., *Essays in the History of Canadian Law, Volume X: A Tribute to Peter N. Oliver* (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 2008).

variety of legal services in smaller communities.

Our other principal programme is our publishing programme. We started modestly in 1981 with the avowed intention to produce one book a year about Canadian legal history, and by now we regularly publish four a year. This year's four books take us to 84, a remarkable total. The field of legal history in Canada was largely unknown before the Osgoode Society; as one reviewer put it some years ago, the work of the Osgoode Society was 'a highly significant event in providing momentum for a take off' in the field.[3] How considerable an achievement this is is made apparent by comparing the Osgoode Society to similar organizations elsewhere. Perhaps the best-known legal history association in the Anglo-American world is the British Selden Society, and its publishing programme runs to some 150 volumes, 66 more than us. But they had a head start - they were founded in 1887. To invoke another comparison, the 'Studies in Legal History Series' published by the University of North Carolina Press in association with the American Society for Legal History, began in 1981, the year the Osgoode Society published its first book, but they have published just over 50 books, rather fewer than we have. The Osgoode Society, I am proud to say, is a genuine Canadian success story, and recognised everywhere as the most successful legal history society in the world.

Its success, I believe, lies principally in the fact that it is genuinely a joint enterprise between the academics and the profession. Most of the books are written by academics, whose job it is to do just that, but many are written by lawyers and judges. Our members and other readers are drawn mainly from the profession. And we receive generous funding from the Law Foundation of Ontario. The Osgoode Society in my view, is a perfect example of what we mean when we talk of the legal profession as a learned profession.

As a segue between talking about the Osgoode Society and about legal history generally, I want to stress the variety of subject matter captured by the term 'legal history.' We publish biographical works on famous lawyers and judges, as well as court histories, things that people would easily fit

[3] J. McLaren, 'In the Northern Archives Something Stirred: The Discovery of Canadian Legal History,' *Australian Journal of Legal History*, 7 (2003), p. 75.

into the definition of what legal history is. But these actually constitute a distinct minority of our books. They include volumes on the history of crime and punishment, on women and the law, on the experience of ethno-cultural minorities and the law, detailed case studies in a variety of areas of the law, and many others. Ten days ago, for example, we launched our 2010 books - a court history,[4] a judicial biography,[5] a book of essays exploring the background and context of famous Canadian labour law cases,[6] and a volume on the experiences of black Canadian in the criminal courts from the mid-nineteenth to the mid twentieth centuries.[7]

Here endeth the commercial - except of course to note that there is a book display just outside this room, where excellent holiday gifts can be acquired for the readers among your family and friends. I turn to why this all represent a valuable enterprise. Why do we do legal history, and why does it matter?[8] It is often said that the most important lesson of legal history is that it teaches us about the contingency of the law and the legal system, about the fact that law is not a set of abstract ahistorical and universal principles, it does not exist in a vacuum. Rather, it is formed by, and exists within, human societies, and its forms and principles, and changes to them, are rationally connected to those particular societies. When I use the term contingency I am not suggesting that legal developments are arbitrary or random, or a set of constant short term changes. Indeed I am arguing for exactly the opposite, that legal developments are rationally and logically connected to other kinds of developments, and like other historical change the pace is often slow, with old forms co-existing for a period with new ones.

---

[4] Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years*

[5] Frederick Vaughan, *Viscount Haldane: Wicked Stepfather of the Canadian Constitution*

[6] Judy Fudge and Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles*

[7] Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958.*

[8] These brief comments are elaborated on in J. Phillips, " Why Legal History Matters," John Salmond Lecture, Victoria Univeristy of Wellington, 2010, to be published in *Victoria University of Wellington Law Review*, forthcoming 2010.

There is a corollary to, and a derivative of, this lesson of contingency. It is that legal history is liberating. It demystifies the law, removes history as authority in itself, and makes it possible for current students and practitioners to envisage other worlds, other ways of doing things. This was something understood long ago by the pioneer English legal historian, F.W. Maitland. In a famous and often-used quotation on the question of the usefulness of legal history, Maitland asserted: "The only direct utility of legal history ... lies in the lesson that each generation has an enormous power of shaping its own law. I don't think that the study of legal history would make men fatalists; I doubt that it would make them conservatives. I am sure that it would free them from superstitions and teach them that they have free hands."[9] Maitland's point has been made in different ways by many legal historical studies. There is much apparent and beguiling continuity in the law, with institutions like the jury or doctrines like "nuisance" or underlying ideas like "freedom of contract" having been around for a long time. But in many cases the words stay the same but the meaning changes. As a famous aphorism has it, "The past is a foreign country: they do things differently there."

I am not suggesting that it is inappropriate to write about legal history for other reasons - including its sheer fascination. It is also of course a truism that understanding our history is crucial to understanding also how our current world is constructed. The past is not simply the past, it is part of our present also. But the point I want to emphasise today is how different the past can be; as one author has put it, "how the decisions of the past were often made in profoundly different institutional contexts and with different questions in mind."[10] We must not be too beholden to the past, just as much as we need to understand it.

Let me link these ideas to some of the things that we know about the history of the Ontario legal profession, things we know, of course, largely through the published work of the Osgoode Society. We are becoming increasingly aware of what nineteenth century lawyers actually did. In the first half

---

[9] F.W. Maitland to A.V. Dicey, c. July 1896, in P.N.R. Zutshi (ed) *The Letters of Frederic William Maitland, Volume II* (Selden Society, London, 1995), at 105.

[10] J. Webber "The Past and Foreign Countries" *Legal History* 10 (2006), p. 2

of the century lawyers, whether in small towns or the larger cities, did not confine themselves to providing a narrow range of clearly lawyer-like services to clients. Many did of course advise and litigate, draw up wills and contracts, convey real estate, but they also performed a wide range of tasks for clients and on their own behalf. Lawyers were frequently entrepreneurs, on their own behalf and in partnership with clients. As early as the 1820s three of the directors of the newly formed Welland Canal Company were lawyers - John Beverely Robinson, then attorney general, Henry John Boulton, then solicitor general, and Boulton's father D'Arcy, a former solicitor general. They were not there for their legal advice as much as for their ability to extract favours from government and what was perceived as their commercial acumen. They also did very well out of their involvement: Henry Boulton had extensive landholdings around one of the canal's entrances.[11]

The building of transportation networks was of course a significant feature of nineteenth century Canadian economic development, and John A MacDonald, a name not unfamiliar to us, was one of many lawyers who had extensive investments in railways and steamships to go along with his real estate speculation, not to mention his and other attorney generals maintaining private practices while in office. MacDonald was hardly alone in his interest in railways; one third of all railway company directors in the period prior to Confederation were lawyers.[12] Blaine Baker has succinctly summarised the ways in which lawyers involved themselves in their client's activities in his study of Montreal's Torrance-Morris firm at mid-century. The lawyers "were all actively involved in their clients' enterprises in ways that exceeded the momentary provision of technical advice. They often became effective partners of those clients, [in ways] that make the definition of divisions between legal and others types of business labour difficult.' As a result, he says, 'law and the economy became less rather than more distinguishable from each other' over time.[13]

---

[11] See C. Wilton, "Introduction," in C. Wilton, ed., *Essays in the History of Canadian Law, Volume IV: Beyond the Law - Lawyers and Business in Canada 1830-1930* (Toronto: Osgoode Society for Canadian legal History and University of Toronto Press, 1990), p. 11

[12] *Ibid.*, pp. 10 and 11

[13] G.B. Baker, "Ordering the Urban Canadian law Office and its Entrepreneurial Hinterland, 1825-1875," *University of Toronto Law Journal* 48 (1998), p. 180. See also the same

The point of these examples, of course, is that professionalism had a rather different meaning in 1850 or so than it now does. We are certainly familiar with the idea that lawyers can also have business or political careers, but we tend to think of them as occurring sequentially, not simultaneously. Lawyers, it is said, should not involve themselves in their clients' businesses, in part because doing so is a conflict of interest and in part because they are generally rather better at providing technical legal advice than they are to managing companies. Interestingly, nineteenth century lawyers did not see themselves as unprofessional in any sense. They saw little practical distinction between these various roles, but they still saw themselves as a gentlemanly class, part of a self-conscious leadership elite. The Law Society stressed character much more than academic achievement in its admissions process, and lawyers had their own code of conduct. They did not advertise, or poach each others' clients by underbidding them, or hire themselves out as waged labour.[14]

This last point brings me to a second example of the distinction between past and present in what is considered professional. When Amelius Irving, called to the bar in 1849, took on a position as solicitor to the Great Western Railway in 1855 at a salary of $1,250, the *Upper Canada Law Journal* expressed doubts "as to the propriety or practicality of the proceeding', and compared it to 'a tradesman who advertises for a "hand" '. Working for a salary was not gentlemanly, not professional, because it meant that a man was not independent. When, a few years later, a dispute arose over whether costs were to be paid to Irving or his employer, the Law journal again attacked the practice. 'The hire of a solicitor, body and bones, at an annual salary, [was] ... something which savoured of a studied insult to the profession.... Every man who has at heart the dignity of his profession must see throughout a meretricious union between a trading corporation and a solicitor of the courts, which appears to be as dishonourable in the one as it is degrading to the other.'[15] Irving survived the

---

author's "Law Practice and Statecraft in mid-Nineteenth Century Montreal: The Torrance-Morris Firm, 848-1868," in Wilton, ed., *Beyond the Law*.

[14] See Wilton, "Introduction," in *Beyond the Law*, p. 9

[15] The account of Irving is from J. Benidickson, "Amelius Irving: Solicitor to the Great Western Railway, 1855-1872," in C. Wilton, ed., *Essays in the History of Canadian Law,*

calumny heaped on him by colleagues for practising law in a way that thousands of lawyers do today, and indeed was perhaps ironically not only elected Treasurer in 1893 but served in that office for 20 years - the longest-serving treasurer.[16]

Having got us to the late nineteenth-century, we can briefly examine another change in the history of the legal profession. The decades after 1880 were marked by explosive growth in the Canadian economy, with the opening of the west, the development of mining and hydro electricity, the rise of mortgage and loan and trust companies, etc. Lawyers were as central to this development as they had been to economic activity earlier in the century, but it brought two subtle shifts. First, while many continued to combine legal work with entrepreneurial activity, some law firms, or perhaps more accurately some members of law firms, concentrated increasingly on servicing clients rather than throwing in their lot with them. The cause was the increasing complexity of the new economy, which required incorporations, securities management, complicated contracts with suppliers and customers and employees, and a lot more litigation. The change, as I have noted, was not a complete one. Robert Harris of Halifax's Harris, Henry and Cahan was the right hand man to John F. Stairs and the Nova Scotia Steel and Coal Company, for example.[17] Similarly, David and Alex Fasken acted as executives and directors of many mining companies in northern Ontario.[18] But over time, in a process that greatly accelerated after World War I, as lawyers' work become dominated by corporate law, the lawyers themselves acted more as legal advisers than as co-entrepreneurs. Changing ideas about what was professional were in part responsible for this change, although it was also perhaps

---

Volume 7: Inside the Law - Canadian Law Firms in Historical Perspective (Toronto: Osgoode Society for Canadian Legal History and University of Toronto Press, 1996), quotations at pp. 103 and 105.

[16] See C. Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto, University of Toronto Press, 1997), Appendix 2, p. 345.

[17] G. Marchildon, "International Corporate Law from a Maritime Base: The Halifax Firm of Henry, Harris and Cahan," in Wilton ed., *Beyond the Law.*

[18] C.I. Kyer, "The Transformation of an Establishment Firm: From Beatty Blackstock to Faskens, 1902-1915," in Wilton, ed., *Inside the Law*.

the product of a realisation by the business community that a more complex world meant that lawyers were not best suited to make business decisions. As was said in one US book. A lawyer was good for legal advice, but 'to depend upon him further for business or financial advice is not more sensible than taking a broken leg to the dentist'.[19]

This transformation was accompanied by another, which I think sounded warning bells about a decline in professionalism to some. Law practice had for long been the preserve of sole practitioners or firms of 2-3. Toronto had 199 lawyers in 1870, but only 20 firms with three or more partners. By 1910 there were nationwide more than 50 firms of five or more. The largest firm in the country in 1902 was Beatty Blackstock of Toronto, with 15 lawyers.[20] Of course these are modest numbers by contemporary standards, but growth in firm size worried some who feared the rise of what were termed 'law factories' in the US. These law factories were not large, a dozen or so lawyers, but they were so named because they specialised in corporate law. While no-one has systematically investigated the connection between firm size and specialisation, on the one hand, and emerging ideas about professional ethics on the other, the changes I have described took place at the same time that discipline committee of the Law Society of Upper Canada became much more active. Christopher Moore, in his history of the Law Society, argues that "around 1900, the discipline committee was frequently a forum in which practitioners worked out ethical norms for the new conditions of professional work.' Those conditions certainly included claims to specialisation, and charges of soliciting clients, as two cases cited by Moore demonstrates.[21]

Mention of ethics brings me to my final example of how the past is indeed a different country. In an essay in a recent Osgoode Society volume, a tribute volume for my predecessor as editor in chief, Peter Oliver, Ian Kyer has a discussion, rare in Canadian legal historical literature, of estate planning

---

[19] Quotation in Wilton, "Introduction," in Wilton, ed., *Beyond the Law*, p. 3

[20] For these figures see variously Wilton, "Introduction," in Inside the Law, pp. 8 and 14, and Kyer, "The Transformation of an Establishment Firm," p. 169.

[21] Moore, *The Law Society if Upper Canada*, p. 150.

in the 1920s and 1930.[22] In 1933 the Ontario government sued the estate of David Fasken for unpaid succession duty. The government lost and appealed. Sitting on the appeal panel were Justices W.R. Riddell and Cornelius Masten. Riddell has been a long-time partner of David Fasken and was an honourable pallbearer at his funeral. Masten was a long time friend of Fasken. The province's lawyers made no objection, and obviously neither man felt any compunction about determining the tax liability of the estate of an old friend. It goes without saying that we would view this very differently now.

I have painted, with an admittedly broad brush, some general sketches of the ways in which law practice a century or so ago was very different than it is now. We know much of this from the work of authors published by the Osgoode Society, and we need to know more, especially about the twentieth century history of the profession. But what has been unearthed makes it very clear that ideas about what constitutes professionalism have been no more static than the nature of law practice itself. We should not lament this, but rather take it as an invitation to think anew about the challenegs of professionalism today.

[22] This paragraph is from C.I. Kyer, "The David Fasken Estate: Estate Planning and Social History in Early Twentieth-Century Ontario," in Phillips et al eds., *A Tribute to Peter N. Oliver*.