

Becoming "Ethical": Lawyers' Professional Ethics in Early Twentieth Century Canada¹

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I. INTRODUCTION

WHY DO CANADA'S LEGAL PROFESSIONS promulgate codes of ethics?

Why, the better to be ethical, of course!

This unadorned explanation is routine. In his 1916 address to the American Bar Association, for example, Elihu Root explained:

To the student of the law there come from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical, or seeking unfair advantage - a Bar jealous of the honor of the profession and proud of its high calling for the maintenance of justice - that we must look for the effective administration of the law.²

¹ This article is part of a larger research programme on the history of the legal professions in the Canadian prairie provinces. That project has been generously supported by Carleton University, the Social Sciences and Humanities Research Council of Canada, the Faculty of Law at the University of Manitoba, and the Legal Research Institute of the University of Manitoba. The author is grateful to Barry Wright, Dale Gibson, and Alvin Esau for encouragement, commentary and critique. The research assistance of Jeff Borsten and Byron Williams has been most helpful.

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² As quoted in Canadian Bar Association, "Report of the Committee on Legal Education and Ethics" (1919) 4 Report of the C.B.A. 129 at 130-31.

These words resonate in Canadian professional history - Root's views were endorsed by a Canadian Bar Association Committee on Legal Education and Ethics in 1918.³

And yet, this rationale seems too pat, too convenient, too simplistic.

Canadian literature on the question is sparse. Elsewhere scholars from a range of disciplines have long been intrigued by the historical forces which motivate the development of "professional ethics". This diverse body of literature generally repudiates claims that codes of ethics arise exclusively (or even primarily) from altruistic impulses. While the range of enquiries, methodologies, and perspectives of such studies is far too diffuse to permit the extraction of any single explanation, codes of ethics are viewed as self-serving by many authors. The projection of an "ethical" image is sometimes portrayed as instrumental in legitimating various mechanisms of professional "market control," including state enforcement of a professional monopoly over the provision of various services. Alternatively the "ethical" project is sometimes conceived of as a means by which the cultural authority of the profession as a whole is enhanced, or as a device by which elites within the profession repress those of whom they disapprove.

II. VISIONS OF PROFESSIONALISM

AS ELIHU ROOT'S 1916 ADDRESS ILLUSTRATES, one of the core notions of professional ethics is the idea that a legal career should not be pursued as a business. The sense that values are at stake which are too important to be left to the vagaries of the free market is pervasive.

Lionized Harvard Law Dean Roscoe Pound, for example, asserted that the concept of profession involves three ideas: "organization, learning, and the spirit of public service. The remaining idea, that of gaining a livelihood, is incidental."⁴ The spirit of public service is, according to Pound, the most important component of "professionalism" and, even at its worst, he thought professional activity to be "restrained and guided by something better than the desire for money rewards."⁵ The ideal of professionalism for Pound stood as a sort of

³ *Ibid.*

⁴ "What is A Profession? The Rise of the Legal Profession in Antiquity" (1944) Part 1 Notre Dame Lawyer 203 at 204.

⁵ *Ibid.* at 205.

polar opposite to the "extreme regime of competitive individual self-assertion" which characterized many areas of social life. Through its traditions "of organization, of learning, and of a spirit of service" Pound hoped that the U.S.A. legal profession of the 1940's might foster the development of a wider spirit of cooperation in place of the unfettered competition of American capitalism.⁶

While all of this may seem somewhat quaint - perhaps even naive - to Canadian lawyers of the 1990's, the linkage of "professionalism" with a rejection of market principles is powerful and continuing. Dean H. W. Arthurs of the York University law school wrote in 1975 that "[t]he existence of a code of ethics is often thought to be the very essence of professionalism" to such an extent that the terms "ethical" and "professional" are sometimes used interchangeably.⁷ Modern sociologists treat the existence of a "code of ethics" as the hallmark of professions (in contradistinction to mere occupations), historians have increasingly come to focus their attention on the uses of notions of appropriate practice in the development of the modern legal profession and legal academics are now turning their attention to "professional ethics" as a means of effecting progressive social change.⁸ Courses in professional ethics (or "professional responsibility") are mandatory at many Canadian law schools and in most bar admission courses.⁹ One of the more onerous committees a Bencher may be asked to serve upon in most provinces is that charged with the enforcement of "ethical" standards. The Canadian Bar Association, provincial bar associations,

⁶ *Ibid.* at 206. Compare E. Durkheim, *Professional Ethics and Civil Morals* (London: Routledge & Paul, 1957), esp. at 3-13.

⁷ H.W. Arthurs, "Code of professional ethics" in H.W. Arthurs, D.L. Mills & G. Starr, *Materials on the Canadian Legal Profession* (York University School of Law, 1985) [unpublished] 247 at 247. S. Arthurs also argues that the service orientation, the notion of "trust", and the abhorrence of caveat emptor as a foundation for client-professional relations create a radical distinction of "profession" from "business." See: S. Arthurs, "Discipline in the legal profession in Ontario," (1970) 7 *Osgoode Hall L.J.*, 235 [hereinafter "Discipline"].

⁸ See, e.g., R. Gordon, *Virtue, Commerce and Lawyers, WS 1987-1988* (1) (University of Toronto, Faculty of Law Workshop on Legal Theory and Public Policy, 25 September 1987); R.L. Abel, "Taking Professionalism Seriously" in *Annual Survey of American Law* vol. 1, (New York: N.Y.U. School of Law, 1989) 41.

⁹ See A. Esau, "Teaching Professional Ethics and Responsibility at Law School: What, How, and Why?" in R. Matas & D. McCawley, eds., *Legal Education in Canada* (Montreal: Federation of Law Societies, 1987) 308; A. Esau, "Teaching Professional Responsibility in Law School" (1988) 11 *Dalhousie L.J.* 403.

and provincial Law Societies, like their U.S.A. counterparts, continue to concern themselves with the promulgation of statements of "professional ethics". In general, the content of these codes of ethics has been subject to a considerable renegotiation during the 1970's and 1980's but the idea that the legal profession should generate, publicize and ultimately enforce standards of ethical conduct is largely taken to be a matter of common sense.

It was not always so however. While the legal profession in common law countries¹⁰ has frequently held itself out as being in some sense bound by special standards of conduct and customs, the idea that any professional body should presume to dictate to individual practitioners how they should go about their business is of recent vintage. This is not only the case with respect to the United States of America (where Jacksonian democracy in the nineteenth Century largely destroyed professional organizations, challenged professional monopolies, and thus effectively precluded the development of enforceable standards of ethical conduct)¹¹ but also - contrary to a persistent myth - in England where the transformation of the Inns of Court into disciplinary organs occurred only in the 1860's, and only in the most hotly contested of circumstances at that.¹²

¹⁰ Insofar as it makes sense at all to talk of a single, unitary legal profession in times past. See: W.W. Pue, "Rethinking Professionalism: Taking The Professions in Early Modern England Seriously" (1989) 4 Can. J. Law & Society 175 at 182 [hereinafter "Rethinking Professionalism"].

¹¹ E.N. Griswold, *Law and Lawyers in the United States: The Common Law Under Stress* (London: Stevens & Sons, 1964); A.-H. Chroust, *The Rise of the Legal Profession in America, Vol. II: The Revolution and the Post-Revolutionary Era* (Norman: University of Oklahoma Press, 1965); T.J. Johnson, *Professions and Power* (London: MacMillan, 1972); M.S. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1979); D. Boorstin, "The Colonial Experience," in *The Americans* (Harmondsworth: Penguin, 1965) c.7; J.F. Kett, *The Formation of the American Medical Profession: The Role of Institutions, 1780-1860* (New Haven: Yale University Press, 1968); R.L. Abel, *American Lawyers* (New York: Oxford University Press, 1989) at 10 & 40. Note, however, that "A revisionist historiography (Bloomfield, 1976; Calhoun, 1965) no longer uncritically accedes to Roscoe Pound's (1953) sweeping judgment that 'an Age of Decadence' reigned from ... 1836 to ... 1870." [i.e. the period of Jacksonian attacks]: W. Espeland & T.C. Halliday, "Resurrecting the Dead: Biography and Death Rituals in the Reconstruction of Professional Legitimacy by Chicago Lawyers, 1870-1900" (American Bar Foundation Working Paper series 9018).

¹² See W.W. Pue, "Moral Panic at the English Bar: Paternal vs. Commercial Ideologies of Legal Practice in the 1860's" (1990) 15 Law and Social Inquiry [hereinafter "Moral Panic"]; "Guild Training versus Professional Education: The Department of Law at Queen's College, Birmingham in the 1850's" (1989) 33 The American Journal of Legal

Moreover, the development of "professional ethics" has not generally been a matter of merely prohibiting "obviously" harmful or undesirable conduct. Rather, in the United States of America and in England there has been a distressingly recurrent pattern of elite lawyers promulgating "ethical codes" which are remarkably consistent in prohibiting practices helpful to non-elite practitioners and their clients, while condoning virtually any conduct which is actually engaged in by elite practitioners on behalf of themselves or their clients. Typically, research has revealed that codes of professional ethics do not advance ethical visions that are traditional, timeless, consensual, or revealed. The social construction of "professional ethics" is heavily influenced by the social location of the drafters. This, of course, is not a shocking conclusion given the overwhelming evidence drawn from a number of fields which suggests that all knowledge is tentative and partial in these ways.¹³ The realities of professional governance as it has actually taken place amongst lawyers in the United Kingdom and the United States of America have resulted in the implementation of professional codes which are in varying degrees class biased, disempowering of ordinary citizens, anti-democratic, racist, anti-semitic, patriarchal, and xenophobic or nativist.¹⁴

History 241 [hereinafter "Guild Training"]; "Rebels at the Bar: English Barristers and the County Courts in the 1850's" (1987) 16 *Anglo-American Law Review* 303 [hereinafter "Rebels"]; "Exorcising Professional Demons: Charles Rann Kennedy and the Transition to the Modern Bar" (1987) 5 *Law & Hist. Rev.* 135 [hereinafter "Professional Demons"].

¹³ See, amongst many others: G. Peller, "The Metaphysics of American Law" (1985) 73 *Cal. L. Rev.* 1151; A. Hunt, "Living Dangerously on the Deconstructive Edge" (1988) 26 *Osgoode Hall L.J.* 867 [review of *Dwelling on the Threshold*, by A. Hutchinson (Toronto: Carswell, 1988)]; R.M. Unger, *Knowledge and Politics* (New York: The Free Press, 1975); R.M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: The Free Press, 1976); P.L. Berger & T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (New York: Anchor Books, 1967); T.S. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970). For a useful review of such epistemological concerns in relation to feminist jurisprudence see K. Busby, "The maleness of legal language" (1989) *Man. L.J.* 191. Similar work in the field of law and geography is reviewed in W.W. Pue, "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11:6 *Urban Geography* 566 (special issue edited by G.L. Clark & N. Blomley) [hereinafter "Wrestling with Law"].

¹⁴ J. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976); R.L. Abel, "Why does the A.B.A. Promulgate Ethical Rules?" (1981) 59 *Texas L. Rev.* 639; D.L. Rhode, "Why the A.B.A. Bothers: A Functional Perspective on Professional Codes" (1981) 59 *Texas L. Rev.* 689; "Moral

It is unclear however to what degree any of these findings apply in Canada. While one study has revealed that solo practitioners in the early 1970's were much more likely to be subjected to disciplinary proceedings than large firm lawyers, this observation did not lead the author on to the sorts of critical enquiry which might have been expected.¹⁵ With regard to the specific question as to whether transformations of Canadian legal professions in the early twentieth Century were conditioned by the sorts of class bias and xenophobia which dominated in the United States, Kyer and Bickenbach suggest that there is no evidence to this effect¹⁶ and Arthurs points to an indeterminate pattern of similarity and difference.¹⁷ In both cases the conclusions are based on intuition or anecdotal evidence at best. Neither is specifically concerned with the policing of codes of ethics as such. We simply do not know why Canadian lawyers were motivated to develop codes of professional ethics, who took on the task, what they hoped to achieve, or what, if anything, was the instrumental effect. We are ignorant of our own histories, and left to "intuit" conclusions from the secondary literatures of other places.

These are issues that matter. The history of "professional ethics" in Canada must be studied. The subject-matter is, however, immense. An

Panic", *supra*, note 12; "Rebels", *supra*, note 12.

¹⁵ "Discipline", *supra*, note 7. A deep cynicism about the exercise of professional disciplinary powers is pervasive in the 1990's. See R. Haliechuk, "Ontario benchers in uproar over favoritism charge: By the narrowest of margins, the Law Society of Upper Canada has voted to have its handling of a professional misconduct complaint independently investigated" *The Lawyers Weekly* (9 February 1990) 10.

¹⁶ C.I. Kyer & J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, The Benchers, and Legal Education in Ontario, 1923-1957* (Toronto: Osgoode Society, 1987) at 72, regarding increasing standards of legal education: "The motives behind the movement towards higher uniform standards were not always above reproach. Jerold Auerbach has argued, for example, that the greatest part of the hostility felt by the academics and practising lawyers towards the 'propriety' of night schools was a resentment of foreign-born, Jewish, and black lawyers who had gained access to the profession through the less expensive night schools. If this is true of the United States ... there is almost no evidence to suggest that the Canadian attempts to standardize and upgrade legal education in the 1920s and later were similarly motivated by racism or xenophobia. [However] It is foolish to suggest that such attitudes were unknown in Canada, and it is not difficult to find in the Canada Law Times and other journals editorials warning of the 'dilution' of professional competence that would result if immigration policies were not tightened."

¹⁷ H. Arthurs, Book Review of *Unequal Justice* by J.S. Auerbach (1977) 27 U.T.L.J. 513.

adequate consideration of "professional ethics" amongst lawyers in Canada would require simultaneous consideration of developments in each of the provinces and territories from at least the time the first informal association of "lawyers" was formed. It would require a careful consideration of the various policies developed in relation to admission to the profession, unauthorized practice, the exercise of "disciplinary powers" (which likely, as in England, preceded the articulation of codes of ethics), legal education, and professional "custom," "tradition," "etiquette," and "ethics." The relative importance of indigenous concerns and external influences from Europe, England and the United States of America would have to be taken into account, and the study would have to concurrently investigate material conditions, principle, interests, and the social construction of knowledge. Cognate fields of learning such as philosophy and political theory would have to be accessed in all relevant times and places. The internal dynamics of the profession as well as its complex interwoven relationships with the larger society would have to be probed.¹⁸ An adequate study of the origins of professional ethics amongst lawyers in Canada would problematize the very notion of "lawyer"¹⁹ and would take seriously ethnicity as well as regional, class, linguistic, racial and gender diversities of legal practice in times past.²⁰ Unfortunately, the existing secondary literature is so sparse as to make any attempt at synthesis of this sort absurdly premature.²¹

¹⁸ For a fascinating case-study of the complex interrelationships between professional self-government and the larger community, with particular reference to developments in Western Canada, see: P.J. Giffen, "Social control and professional self-government: a study of the legal profession in Canada" in S.D. Clark, ed., *Urbanism and the Changing Canadian Society* (Toronto: University of Toronto Press, 1961) 117.

¹⁹ See "Rethinking Professionalism", *supra*, note 10.

²⁰ As regards ethnicity, see the preliminary work of A. Esau, "Ethnicity and Professional Identity: Icelandic Law and Lawyers in Manitoba"; on gender see the work of U.S.A. legal theorist C. Menkel-Meadow, "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change" (1989) 14 *Law & Social Inquiry* 289-319; on the need to address seriously notions of 'place' in legal scholarship, see "Wrestling with Law", *supra*, note 13.

²¹ Which is not to deny the existence of a rapidly growing and impressive secondary literature dealing with some or all of these topics. See, amongst others: G.B. Baker, "The Juvenile Advocate Society, 1821-1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class" [1985] 74 *Historical Papers, Canadian Historical Association*; G.B. Baker, "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator" in D.H. Flaherty, ed., *Essays in the History of Canadian Law* vol. 2 (Toronto: Osgoode

The present paper has the more modest objectives of sketching out the ways in which the Canadian Bar Association first moved towards the adoption of a "Code of Professional Ethics" and of outlining the contours of a debate amongst eminent lawyers as to the desirability of adopting any such code at all.

Society, 1983) 49; G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late Victorian Empire" (1985) 3 *Law and Hist. Rev.* 219; G.B. Baker, "So Elegant a Web': Providential Order and the Rule of Secular Law in Early Nineteenth Century Upper Canada" (1988) 38 *U.T.L.J.* 184; P. Romney, "From the Types Riot to the Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence, and the Rule of Law in Upper Canada" (1987) 79 *Ontario History* 113; P. Sibenik, *The Doorkeepers: The Governance of Territorial and Alberta Lawyers, 1885-1928* (M.A. Thesis, U. of Calgary, 1984) [hereinafter "Doorkeepers"]; P. Sibenik, "The Black Sheep': The Disciplining of Territorial and Alberta Lawyers, 1885-1928" (1988) 3 *Can. J. Law & Soc.* 109 [hereinafter "Black Sheep"]; C. Cole, "A Developmental Market: Competition and Professional Standards in the Ontario Legal Profession, 1881 - 1936" 6 *Canada-U.S. L.J.* 125 [hereinafter "Developmental Market"]; C. Cole, "A Hand to Shake the Tree of Knowledge': Legal Education in Ontario, 1871-1889" (1986) 17 *Interchange* [hereinafter "Legal Education in Ontario"]; C. Cole, "After the Crisis: Legal Education at Osgoode Hall, 1949-1957" *Proceedings of the Canadian Law in History Conference*, Vol. 3 (Ottawa: Department of Law, Carleton, 1987); C. Cole 'A Learned and Honourable Body': The Professionalization of the Ontario Bar, 1867-1929 (Ph.D. Thesis, University of Western Ontario, 1987) [hereinafter "Professionalization of the Ontario Bar"]; D. & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (Winnipeg: Peguis, 1972); L. Gibson, "A Brief History of the Law Society of Manitoba" in C. Harvey, ed., *The Law Society of Manitoba, 1877-1977* (Winnipeg: Peguis, 1977) 28; "Fiercest Debate", *supra*, note 16; J.P.S. McLaren, "The History of Legal Education in Common Law Canada" in *Legal Education in Canada*, *supra*, note 9 [hereinafter "History of Legal Education"]; J.P.S. McLaren, Book Review of *The Fiercest Debate: Cecil A. Wright, the Benchers and Legal Education in Ontario, 1923-1957* by C.I. Kyer & J.E. Bickenbach (1989) 68 *Can. Bar Rev.* 193; A. Watts, *History of the Legal Profession in British Columbia, 1869-1984* (Vancouver: Law Society of British Columbia, 1984); J. Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979); R.A. MacDonald, "Understanding Civil Law Scholarship in Quebec" (1985) 23 *Osgoode Hall L.J.* 573; R. St.J. MacDonald, "Maximilien Bibaud, 1823-1887: The Pioneer Teacher of International Law in Canada" (1988) 11 *Dalhousie L.J.* 721; D. Howes, "Property, God and Nature in the thought of Sir John Beverley Robinson" (1985) 30 *McGill L. J.* 365; D. Howes, "La domestication de la pense Juridique quebecoise/The Domestication of the Quebec Legal Mind" (1989) 13 *Anthropologie & Sociologie* 77; D. Howes, "The Origin and Demise of Legal Education in Quebec" (1989) 38 *U.N.B.L.J.* 127; D. Howes, "Dialogical Jurisprudence" in W.W. Pue & B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988); C. Wilton, ed., *Beyond the Law: Lawyers and Business in Canada 1830 to 1930* (Toronto: Osgoode Society, 1990); R. Willie, "These Legal Gentlemen': Becoming Prominent in Manitoba, 1870-1900 (Ph.D. Thesis, University of Alberta, 1989).

III. PROFESSIONAL ORGANIZATION

AS A PRELIMINARY MATTER HOWEVER it is crucial to understand that certain features relating to the organization and structure of Canadian legal professions in the first quarter of the twentieth Century produced lawyer's self-conceptions distinct from those which now prevail. The legal professions of the period had professional forms which differed in at least four essential respects from those which we take for granted today:²²

1) the idea of national professional organization was novel, the Canadian Bar Association only having become successfully established in 1915;²³

2) provincial law societies (by whatever name) generally lacked the powers now assumed to be essential to self-governance (and, hence, lacked the sine qua non of modern "professionalism");

3) forms of professional education and qualification were relatively loose, varying widely from province to province;²⁴

4) the idea of a unified profession had not yet fully taken hold. Formal distinctions between barrister and solicitor mattered in the common law provinces, just as that between avocat and notaire mattered (and matters) in Quebec.

²² Generally useful sources on these matters include: W.R. Riddell, *The Legal Profession in Upper Canada in its early Periods* (Toronto: Law Society of Upper Canada, 1916); W.R. Riddell, "Women as Practitioners of Law" (1918) 18 J. Compar. Legislation 200; W.R. Riddell, *The Bar and Courts of the Province of Upper Canada or Ontario* (Toronto: MacMillan, 1928) [hereinafter *Bar and Courts*]; "Doorkeepers", *supra*, note 21; "Black Sheep", *supra*, note 21; "A Developmental Market", *supra*, note 21; "Legal Education in Ontario", *supra*, note 21; "Professionalization of the Ontario Bar", *supra*, note 21.

²³ There was, of course, an abortive effort to launch a Canadian Bar Association in the 1890's. See P. Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia, 1850-1910", above.

²⁴ See: A.Z. Reed, *Bulletin 15: Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with some account of conditions in England and Canada* (New York: Carnegie Foundation, 1921); A.Z. Reed, *Bulletin 21: Present-Day Law Schools in the United States and Canada* (New York: Carnegie Foundation, 1928); "History of Legal Education", *supra*, note 21.

Even a brief description of these features is beyond the ambit of this article. For present purposes however two points in particular merit further exploration: the absence of full powers of professional self-governance and the formal division of the legal professions (outside of Quebec) into barrister's and solicitor's branches.

IV. SELF-GOVERNANCE

TAKING FIRST THE MATTER OF PROFESSIONAL GOVERNANCE, it is important to note that while professional organization in Canada can lay claim to a relatively ancient lineage,²⁵ it has only been in the last sixty or seventy years that full privileges of self-governance have been conferred upon law societies by the various provincial governments. In all cases Canadian professional organizations bore some resemblance to the English bar, with the important qualification that their powers originated in "statute instead of by prescriptive right."²⁶

In Ontario, for example, the Benchers of the Law Society had long exercised powers of suspension or disbarment of barristers and had, since 1876, had the right to discipline members of the Attorney's branch of the profession. It was only in 1880, however, that legislation was passed unequivocally empowering the Benchers to suspend, disbar, expel (or, in the case of Attornies, move to strike) barristers, attorneys, or clerks guilty of "professional misconduct or of conduct unbecoming...."²⁷ Even this stopped far short of conferring full-fledged disciplinary powers. In 1919 Mr. Justice Riddell of the Supreme Court of Ontario indicated that while the law society in that province had "ample power to disbar in a proper case" in fact "the power has been exercised only in the case of a crime." Any attempt to

²⁵ The Law Society of Upper Canada is arguably the longest standing professional organization of lawyers in the common law world, tracing its origins to 1797: *The Bar and the Courts*, vol. 1, *supra*, note 22 at 47-89 [to characterize the LSUC thus depends, of course, on how one interprets the variegated history of the English Inns of Court. See: B. Abel-Smith & R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965* (London: Heinemann, 1967); "Rethinking Professionalism", *supra*, note 10].

²⁶ *Bulletin 15*, *supra*, note 24 at 26. This is an important point worthy of note for it makes complete nonsense of any argument to the effect that fundamental democratic traditions render it important that the legal profession be immune from political governance. Whatever the merit of such arguments in the United Kingdom, the legal professions in Canada are, in their origins, entirely creatures of the state.

²⁷ *The Bar and Courts*, vol. 1, *supra*, note 22 at 112.

develop a code of ethics which would have penal consequences attached would, he thought, be clearly ultra vires the law society as then constituted.²⁸

Manitoba Chief Justice T.G. Mathers²⁹ noted in 1920 that, in the country as a whole, "there are no agencies clothed with express authority to punish breaches of an ethical code, adopted for the whole Dominion. The incorporated Law Associations in the several provinces possess by statute certain control over their members but the disciplinary power of their Associations is by no means uniform."³⁰ In Quebec the Bar Council had extensive disciplinary powers.³¹ In Manitoba, New Brunswick, and Nova Scotia, the disciplinary powers of the Benchers were similar to those of the governing body of the Law Society in Ontario,³² while in Saskatchewan and Alberta disciplinary powers were "possessed by the Superior Courts or the Judges

²⁸ W.R. Riddell, "A Code of Legal Ethics" (1919) 4 Reports of the Can. Bar Assn. 136 at 139; An analogous pattern of professional discipline appeared in matters relating to the English Bar during the nineteenth Century. See "Moral Panic", *supra*, note 12.

²⁹ Appointed to the Manitoba bench in 1905, Mathers developed an excellent reputation as a trial judge and was elevated to the position of Chief Justice of the Court of Kings Bench in 1910. He chaired the 1915 provincial enquiry into the construction of the Winnipeg Law Courts and the Legislative Building and a 1919 federal royal commission into the circumstances surrounding the Winnipeg General Strike. He played a leading role, with E.K. Williams, in the development of the Canadian Bar Association's Canons of Legal Ethics (adopted in 1920). Said to be a man of "uncompromising sternness," he died in 1927. See *Substantial Justice, supra*, note 21 at 198, 201, 222-223, 236, 239, 251.

³⁰ Mathers, C.J.M., *Legal Ethics* (Address to the Manitoba Bar Association, 19 May 1920) [Archive of Western Canadian Legal History, Acc. No. 49.A222] at 5. This paper was also presented at the 1920 meeting of the Canadian Bar Association: (1920) 5 Proceedings of the Can. Bar Assn., 268.

³¹ *Ibid.*; "Report of the Committee of the Province of Quebec on Professional Ethics," (1919) 4 Reports of the Can. Bar Assn. 132.

³² D. & L. Gibson, in *Substantial Justice, supra*, note 21 at 252, indicate: "The Manitoba Law Society's disciplinary powers were significantly strengthened in 1926 by an amendment authorizing the benchers to suspend or disbar members of the profession without prior judicial intervention. Previously, the benchers had been compelled to apply to a King's Bench judge if they wanted a lawyer suspended or disbarred; now they could do so on their own authority, subject only to an appeal to the Court of Appeal."

thereof.”³³ In Prince Edward Island no disciplinary power existed other than that which lay within the inherent power of the Courts. In provinces where the law society did possess disciplinary powers the Court of King’s Bench generally retained co-extensive authority as well as being authorized to hear appeals from suspended or disbarred lawyers. The Benchers in British Columbia enjoyed wide disciplinary powers subject only to appeal to the Supreme Court Judges as Visitors.³⁴

V. ONE PROFESSION OR TWO?

IT HAS BEEN COMMON TO ASSUME that the formal distinction of barrister from solicitor, though still retained in name, has long been a dead-letter in the common law provinces. Certainly, this is the dominant impression left in the works of William Renwick Riddell. In 1921, the U.S.A. observer, Alfred Reed, concluded that “[t]he distinction between the two branches ... is little more than nominal.”³⁵ In certain respects however the distinction continued to form an important part of the way in which Canadian lawyers thought about their profession. In each of the common law provinces, except Alberta and Saskatchewan, it was possible for an individual to be either a barrister or a solicitor or both at her/his choice. Even in the two excepted provinces the distinct professions were recognized in name, every lawyer being admitted as both barrister and solicitor. While most lawyers across the country chose to be admitted to both branches of the legal profession simultaneously this was not necessarily the case. Canadian lawyers were, after the Great War, acutely aware that

³³ In 1921 Alberta began a long drawn out process of transferring disciplinary power from the courts to the Law Society, in part in response to a provincial Attorney-General’s Department memorandum indicating that, absent active Law Society policing of its members, “the people will probably take the matter into their own hands and may possibly do some damage.” [as quoted in “Doorkeepers”, *supra*, note 21 at 149.] Grounds for suspension, or disbarment and striking from the rolls, in the early years included defalcation, criminal conviction, breach of legislation governing the professional activities of lawyers, any activity for which the English superior courts could strike a solicitor, “professional misconduct,” and “conduct unbecoming an advocate”: see “Doorkeepers”, *supra* at 145-147.] See also “Black Sheep”, *supra*, note 21.

³⁴ Mathers, *supra*, note 30 at 5-6. For a very useful discussion of the course of professional development in Alberta see “Doorkeepers”, *supra*, note 21; “Black Sheep”, *supra*, note 21.

³⁵ *Bulletin 15*, *supra*, note 24 at 26.

"the legal profession in Canada is made up of two distinct professions, with different duties, different responsibilities and liabilities, different history and traditions and subject to different rules."³⁶

VI. VISIONS OF PROFESSIONALISM

THE DEVELOPMENT OF A CODE OF PROFESSIONAL ETHICS by Canadian lawyers was strongly influenced by visions of professionalism adhered to by the hegemonic fraction of the profession during this formative period. While the earliest efforts to develop a code arose in Ontario,³⁷ Alberta,³⁸ and Saskatchewan,³⁹ the Canadian Bar Association provided leadership in the field from its effective date of origin in 1915.

The image which these Canadian lawyers wished to cultivate was of a learned body of men (sic) trusted by the public, caring more for the advancement of the public good than for private gain, and drawing on hallowed professional traditions to withstand the temptations of filthy lucre! Thus, in his 1915 Presidential address to the Canadian Bar Association Sir James Aikins⁴⁰ claimed that "[f]aithful and

³⁶ Mather, *supra*, note 30 at 6. For a comparative discussion, see: J.R.S. Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (Sydney: The Law Book Co., 1979).

³⁷ W.J. McWhinney, K.C., "Ontario Bar Association" (1916) 52 Can. L.J. 1 at 4.

³⁸ Under the leadership of Dr. James Muir, who drafted the earliest code of legal ethics intended for adoption by the governing body of any Canadian legal profession. Muir was then President of the Law Society of Alberta. The Alberta draft code is reproduced as "Suggested Canons of Ethics Prepared by James Muir, K.C., LL.D., President of the Law Society of Alberta" (1919) 4 Reports of the Can. Bar Assn. 133.

³⁹ "Report of the Committee on Legal Ethics", *supra*, note 2.

⁴⁰ President of the Canadian Bar Association from 1915 until his death in 1929; Lieutenant-Governor of Manitoba from 1916. He has been described as follows: "A humourless man, of Methodist persuasion and consuming ambition, he almost invariably put business before pleasure, and found little time to develop close personal relationships. Although capable of impulsive generosity, he had a reputation for niggardliness. Nevertheless, there were few in the profession who would deny that he had been an uncommonly competent lawyer, or that he had devoted as much of his talent and energy to the interests of his province and his profession as to the amassing of personal wealth. Sir James Aikin's record of public service, as a bencher for fully fifty years (during which time he served as secretary, treasurer and president of the Law Society), as founder, long-time president, and generous patron of the Can. Bar Assn., and as Lieutenant-Governor of Manitoba, has few parallels." He also served as President of the

efficient service has been and is a characteristic of our profession" and that lawyers were "certified to the people" as being of superior learning and "as worthy to be trusted, counsellors of persons in any occupation or in positions of authority."⁴¹ The key feature which distinguished the profession of law from a mere "craft"⁴² was, for Aikins, the professional's principled rejection of the profit motive:

Few indeed have spent energy and time and money in the preparation for admission to the legal profession and have entered it with the primary object of thereby making money. Those who have done so have shewn at the outset lack of judgment and good taste, both essentials of true professional success. It is not a calling or instrumentality suited to that purpose as is the business of the merchant, manufacturer or miner.⁴³

Despite this claim of faithful adherence to supposed anti-commercial traditions, Aikins was careful to avoid portraying the profession as standing aloof from the concerns of ordinary people. His ideal lawyer was a useful "man" of the world who exhibited pristine personal ethics even while engaged in "vigorous participation in affairs" and the "robust work of the world." "He" was to be a practical individual whose function and role could be justified on the starkly utilitarian terms required of an early twentieth Century North American democracy while simultaneously embodying the contrary ideas of professional distance and public service. All things to all persons, the lawyer was portrayed as faithfully serving private interest while respecting public good, integrating the demands of individual liberty with the impulses of democracy, working actively in commerce while resisting the taint of commercialization, serving at once "the people," commerce, and the state while remaining untarnished by overly-close identification with any of these. Canadian lawyers were to embody the

Conference of Commissioners on Uniformity of Legislation in Canada from its origins in 1918 through 1923. [*Substantial Justice, supra*, note 21 at 252, 255-256.] An important study of Aikin's legal career is D. & L. Gibson, "Sir James Aikins: Law and Politics in Manitoba, 1880s-1920s" (Paper presented at "Law for the Elephant/Law for the Beaver: Transboundary Conference on the Legal History of the West and North-West of North America," University of Victoria, February 1991).

⁴¹ Sir James Aikins, "The Advancement of the Science of Jurisprudence in Canada" 51 *Can. L.J.* 161 at 162.

⁴² *Ibid.* at 165.

⁴³ *Ibid.* at 162-163. Aikins was, by this time, a self-made millionaire - with the help of his father's influence.

best traditions of the Bar but avoid the charge of anachronism which had long stigmatized English barristers.⁴⁴

Such themes recur time and again in the writings and speeches of Canadian lawyers during the half-decade beginning in 1915. Generally, these reflect an awareness that legal professionals in an evolving democratic state needed to actively justify their special privileges, roles, and incomes in innovative ways. Their justifications routinely emphasized learning, usefulness,⁴⁵ dedication to public service, and the purportedly superior moral sensibilities of lawyers. E. F. B. Johnson, K.C., for example, took pains during an address to the Canadian Bar Association in 1915 to stress the importance of lawyers in their local communities, in business and in politics,⁴⁶ while W. J. McWhinney, K.C., used his Presidential Address to the Ontario Bar Association the following year to express great pride in the purported usefulness of lawyers to the age of commerce:

This is a business age, and business exigencies prevail, and in the main our Judges and lawyers are business men as distinguished from legal technical controversialists, and are expected to know and apply business principles in preference to merely establishing precedents.⁴⁷

⁴⁴ *Ibid.* at 163-164: "Time was when the lawyer was regarded as aloof from the practical affairs of the world, as the learned and dignified aristocrat of society who did not concern himself with the daily duties of common life of the struggle of the people to improve their condition. Now, in our democratic country the members of the profession are not only with the people, but of the people, working among men, advising in their personal affairs, sympathising in their efforts, guiding in their business, aiding in their social movements for reform, taking share in all the departments of public government, yet, withal, maintaining the professional ideals of the past, their intellectual attainments, dignity, strength of honour and independence of character, which will not cringe before courts or be carried away by popular emotions or a hostile press."

C. Berger, in *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867-1914* (Toronto: University of Toronto Press, 1970), indicates that the sense Canadians could lead the Empire by melding British tradition with the 'genius' of a new, northern people was pervasive among early twentieth Century English-Canadian elites.

⁴⁵ Utilitarian notions such as usefulness to the business community and practical learning were powerfully employed by English attorneys of the 1850's in their conflicts with the Barrister's profession. See "Guild Training", *supra*, note 12.

⁴⁶ E.F.B. Johnson, K.C., "The Honour of the Profession" (1915) 51 Can. L.J. 178 at 178-179.

⁴⁷ "Ontario Bar Association", *supra*, note 37 at 6.

In an extraordinary address to the Canadian Bar Association in 1919 Sir James Aikins developed a fully-fledged theory of professionalism emphasizing the "usefulness" of lawyers in the pursuit of social well-being. Therefore, he argued, a professional monopoly on the provision of "legal" services (something Canadian lawyers had not yet fully secured) was fully justified, legal education should be rendered more exclusive, professional fees should be high, and, importantly, a developed notion of "professionalism" should be enforced by the guild.

Asserting that "the first duty" of the lawyer was to the state,⁴⁸ Aikins continued:

It is a false notion of democracy that the right to practice law should be free for all, that anyone can practice it, and without serious loss to the public, operate or help to operate the expensive and intricate machinery of justice which the State creates for its safety and well-being. The administration of justice has always touched the nadir of its decline when the profession has been lowest in morals and least educated. In such times there is seen a tendency on the part of practitioners to regard the work of the Bar as a trade and not a profession, a thing to be bartered and not a national service to be sought after; then also is found the pettifogger, the ambulance chaser, the fabricator of evidence and the trickster, and the man who is alien to the professional spirit and its traditions, destitute of gentlemanly instincts, disrespectful to his seniors, and a slanderer of Judges.⁴⁹

Given the important social interests involved in the practice of law, Aikins proceeded to argue that lawyers need to be highly educated. Of course, the well educated deserved "adequate rewards for meritorious services" and, hence, "Standard Solicitor's Tariffs" were necessary.⁵⁰ The object, for Aikins, was to "create a higher type of barrister and advocate, well skilled in the law, gentlemanly in conduct, kindly disposed to his fellow practitioners and of a public spirit." Frequent meetings of the members of each of the provincial bars would, he thought, tend to foster this sort of professionalism. He concluded therefore that "[n]one can commend too highly the official law and Bar societies, those bulwarks protecting the people against incompetent

⁴⁸ This stands in strong contrast to both British and United States of America traditions which conceive of the legal profession as a shield protecting citizens from the State.

⁴⁹ "The Legal Profession in Relation to Ethics, Education and Emolument" (1919) 55 Can. L.J. 335 at 335 (Presidential address to the Winnipeg meeting, CBA).

⁵⁰ *Ibid.* at 336.

and unscrupulous men posing as lawyers, and thus guarding the honour of the profession."⁵¹

The linkage of State, ethics, education, fees, elimination of "unauthorized" practice, enhancement of professional monopoly, and advance of the "public interest" forms a logical whole in Aikin's speech. In the immediate post-war period then, the Canadian Bar Association was actively and self-consciously engaged in a deliberate "professionalization project" of the sort sociologists and historians of the legal profession have identified *ex post facto* in other places and at other times.⁵²

It is also apparent from Aikins' 1919 speech that the context was one in which professional privileges were under assault.⁵³ The development of a code of professional ethics, the call for a bolstering of professional socialization, and the plea for extended professional education were all proffered as means to improve the service of lawyers and, simultaneously, to provide public legitimation for a profession which wished to fix minimum fee levels and to better secure

⁵¹ *Ibid.* at 338.

⁵² R.L. Abel, "Comparative Sociology of Legal Professions: an Exploratory Essay," (1985) *American Bar Foundation Research Journal* 1. R.L. Abel, Book Review of *The Rise of Professionalism* by M.S. Larson (1976) 6 *Brit. J. Law & Soc.* 82. M.S. Larson, *The Rise of Professionalism* (Berkeley: U. Cal. Press, 1979). R.L. Abel, *The Legal Profession in England and Wales* (Oxford: B.H. Blackwell, 1988); R.L. Abel & P. Lewis, eds., *Lawyers in Society: The Common Law World* (Berkeley: U. Cal. Press, 1988); R.L. Abel, *American Lawyers* (New York: Oxford University Press, 1989); R.L. Abel & P. Lewis, eds., *Lawyers in Society*, vol. 3 (Berkeley: U. Cal. Press, 1989); K. Economides, Book Review of *The Legal Profession in England and Wales* by R.L. Abel (1988) 15 *Journal of L. & Socy.* 319. Richard Abel's overall contribution to studies of the legal profession is reviewed at length in W.W. Pue, "Trajectories of Professionalism: Legal Professionalism after Abel" (1990) 19 *Man. L.J.* 383.

⁵³ As a point of comparison, it is worthy of note that the American Bar Association "Canons of Ethics", which were reproduced in (1918) 4 *Reports of the Can. Bar Assn.* 220 at 220, include the following as a preamble: "In America, where the stability of courts and of all departments of government rests with the approval of the people, it is peculiarly essential that the system of establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."

a state-created monopoly for themselves.⁵⁴ Winnipeg, which produced the great general strike of 1919, also produced, in Aikins, a President of the Canadian Bar Association who feared that, through a "false notion of democracy," the "intricate machinery of justice which the State creates for its safety and well-being" might fall into the hands of the general public. Faced with the burgeoning enthusiasm for democratic reform which characterized post - World War I Canada, the United States experience of radical democratization of legal professions under Jacksonian democracy was not a model Canadian lawyers wished to emulate.

VII. THE SPECTRE: UNPROFESSIONAL ACTIVITY

THESE, THEN, WERE THE ELEMENTS of "professionalism" which danced in the heads of elite Canadian lawyers in the first years of the Canadian Bar Association. Full colour can only be given to their concerns by reference to the specific sorts of "unprofessional conduct" which caused them distress.

What appears when these are probed is an unpleasant admixture of nativism, disdain for the "commercialized" practices of non-elite practitioners, the sort of class bias which refuses to recognize as legitimate the legal claims of working people, and a vision of rule of law more oriented towards paternalism than the empowerment of the citizenry.⁵⁵

⁵⁴ The extent of this concern is demonstrated by an article from *Law Notes*, reproduced in "Unauthorised Practice of Law" (1919) 55 *Can. L. J.* 375 and introduced as follows: "This Journal has always taken the ground and frequently referred to the wrongs suffered by the legal profession at the hands of the host of unlicensed practitioners and conveyancers. No remedy has been found, or rather none seems possible when many of our Provincial legislators are the robbers or are in various ways in alliance with them." The article reproduced from the U.S. journal proceeded to protest the massive volume of real estate transactions documented by non-lawyers.

⁵⁵ On this theme see generally the Baker-Romney debate regarding the notion of "rule of law" prevalent in nineteenth Century Upper Canada. G.B. Baker, "The Juvenile Advocate Society, 1821-1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class" [1985] *Historical Papers*, Canadian Historical Association 74; P. Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture" (1989) 7 *Law & History Review* 121; P. Romney, "From the Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism" in *Historical Papers* (Windsor: Canadian Historical Association, 1988) 86; P. Romney, "From the Types Riot to the Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence, and the Rule of Law in Upper Canada" (1987) 79 *Ontario History* 113; G.B. Baker, "'So Elegant a Web': Providential Order and the

It has been routinely observed that elite legal practitioners and non-elite lawyers represent different clienteles, engage in different sorts of legal work, and come by their business in quite different ways. This is so much so that Heinz and Laumann's celebrated study of the Chicago Bar concludes with the suggestion that legal practice is rent into two hemispheres with few points of contact.⁵⁶ Auerbach's initiatory and productive study of the New York bar has eloquently demonstrated that nominally anti-commercial "professional ethics" can line the pockets of elite practitioners while advancing the interests of their clients and simultaneously depriving less well-established attorneys of both the income and clientele which might be developed from advertising, fee competition (denigrated as "ambulance chasing"), contingency fees, and other such commercialized practices.⁵⁷ Broadly similar patterns emerged in nineteenth Century England.⁵⁸

Certainly for Sir James Aikins it was a matter of principle that legal practice should not be "prostituted" for the crass purpose of making money. As the Canadian Bar Association began work on the development of an ethical code in 1915 he warned Canadian lawyers off these shoals:

Persons who have thus sought to commercialize it (i.e. the practice of law), to prostitute it to such an end in itself (i.e. making money) have lowered the professional tone and so lost the respect and esteem of their fellow-practitioners and of the people. They take no interest in the advancement of our profession and do not possess its spirit.⁵⁹

To similar effect, E.F.B. Johnson cautioned Canadian Bar Association members that "one of the most dangerous causes at work affecting the reputation of our Profession is the scheming for business" and went on to make abundantly clear that the real problem with

Rule of Secular Law in Early Nineteenth Century Upper Canada" (1988) 38 U.T.L.J. 184.

⁵⁶ J.P. Heinz & E.O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation, 1982).

⁵⁷ *Unequal Justice*, *supra*, note 14, esp. at 42 ff.

⁵⁸ See "Professional Demons", *supra*, note 12; "Rebels", *supra*, note 12; "Moral Panic", *supra*, note 12. For a more recent United Kingdom comparison see Z. Bankowski & G. Mungham, *Images of Law* (London: Routledge Kegan Paul, 1976), especially c.3, "Up Against the Law".

⁵⁹ Aikins, "The Advancement of the Science of Jurisprudence in Canada", *supra*, note 41 at 162-163.

commercialized legal practice was that it permitted injured workers, the poor, maimed and injured, to recover damages from business enterprises!

In most places particularly where there are large factories, electric railways and similar undertakings, involving great personal risk, there are always a certain number of lawyers who appear on the scene in company with the ambulance or the coroner. Men, not lawyers, have to my knowledge been employed by legal vultures, and have received a commission on bringing in the body dead or alive. Retainers are promptly obtained, and actions are brought again and again, on purely speculative grounds. Relying on the sympathy of a jury, defendants are put to heavy costs, with no chance of getting a dollar from the plaintiff, and with many chances in favour of a substantial verdict against them, particularly in actions against large corporations.... [there is then a discussion of Ontario legislation establishing Worker's compensation and requiring trial by judge alone under the Ontario Municipal Act]... If we could have continued the old experience of thirty or forty years ago with lawyers above suspicion, the jury system would still remain as it was intended to be - a bulwark against wrong-doing, and a tower of strength in the administration of justice. The soliciting of business in the manner I have indicated should disqualify any lawyer from ever practising again. And so with speculative litigation. Nothing is so destructive to the reputation of the solicitor, or to the legal profession generally, as the promoting and carrying on of cases on a purely speculative basis. It is unjust to the client, most dangerous to the community and absolutely demoralizing to our whole system of jurisprudence.⁶⁰

There is little sense here that access to justice should be of concern to the legal profession, that the poor as well as the rich should be entitled to their day in court, that lawsuits to rectify injustice might be desirable, or that the rule of law should benefit even the humblest of citizens.

Indeed, the vision of "rule of law" which was subscribed to by many elite Canadian lawyers in the first quarter of the twentieth century was a distinctly paternalistic one. While historians such as E.P. Thompson and Greg Marquis have drawn attention to the ways in which subordinate groups in society have traditionally appealed to notions of "equality before the law" as sword and shield,⁶¹ there is

⁶⁰ "The Honour of the Profession", *supra*, note 46 at 184. Compare "Ontario Bar Association", *supra*, note 37 at 6: "The successful lawyer of to-day keeps his clients out of court unless the stake is worth while and the merits on his side. The speculator litigant as well as the legal ambulance chaser are few and much discouraged."

⁶¹ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975). For critiques of his "rule of law" thesis see: M.J. Horwitz, "The Rule of Law: An Unqualified Human Good?" (1977) 86 Yale L.J. 561; A. Merritt, "The Nature and Function of Law" (1980) 7 Brit. J.L. & Soc. 194. See also G. Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography" in *Canadian Perspectives on Law and Society*, *supra*, note 21.

little sense of committed service to the client or of respect for client autonomy in the writings of Canadian lawyers at this time. One observer argued that it was improper for a lawyer to work for the acquittal of one known to be guilty of an offence, taking the opportunity to pass comment critical of contingency fees.⁶² Johnson argued that lawyers should maintain an impersonal, distanced position vis-a-vis their (subject) clients, declining to fight full-out on behalf of clients of whom they disapproved.⁶³

Ominously, the Canadian Bar Association committee on legal ethics hinted in its 1919 Report that the practice of law might be falling into the wrong hands as young men who were not of Anglo-American origin entered into practice.

In view of the changed and changing conditions of this country, and the large number of students now admitted to practice, many of whom come from various countries whose traditions and surroundings have not been similar to those of our own and the Motherland, the time may be considered as having arrived when it is necessary to reduce to writing for the information of members of the Bar and the guidance of our law students some of the most important general principles governing the conduct of the profession towards the Bench, the public, and their clients, setting forth among other things the ideals and standards of the profession, its honour, dignity and traditions ...⁶⁴

So-called "ethnic" Canadians could not be fully trusted.

To emphasize these, perhaps unseemly, motivations for the adoption of ethical codes by Canadian lawyers is, however, to present a partial impression only and produces a distorted understanding of the period. Also of great importance, no doubt, were the model of the American Bar Association (which had adopted a code of professional

⁶² "Professional Ethics" (1910) 46 Can. L.J. 531.

⁶³ "The Honour of the Profession", *supra*, note 46.

⁶⁴ "Report of the Committee on Legal Ethics" (1919) 55 Can. L.J. 294-297 at 296-297. This comment is made just as the children of the first great waves of east European immigration to the prairie west would have been establishing their careers and at the height of a post-war xenophobia. For an intriguing general account of immigration and culture in the prairie west see G. Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987), c.11 "Immigrant communities 1870-1940: The struggle for cultural survival" 242. A full study of the ethnic demography of the profession remains to be undertaken. An account of the increasing ethnic tensions that characterized Winnipeg in the period leading up to the 1919 general strike is to be found in D. Avery, "The Radical Alien and the Winnipeg General Strike of 1919" in C. Berger & R. Cook, eds., *The West and the Nation: Essays in Honour of W.L. Morton* (Toronto: McClelland & Stewart, 1976) 209-231.

conduct in 1908), the idealism of war-time and immediate post-war Canada, and genuinely-held commitment on the part of many lawyers to developing a "morality of aspiration." All of this was intermingled in varying degrees with a nostalgic and inchoate sense that valued traditions were slipping away with the era of kings, queens and principalities which had closed in August 1914.

VIII. DEVELOPING THE CODE

ALL OF THESE MOTIVATIONS AND CONCERNS found expression in the "Report of the Committee on Legal Ethics" to the Canadian Bar Association in 1919.⁶⁵ Noting that previous efforts had been taken in this direction in the U.S.A. and in several Canadian provinces (efforts in Saskatchewan and Alberta and an abortive effort in Ontario), the Committee called upon the President to appoint a Select Committee "to prepare such a statement of the principles of legal ethics as has been suggested in this report, using amongst other data the code of the American Bar Association supplemented by the draft code prepared for the Law Society of Alberta, as well as a similar code prepared some years ago and adopted by the Ontario Bar Association...." and to report to the next meeting of the Canadian Bar Association.⁶⁶ Also at the 1919 Canadian Bar Association meetings Dr. James Muir of Alberta presented his draft "Canons of Ethics" for consideration,⁶⁷ the Quebec Committee on Legal Ethics reported, encouraging "the adoption by all the provinces of Canada of the best means" to establish and maintain the "highest standards of professional ethics,"⁶⁸ and the distinguished Ontario jurist, William Renwick Riddell delivered an address on the topic of "A Code of Legal Ethics."⁶⁹

⁶⁵ "Report of the Committee on Legal Ethics", *supra*, note 2.

⁶⁶ *Ibid.* at 131.

⁶⁷ "Suggested Canons of Ethics", *supra*, note 39.

⁶⁸ "Report of the Committee of the Province of Quebec on Professional Ethics", *supra*, note 31.

⁶⁹ "A Code of Legal Ethics", *supra*, note 28.

IX. RESISTANCE

RIDDELL'S CONTRIBUTION TO THE DISCUSSIONS of legal ethics is worthy of particular attention in that it represents a lonely voice raised against the idea of developing enforceable codes of ethics at a time when the notion was sweeping over the upper echelons of the Canadian legal profession like a prairie fire. Whereas Christopher Robinson, K.C., had earlier dissuaded Ontario lawyers from following this course with the argument "that legal ethics could not be taught in that way, that it was merely a matter of mental and moral education, and not one that could be reached by the adoption of formal rules,"⁷⁰ in 1919 Mr. Justice Riddell's objections failed to persuade his audience. Those objections are worthy of note however precisely because they are representative of a dying vision of professionalism. Articulated in the face of a powerful counter-ideology of professionalism which by 1919 amounted to a new sort of "common sense" for elite lawyers, Riddell's views reveal much about the developing character of professionalism.

They are interesting for other reasons also. A Supreme Court judge, he had long been actively involved in providing instruction in professional ethics at the law school in Toronto.⁷¹ Moreover, as the preeminent historian of the Ontario legal profession, he was well aware of its customs, traditions, and corporate values. Intriguingly, Riddell conducted a survey of "the Chiefs of Bench and Bar" (not the solicitors' profession) in England, Ireland, and Scotland in the course of preparing his remarks, thus providing us with a "snap-shot" impression of dominant values amongst lawyers in the British Isles over and above his own cogent arguments against the Canadian adoption of a written code of legal ethics. The leaders of the British professions all opposed in principle the development of a written code of professional ethics (see Appendix).

Mr. Justice Riddell disapproved such a code for six reasons. These related to Canadian constitutionalism, existing legislated limits of "self-regulation," the limited value of a merely hortative code, the danger of developing an "artificial conscience," the fear that prohibitions strictly construed would lead to an erosion of ethical standards, and the impossibility of precision.

⁷⁰ "Report of the Committee on Legal Ethics", *supra*, note 2 at 130.

⁷¹ Along with Hamilton Cassels, Edwin Bell, and others: "Report of the Committee on Legal Ethics", *supra*, note 2 at 130.

One of the strongest intellectual forces making the development of a written ethical code appear to be a logical and necessary next step in the evolution of their profession was the model of the United States. Riddell reported that "[m]ost of the Bar Associations of the various States of the Union have their formal Codes of Ethics" and that U.S.A. lawyers exhibited an "almost universal approval of the written Code."⁷² Recognizing that "the usages of trade and of society, the 'genius of the people'" in the United States were closer to those of Canadians than any other country,⁷³ he was acutely aware of the persuasive force of U.S.A. practices. Against this, Riddell mustered the traditions of the Anglo-Canadian legal professions, a number of specific arguments as regards the merits of the course proposed, and an explanation for the mass psychosis which had apparently taken grip amongst U.S.A. lawyers. The "American mind," he asserted, sometimes deviated from Common Sense as a result of peculiar habits of thinking. While the U.S.A. legal professions had, in many instances adopted the view that codes of professional conduct were desirable, Riddell attributed this to a sort of juridical conditioning: "in many instances that view is due in no slight degree to the fact that the United States and the separate States have all a written Constitution. The mind of the American lawyer naturally and instinctively inclines to written formulation of all precepts, all rules, all principles." Canada, of course, subscribed to "indefinite and indefinitely formulated principles upon which a British people should be governed."⁷⁴ Canadian lawyers should, accordingly, decline to follow the U.S.A. infatuation with written codes when it came to their own governance.

More substantively he argued that the various Canadian law societies had neither inherent power nor jurisdiction conferred upon them by statute to act as legislator, police officer, and judge in the creation and enforcement of ethical codes: "If it were proposed to make the Code a Penal Code violation of which would render the offender liable to disbarment, legislation would be necessary, and many considerations would arise ... which to my mind would be fatal to the proposition."⁷⁵ Conversely, a merely hortative code, would be without benefit as being too "much like drawing up a Code of Etiquette to

⁷² "Suggested Canons of Ethics", *supra*, note 39 at 138.

⁷³ *Ibid.* at 137-138.

⁷⁴ *Ibid.* at 138.

⁷⁵ *Ibid.* at 139.

make a gentleman."⁷⁶ While lawyers should be encouraged, during their training and formal education, to behave as "liberal" and "learned" men and to aspire to the highest standard of conduct of a "scholar, gentleman, and Christian" that, Riddell said, was "the whole of the law and the prophets."⁷⁷

If a straightforward Code of Professional Conduct were to be developed imposing only this general duty it would be "superfluous, unnecessary."⁷⁸ Conversely, he argued that the precision aspired to by penal law was unattainable in the area of professional conduct. First, "any attempts to particularize would be dangerous";⁷⁹ this would inevitably lead practising lawyers to conclude that anything not expressly prohibited was allowed. Lawyers would likely give themselves the benefit of doubt in construing any case of ambiguity or omission, and "the dishonest lawyer's ingenuity will enable him to misconstrue language with some plausibility."⁸⁰ The broader the drafting of the code, the greater the danger of "fraud lurking in generalities";⁸¹ the more precise the drafting, the more a code might be used as a means to justify behaviour falling below the standards expected of a "scholar, gentleman, and Christian."⁸²

Riddell also identified what he termed the danger of "artificial conscience." This is the problem of assuming that conduct which literally violates a code prohibition "is morally wrong, however innocent it may be in fact."⁸³ Any code sufficiently precise to give concrete guidance to practitioners would necessarily require unethical

⁷⁶ *Ibid.* at 139. This view was apparently shared by Dr. Scott of Edmonton, whom Riddell credits in a note.

⁷⁷ *Ibid.* at 139.

⁷⁸ *Ibid.* at 140.

⁷⁹ *Ibid.* at 140.

⁸⁰ *Ibid.* at 141.

⁸¹ *Ibid.* at 141. Riddell expressed this concern with the Latin maxim *dolus latet in generalibus*.

⁸² Interestingly, Riddell pointed to corporate behaviour - considering themselves "justified in acting in any way not forbidden by the 'Companies Act'" - and U.S.A. constitutional practice as providing foundation for this fear: *ibid.* at 148-149 n. 5 & 6.

⁸³ *Ibid.* at 141.

behaviour whenever unusual circumstances produced a situation in which morality pointed in one direction while a specific rule pointed in quite another. In the hurly burly of practice, he pointed out, “[c]ircumstances are so different that what looks like oppression in the abstract case is plain dealing and good business in the concrete.”⁸⁴ Specific rules, whether developed as a matter of convenience⁸⁵ or simply reflecting generally appropriate behaviour in the ordinary run of cases cannot, by definition, do justice in extraordinary circumstances. The particular examples Riddell cited in support of this line of argument indicate that significant concerns relating to civil liberties and class justice arise whenever ethical codes are enforced by the organized legal profession. Enforcement of general rules of conduct might produce repression and social injustice in particular cases.

In order to illustrate the problems of “artificial conscience,” he pointed to four particular circumstances in which problems might arise. These related to:

- 1) A Bar Association canon to the effect that a lawyer appearing for a client in litigation undertook to the world at large that he (sic) believed the case to be a righteous cause.
- 2) A hypothetical situation in which a solicitor begins foreclosure proceedings for a 25¢ shortfall in mortgage payments.
- 3) The rule against Champerty.
- 4) The prohibition of contingent or conditional fees.

Each of Riddell’s illustrations raised issues relating to fundamental civil liberties, to the integrity of the legal system, or to the capacity of law to deliver on its oft-repeated promise of “equality before the law” for even the humblest of citizens.

Mr. Justice Riddell took strong exception to the rule of one Bar Association in the United States of America that a lawyer’s “appearance in Court should be deemed equivalent to an assertion on his honour that in his opinion his client’s case is one proper for judicial

⁸⁴ *Ibid.* at 141.

⁸⁵ *Ibid.* at 141: “It is well known that a statute against a particular course of conduct will inevitably bring about a state of public opinion that such conduct is morally wrong, however innocent it may in fact be.”

determination." Any such rule could, of course, have a chilling effect on the willingness of lawyers generally to represent unpopular clients, and to press the limits of law (good or bad) in court. It would require that lawyers become judges of their clients - judges who would hear no argument, would not give reasons for their decisions, who may be biased for undisclosed reasons, and whose decisions were made in secret and without the possibility of review. In criminal cases it would deprive accused persons of the hard-won constitutional right to be presumed innocent until proven guilty. Such a rule would likely cause disproportionate injury to the poor, political radicals, and those who are marginalized by reason of "race,"⁸⁶ religion, sexual orientation, or ethnicity. While Riddell did not address these wider consequences directly, he would have nothing of any such rule:

the client is entitled to the services of his lawyer to enforce any claim or defence which is not dishonest; the client is entitled to the full and candid opinion of his lawyer, but when that is given he is entitled to have his case put before the Court whatever may be the lawyer's opinion on the law. Neither Court nor client is at all concerned with the opinion of counsel - the client demands, the court enforces the law, as it is found to be - that is the duty of the Court, the right of the client.⁸⁷

With respect to his second illustration, Riddell pointed out that the behaviour of any solicitor in commencing foreclosure proceedings for a minuscule shortfall, "would be strongly animadverted upon by the Code builders." Particular circumstances might however render such action justifiable - indeed, praiseworthy. The example he provided involved a hypothetical situation in which a mortgagor had long engaged in petty dishonesty by a "long series of attempts to defraud his creditor out of small sums." In such circumstances, the apparently malicious foreclosure action becomes, he said, a matter of "simple self-defence."⁸⁸ Viewed in this light actions such as the "unethical" foreclosure are necessary if the integrity of a legal system is to be protected from the corrosive effects of petty dishonesty: professional "ethics" thus can threaten system integrity!

⁸⁶ The term "race" cannot be employed in an unproblematized fashion. See: A. Kobayashi, "Racism and Law in Canada: A Geographical Perspective" (1990) 11 *Urban Geography* 447; A. Kobayashi, "Viewpoint: A Geographical Perspective on Racism and the Law" (1991) 11 *Bulletin, Canadian Law and Society Association* 4.

⁸⁷ "Suggested Canons of Ethics", *supra*, note 39 at 140-141.

⁸⁸ *Ibid.* at 141.

The common law rule against champerty and related prohibitions on contingent or conditional fees were all treated by Riddell as being "in the same category" and raising similar issues.⁸⁹ A hypothetical situation might arise, he said, in which a poor person, unable to enforce a perfectly legitimate legal right because of costs, finds a solicitor willing to do the necessary legal work in return for a portion of the subject matter of litigation. Riddell observed that though "it may be good business and for the advantage in common of both parties, ... the Court says it is bad morals."⁹⁰ While acknowledging that any such arrangement was then illegal in Ontario he vigorously rejected the notion that an underlying ethical principle was at stake. Although it might be in the interest of the state that there be an end of lawsuits (*interest republicae ut sit finis litum*), "that does not mean that it would be for the advantage of people at large, that there should be no law suits - so long as injustice prevails a lawsuit to end an injustice is infinitely better - and, I add, infinitely more in harmony with the genius of our people - than passive submission to injustice."⁹¹ The class dimensions to the prohibitions on champerty, maintenance, and contingency fees - long noted by lawyers, historians, and legal scholars⁹² - were thus clearly appreciated by Mr. Justice Riddell. The grandiose promise of equality before the law rests on equality of access to legal services, and contingency fees are a powerful device in effecting equality of access to professional advice and representation. He acknowledged that different considerations might apply to the solicitor's and barrister's branches of the Canadian legal professions and that "there are reasons of prudence which may prevent the barrister from having anything to do with the subject-matter of litigation or with contingent fees." Nonetheless, Riddell insisted that even as regards barristers "the reasons are reasons of prudence and not of morals."⁹³

⁸⁹ *Ibid.* at 143.

⁹⁰ *Ibid.* at 142.

⁹¹ *Ibid.* at 142.

⁹² See: "Moral Panic", *supra*, note 12; "Professional Demons", *supra*, note 12; *Unequal Justice*, *supra*, note 14; R.L. Abel, "Why Does the A.B.A. Promulgate Ethical Rules?" (1980-81) 59 Texas L.R. 639.

⁹³ "Suggested Canons of Ethics", *supra*, note 39 at 149 n. 10.

X. CODIFICATION

DESPITE THESE CAUTIONS, the Canadian Bar Association approved a code of professional ethics the following year. Fully 1,000 copies of the Canons and related documents were quickly disseminated.⁹⁴ Copies were given to law students, and the new code rapidly became a component of legal education in many parts of the country - though only Alberta and Manitoba made instruction in professional ethics a significant part of the curriculum.⁹⁵ Between January and June, 1921 the Canadian Bar Association "Canons of Ethics" were adopted by provincial Law Societies in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario.⁹⁶ The Association's Committee on Legal Ethics indicated, in 1922, that "[t]he value of the disciplinary powers cannot be overestimated" and that enforcement of the ethical rules was best left to "the Disciplinary Committees of the governing bodies of the various Law Societies of the different provinces."⁹⁷ The momentum of those who favoured the adoption of such a code was unstoppable.

The Code itself was, in many particulars, responsive to the cautions, criticisms, and concerns of individuals such as Riddell.⁹⁸ Of the five short paragraphs in the preamble, the first three assert repeatedly that the specific duties outlined are not exhaustive of lawyer's ethical duties. Premised on the notion that lawyers are more than mere citizens because their status involves duties as "a minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honorable and learned profession,"⁹⁹ the Code then sets out duties "To the State" (4 canons), "To the Court" (4 canons), "To the

⁹⁴ "Report of the Committee on Legal Ethics" (1921) 6 Proceedings of the Can. Bar Assn. 238 at 238.

⁹⁵ *Ibid.*; "Report of the Committee on Legal Ethics" (1922) 7 Proceedings of the Can. Bar Assn. 256; "Report of the Committee on Legal Ethics" (1923) 8 Proceedings of the Can. Bar Assn.

⁹⁶ "Report of the Committee on Legal Ethics", *supra*, note 94.

⁹⁷ "Report of the Committee on Legal Ethics" (1922), *supra*, note 95.

⁹⁸ "Canons of Legal Ethics", (1920) 5 Proceedings of the Can. Bar Assn. 261.

⁹⁹ *Ibid.* at 261.

Client" (11 canons¹⁰⁰), "To His Fellow Lawyer" (4 canons) and "To Himself" (7 canons¹⁰¹). In light of concerns such as those raised by Riddell a lawyer's "right to undertake the defence of a person accused of crime, regardless of his own personal opinion" was preserved.¹⁰² Contingency fees and comparable arrangements, however, continued to be prohibited unless "by law expressly sanctioned."¹⁰³

The important issue for present purposes relates, however, not to the content of the 1920 Code¹⁰⁴ but rather to the question of how and why such a Code came about at all. Forceful arguments were mustered by opponents of codification, and the unanimous disapproval expressed by leaders of United Kingdom legal professions must have carried some weight with members of tradition-loving, anglophilic professionals in a loyal British Dominion. The total lack of indigenous Canadian traditions of ethical policing makes the powerful momentum of the codifiers all the more curious. Given all of these considerations, why did the movement towards codification prove to be an irresistible force?

In the present state of the literature no definitive answer can be provided. Nonetheless, certain hypotheses do present themselves. In part, the answer probably is found in the forcefulness of the personalities involved and in the politics of the early Canadian Bar Association. The efforts of individuals such as Sir James Aikins and Manitoba Chief Justice Mathers, the advocacy and hard work of individuals

¹⁰⁰ Four of which relate to permissible fee arrangements. Most of the rest more or less explicitly indicate that lawyers should not pursue their client's interests too aggressively!

¹⁰¹ Including a prohibition on advertising, a duty to eradicate "unprofessional" practitioners, and a duty to hinder persons thought to demonstrate moral or educational deficiencies from being admitted to the Bar.

¹⁰² It is interesting, however, that this left it open to the interpretation that lawyers working in civil litigation might be taken as acting unethically when advancing causes which were of questionable merit: *expressio unius exclusio alterius*. Elsewhere, the canons prohibited stirring up litigation - and especially in the area of personal injury claims. When it is recalled that some lawyers at least perceived litigation on behalf of injured workers to be highly improper, the class dimensions of this entire arrangement become intriguing.

¹⁰³ Given that they were never expressly sanctioned under Canadian law at the time, this exception represents a Pyrrhic victory at best for those who held out hope that such arrangements might bring about equality of access to legal services.

¹⁰⁴ For an analysis of the Code's provisions, see Mathers, "Legal Ethics", *supra*, note 30.

such as E.F.B. Johnston¹⁰⁵ and Dr. James Muir¹⁰⁶ was extraordinary. The persuasive influence of developments in the U.S.A. should not be underestimated, especially given longstanding contacts between leading Canadian lawyers and their U.S.A. counterparts.¹⁰⁷ Moreover, there was a significant indigenous history of movements in this direction notwithstanding powerful resistances. In particular it is noteworthy that virtually the entire leadership of the legal professions in the prairie west had long supported the development of a code of ethics.¹⁰⁸

More than personalities were involved. The very idea of what it means to be a "professional" lay at the core of the debates regarding "legal ethics" in early twentieth Century Canada. It is commonplace to observe that professional prerogatives and privileges tend to be questioned in times of ascendant populist politics. The rapidly changing social and economic conditions of Canada in the early twentieth Century, the ascendance of populism in Progressive and United Farmer politics (in an era when mass politics was given dramatic display in the Winnipeg General Strike¹⁰⁹) likely put pressures on the legal profession to justify itself to politicians and

¹⁰⁵ "The Honour of the Profession", *supra*, note 46.

¹⁰⁶ "Suggested Canons of Ethics", *supra*, note 38.

¹⁰⁷ See, e.g., "Address by Hon. William H. Taft on Legal Ethics," (1920) 5 Proceedings of the Can. Bar Assn. 265. The influential "Report of the Committee on Legal Ethics", *supra*, note 2 demonstrates a considerable tone of intellectual deference to U.S.A. leadership in this area. The A.B.A. 1908 "Canons" were reproduced in (1918) 3 Reports of the Can. Bar Assn. 220.

L. Gibson's forthcoming history of the Winnipeg law firm Aikins, MacAulay & Thorvaldson points out that Sir James Aikins maintained contacts with American Bar Association Officials at this time.

¹⁰⁸ For example, on April 15, 1908, a Winnipeg newspaper reported: "BENCH SCORES BARRISTER, Judge Mathers in Setting Aside the order For Substitution of Service's case of Czar v Proskouriakoff Pleads for Code of Professional Conduct", in Law Society of Manitoba Scrapbook, 25 November 1907 to 31 December 1908 (Manitoba Legal History Archives, Faculty of Law, University of Manitoba) 52.

¹⁰⁹ A useful overview of literature respecting the Winnipeg General Strike is provided in K. Kehler & A. Esau, "The Winnipeg General Strike Trials: Overview and Suggestions For Legal History Research" in K. Kehler & A. Esau, *Famous Manitoba Trials: The Winnipeg General Strike Trials - Research Source* (Winnipeg: Legal Research Institute, 1990) 1.

public in new ways.¹¹⁰ Riddell, like his British correspondents, advanced a notion of legal professionalism in which the trustworthiness of lawyers and their commitment to the collective good could be taken as granted. This was a paternalistic vision, a "tory touch". While deeply rooted in both professional tradition and Canadian political culture, it had become anachronistic by the end of the Great War.

The more rule-bound approach of the American Bar Association and of Canadian lawyers who advocated the adoption of professional codes of ethics reflected a recognition that old-style privileges and paternalistic rationales could not withstand emergent democratic urgings.¹¹¹ In place of generalized professional culture and "gentlemanly status" these reformers substituted more rigorous education, more thorough training, "moral screening" and ethical policing as legitimating devices. If populist politics demanded that professions make good on their claims of superior expertise and high standards of professional conduct, the reformers of the early Canadian Bar Association were prepared to respond - albeit on their own terms.

Viewed in this light, it is no surprise that the momentum in favour of codification of ethical standards developed most fully in the relatively fluid social structures of the prairie west, and were resisted most strongly in places where an established ethnic and class structure had congealed.¹¹² In no way however does this imply that the reforms within the legal profession were motivated by sympathy with populist politics. Rather these developments probably seemed a sensible way of justifying and ensuring the continuance of a beloved institution in a new era. They were likely conceived of as providing the minimum possible change in a comfortable status quo. Evidence to this effect is provided by repeated incantations that the democratic age and the special character of the new world required adaptation of traditional professions. Moreover, "ethical policing" carried with it significant repressive overtones: the definition of "the ideal lawyer," explicitly marginalized or excluded all "others" (non-elite lawyers) and,

¹¹⁰ See "Professionalization of the Ontario Bar", *supra*, note 21.

¹¹¹ For an intriguing comparative study, albeit one which is focussed more on the intellectual structure of "law", see D. Sugarman, "A Hatred of Disorder: Legal Science, Liberalism and Imperialism" in P. Fitzpatrick, ed., *Dangerous Supplements* (Pluto, 1991) 34.

¹¹² See R.L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960* (American Bar Foundation Working Paper Series 9014).

thereby, their clients.¹¹³ The opinion expressed by elite practitioners that lawyers representing working class clients were responsible for a decline of professionalism is one manifestation of such motivations. The express nativism of the 1919 Report on professional ethics is another. Indeed, thirty years after the first massive wave of European immigration to the prairie west it would not be surprising if so-called "ethnic" Canadians were attempting to enter the legal profession for the first time. Certainly, fear of the foreigner was rife.¹¹⁴

Ethnocentricity, elitism, class ideology, conservatism, defensiveness in the face of profound democratic urgings, blended with genuine commitment to the ideal of ethical legal practice. Mixed with a new "common sense" about professionalism imported from the United States of America, the transformation of the Canadian legal professions from loose guilds to disciplinary regimes had begun.

¹¹³ The process is perhaps analogous to the larger process by which the "Enlightenment project" constructs an (abstracted) "ideal citizen" as a device which excludes others from participation in social and political life. Useful discussions which touch on this theme include: "A Hatred of Disorder", *supra*, note 111; P. Fitzpatrick, "The Abstracts and Brief Chronicles of the Time: Supplementing Jurisprudence" in *Dangerous Supplements*, *supra*, note 111; P. Fitzpatrick, "The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment" in A. Carty, ed., *Post-Modern Law: Enlightenment, Revolution and the Death of Man* (Edinburgh: Edinburgh University Press, 1990) 90.

¹¹⁴ Useful discussions of immigration patterns and ethnic relations are to be found in D.J. Hall, "Clifford Sifton: Immigration and Settlement Policy, 1896-1905" in H.D. Palmer, ed., *The Settlement of the West* (Calgary: University of Calgary, 1977); H. Palmer, *Patterns of Prejudice: A History of Nativism in Alberta*, c.1, "Strangers and Stereotypes: The Rise of Nativism, 1880-1920" 17; *The Canadian Prairies: A History*, *supra*, note 64 at 344-55; 404-07; 447.

APPENDIX

1919 SURVEY OF BRITISH CHIEFS OF BENCH AND BAR RE:
CODES OF PROFESSIONAL ETHICS¹¹⁵

England

Lord Chancellor:

The Lord Chancellor simply indicated that there was no written code governing the etiquette and conduct of English barristers. "there is ... a considerable floating body of practice and tradition in these matters, which for the most part, is not committed to writing...."

Lord Chief Justice:

"no such written code of ethics exists in England, nor is His Lordship of opinion that there is any need for it"

Attorney-General:

"The Attorney-General does not think that a written code is desirable. Such a code could not be complete, because changing circumstances are bound to give rise to new questions from time to time."

Chairman of the General Council of the Bar:

The Chairman of the General Council of the Bar simply indicated that there was no written code governing the etiquette and conduct of English barristers.

Ireland

Lord Chancellor:

"there are only a few rules, pertaining to retainers for the legal profession in Ireland, and that he does not consider any further written code of ethics to be necessary."

Lord Chief Justice:

"There is no written code of ethics for the legal profession in Ireland, and the necessity for one has not been felt." [argued that

¹¹⁵ Survey conducted by letter by Mr. Justice Riddell, and recorded in "A Code of Legal Ethics", *supra*, note 28 at 144-148.

there was an "esprit de corps" which enforced a "spirit of discipline which is absent in England."]

Attorney-General:

"No code of legal ethics exists for the Irish Bar. The ethics of the profession are controlled by the public opinion of the Bar. The Benchers of the King's Inn exercise jurisdiction over members of the Bar in cases of violation of professional decorum. The standard of professional conduct is also reviewed by the Bar Council, but there is no coercive jurisdiction in that body."

Chairman, Incorporated Law Society:

"there is no written code of ethics for the legal profession in Ireland, and the President does not approve of such a code."

Scotland

Lord Justice General:

"there is no written code of legal ethics. There is, however, an unwritten code which is regarded by all Scottish lawyers as sufficient."

Lord Justice Clerk:

"We have no written code of ethics - our law of practice in the matter depends on practice and tradition.... Our Dean of Faculty is the arbiter for our Bar... I think it would be very difficult, and I think somewhat dangerous, to formulate a written code of ethics."

Lord Justice Advocate:

"There is in existence no written code of ethics for the legal profession in Scotland. There are a few rules regulating counsel's retainers which ... have been more or less officially published ... but even these rules are no more than a formulation of professional custom ... I held office as Dean for several years; and, in accordance with the practice of my predecessors, I referred all cases of professional conduct which were referred to me, to solution in accordance with the simple rules of honour... it is obvious that the application of the rules of strictly honourable conduct consorts very ill with any attempt to reduce the rules of honour to a written code."



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