Book Review
Compte rendu

ENDNOTES GONE BAD

Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession by Philip Slayton
Toronto: Viking

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First things first: forget the cover story entitled "Lawyers are Rats" which appeared in *Macleans* magazine in the summer of 2007. The pugnacious, sensationalistic, tone of the Philip Slayton interviewed in the article does not reflect the tone of the Philip Slayton who wrote the book.

Forget also the somewhat hysterical reactions to the article from, among others, James Morton and J. Parker McCarthy, the presidents of the Ontario Bar Association and the Canadian Bar Association respectively. One's personal view may be that most lawyers are not rats, but it seems somewhat excessive to demand that we refrain from suggesting that *any* lawyers are rats.

Messrs. Morton and McCarthy probably did more to ensure the success of the "Lawyers are Rats" issue of *Macleans* than the *Macleans* marketing department. Ask someone to describe *Macleans* in one phrase, and that phrase will almost invariably be something along the lines of "a Canadian version of *Time* magazine." If for some reason one felt the need to read a Canadian version of *Time* magazine, one could probably pick up a copy of *Time – Canadian Edition*. In this instance, however, many lawyers and others who might never have given a thought to the article received an email from CBA headquarters alerting them to the existence of the article, or heard the denunciations by Morton or McCarthy in the news media, and immediately went out and bought the magazine as a direct result.

One could be, in equal measures, outraged and intrigued by the stunning allegations in the article:

- That there are "gross deficiencies in the regulation of lawyers;"

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- That the legal profession in Canada is "not interested in providing access to poor people or even middle income people;"
- That "[t]here's a big incentive for lawyers to pad their bills," that "it's common practice" and that "there's a general recognition that it happens very widely."

A thoughtful reader, seeking the evidence to back up these statements, is likely to be disappointed. The book addresses the above issues, and makes several other sweeping allegations about the nature of legal practice and lawyers, but these claims are largely unsupported, except anecdotally. This is unfortunate, because many of the issues that Slayton raises are important to lawyers and their clients.

Slayton's intent appears to have been to frame the issues in Chapter 1, to draw conclusions in Chapter 16, and to provide evidence in the form of the anecdotes which make up the rest of the book. He has failed in the last of these endeavors.

The most sensational allegations have to do with over-billing. Slayton writes:

> The pay of a partner or associate depends, often in large part, on the number of billable hours he creates for himself (and for others). The consequence is often "over docketing," the exaggeration by a lawyer of the number of billable hours he has worked.[1]

Despite forty pages of endnotes, none is provided in support of this allegation. If such evidence is found elsewhere in the book, the reader will be forgiven for missing it. One notes with disappointment that the evidence is also missing from what might have been another favorable location, where Slayton states that "abusive billing practices are common."[2]

Slayton goes on to describe the "symbiotic" relationship between the senior executive and the lawyer ("They go out together with their wives to expensive restaurants…they go on fly-fishing weekends"); from this relationship, the lawyer obtains "status… and …income," while the executive obtains "a protective shield." In this environment, says Slayton, "it's unlikely that the lawyer will take a stand if he fears that he may lose the client by doing so." Oh, really? It can certainly be uncomfortable to do so, but many lawyers have, in fact, done so.

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1 Philip Slayton, *Lawyers Gone Bad:, Money, Sex and Madness in Canada's Legal Profession* (Toronto: Vintage, 2007) at 8.

2 *Ibid*. at 237.

Does experience show that more lawyers will take a stand or back down in these circumstances? Slayton does not provide empirical evidence one way or the other. The reader is left thirsting for data. If Slayton is correct about the prevalence of the behavior he describes, it would be a major scandal. The reader is left adrift on this point.

And so it goes. One passage reads as follows:

> What happens to a lawyer gone bad when his transgressions are discovered? In Canada, the legal profession is self-regulating and self-policing. Do law societies deal appropriately and expeditiously with serious complaints about their members? Do they merely suspend lawyers when they should be disbarred? Do they too easily readmit disbarred lawyers when their applications for readmission should be denied? Do they treat similar cases of misbehaving lawyers in a similar fashion or is self-policing suffused by unpredictability and arbitrariness? Should the regulators have "zero tolerance" of lawyers having sex with clients, or would it be wiser to consider particular fiduciary responsibilities as they may arise in individual situations? And do the regulators move decisively to change legal practices vulnerable to abuse by practitioners?[3]

These are all important questions. Unfortunately, and characteristically, Slayton seems to believe that merely to ask the question provides the answer. Immediately after the paragraph quoted above, he goes on to describe changes to legal regulation in Britain arising from the Clementi Report, published in December 2004.[4] One would be forgiven for requesting that, in the next edition of the book, Slayton ask (and, perhaps answer) the following question:

> Did the practice of law in Britain prior to the Clementi Report resemble, in any of its material particulars, the practice of law in Canada?

The discussion in Chapter 1 of the advent of the limited liability partnership (LLP) for law firms in Canada is also frustrating. Slayton argues that the rise of the LLP has obliterated the relationship between client and law firm, as well as between partners; since "the partners are no longer 'all in it together,'" says Slayton, "trust is no longer required" between partners:

> One of the best features of traditional law firm life – the give and take on legal problems, the exchange of wisdom and experience – is severely discouraged. And only a fool would occupy a management position in a limited liability partnership –

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3 *Ibid*. at 14.

4 *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* (London: Department of Constitutional Affairs, 2004).

> head of a practice group, for example, or member of an opinion committee – because such a position carries with it possible liability for everybody and everything.[5]

Perhaps the heads of practice groups of each blue-chip firm all resigned *en masse* and were replaced by chumps after those firms converted to LLPs. If so, many of us in the legal community missed that development. Furthermore, if Slayton's analysis is correct, then the same would apply under a traditional partnership structure; if a corporate partner can be liable for the negligence of a real estate associate that she has never met, only a fool would occupy the position of partner in a traditional law firm. That statement may very well be true, but it is of little relevance in a world where, generation after generation of good lawyers and, one dares to suggest, good people, have competed for these positions.

When Slayton does purport to provide evidence for his assertions, the results border on the bizarre. Many of the endnotes simply contain digressions on the topic discussed in the body of the book, rather than sources for facts presented in the book. Others descend into irrelevance; for instance, one passage reads as follows:

> Law school encourages cosmopolitan desires and pursuits. It reaffirms traditional values. It teaches what the economist Paul Seabright has called "the narrative."[5] Students are encouraged to anticipate wealth and power; they are told how to serve the rich, for it is only the rich who can afford lawyers…[6]

Sure enough, note 5 contains a quote from Seabright[7] defining "the narrative," which applies to "most kinds of professional training, whether apprenticeship as a mechanic or studying for the bar or attending an off-site course as a chef" and involves "learning not just how to accomplish particular tasks but how to project yourself as a certain kind of person."[8] Note 6 quotes a "famous 1973 *New Yorker* cartoon" in which a lawyer says to his client, "You have a pretty good case, Mr. Pritkin. How much justice can you afford?"[9]

In other words, the first half of the passage applies to anyone who has ever learned anything to do with practising any trade or profession, and the second half is simply unsubstantiated.

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5 *Ibid*. at 18-19.

6 Slayton, *supra* note 1 at 235.

7 Paul Seabright, *The Company of Strangers: A Natural History of Economic Life* (Princeton: Princeton University Press, 2004).

8 Slayton, *supra*, note 1 at 282.

9 *Ibid*.

What of the balance of the book? Slayton states that "I have described the often ineffective and confused treatment by regulators of lawyers gone bad."[10] With all due respect, he hasn't. Each chapter/story pretty much stands on its own; one would be hard pressed to identify an argument developing throughout the book.

The individual stories comprising the chapters are generally well told. Slayton clearly has a gift for getting people to talk about their troubles. He was apparently a good audience for these tawdry tales. "Often," he writes, "I found my subjects plausible, engaging, or even charming."[11] One suspects that they felt the same way about him, given how he manages to get his subjects to open up to him.

The stories do not, however, support his argument that the discipline process for lawyers in any of the provinces is fundamentally, or substantially, flawed. One may quibble with the results of the various disciplinary proceedings described, but there is no systemic bad faith, malice, or favoritism in evidence. The Quebec Bar Association appears to have been rather ineffective in the case or Eric Belhassen, as described in Chapter 14; however, we have no way of judging whether the case is typical of disciplinary proceedings for lawyers in Quebec. Slayton, as a lawyer and former law professor surely understands that there is a world of difference between saying that one disagrees with the disposition of a particular case, and saying that that disposition is wrong in principle, or that it is characteristic of cases dealt with by a particular tribunal.

Slayton certainly raises some interesting issues, and expresses the issues in compelling language; he discusses, for example, the readmission to practice in 2002 of Dan Cooper, a former partner of McCarthy Tétreault who was disbarred in 1991:

> Said the discipline committee's 1991 report, "The letters of character reference from impressive authors are unanimous in their praise of Mr. Cooper. They resonate with words like 'integrity,' 'trustworthiness,' 'compassionate,' 'kind,' 'intelligent,' 'polite,' 'personable' and 'the best.'" Dan Cooper seemed as impressive to his referees in 1991, when he was disbarred, as he was in 2002, when he was readmitted. And yet in 2002, in the eyes of the law society, he was a fundamentally different man.[12]

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10 *Ibid*. at 237.
11 *Ibid*. at 20.
12 *Ibid*. at 49.

Slayton's discussion of the *Weisman* test[13] as applied by the Law Society of Upper Canada in the Cooper case is clear as well as intellectually and emotionally engaging, and the issue he raises provide food for thought.

In summary, however, the conclusions drawn by Slayton in the book are largely unsupported. Do many, or most lawyers, think and behave in the ways he describes? Perhaps. But one is not in a better position to assess whether this is so after reading this slim volume. Are there systemic deficiencies in the regulation of lawyers by the law societies, as Slayton implies, or are the Law Societies doing a good job of finding and disciplining bad lawyers? Slayton cannot tell us, but if anything, the stories in the book seem to demonstrate the system working well and fairly.

Serious readers who are interested in the topics that he addresses are likely to be disappointed, and may be more enlightened by the article by Patrick J. Schlitz entitled "On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession,"[14] which covers much of the same terrain, albeit in an American context.

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13 *Re Weisman*, Report to Convocation of Law Society of Upper Canada, January 27, 1999.

14 52 Vand. L. Rev. 871 (1999).