



Lawyers as Canadian Heroes: In Search of Our Burning Building

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LAWYERS AS HEROES? At last December's OBA Council meeting, lawyer and politician Tim Murphy reminded us that we don't save lives, we don't feed people, and we don't rush into burning buildings. Instead, we defend those accused of crimes and take on unpopular causes. True enough.

The public's relationship with lawyers is multi-layered. The lawyer as hero is a common literary archetype who saves the day through law and logic, but people find the work of real lawyers hard to figure out. Ultimately, negativity toward lawyers plunges down the public desire to invest in justice.

Awful Branding

Have you ever introduced yourself at a pot-luck supper as a *barrister and solicitor*? Tell Americans you are a lawyer, and they ask, "You're an attorney?" (South of the 49th, authors of fine print are called *lawyers*. Hiring a lawyer is like cheating at cards.)

I have travelled this country exhorting lawyers to counter our profession's negative brand. I have appeared on TVO's *The Agenda* to urge Ontarians to apply the farmers' slogan, *If you've eaten today, thank a farmer*, to lawyers. If you enjoy living in a free society, thank a criminal lawyer. If you're married to a same sex spouse, thank OBA Family Law Award winner Martha McCarthy. A woman reporting a date rape may be forgiven for not writing a thank-you note to the Women's Legal Education and Action Fund (LEAF), recipient of the 2011 OBA President's Award. But thanks to LEAF, judges hearing rape cases think twice before obsessing over the victim's high heels and makeup. Police lay charges even if victims dress like 'sluts.' You can thank lawyers for making our

churches and schools safer for children, and public sidewalks safer for pedestrians. Not to mention all the community work we do.

Examine lawyers' public image closely, similar to that of politicians; the public asks both professions to think on their behalf. Criticizing our leaders is fun, but consider what kind of Canada we might have without politicians. Any program requiring short-term pain for long-term gain is met with protest (as John Crosby found out). The same with carbon taxes, HST, and justice. Nothing makes sense if it requires two or more steps of thinking.

Whatever complexity may exist in their work, doctors, farmers and fire fighters have the advantage of a one-step cause-and-effect between what they do and a desirable end. Ours is the age of Viagra politics. We even talk about public program dollars in terms of 'bang for your buck.' Ours claims to be a sophisticated society, and yet we still pick our heroes from the doers of easily understood tasks. Heroism is all a matter of outcome. We, masters of process, don't stand a chance.

We Like Our Lawyers to Be Played by Actors

We do excel in firing the public's neurons when it comes to lawyers played by actors. For a brief spate in the 1970's, we had earnest outcome-achieving role models among TV doctors (*Marcus Welby, M.D.*), farmers (*The Waltons*) and fire fighters (*Emergency!*). However, lawyers make ideal dramatic characters because a good story is all about process. Great lawyers of fiction make us nervous no matter what the story's outcome.



Not accidentally, the first great character of classical drama is an archetypal lawyer hero. King Oedipus uses his wits to solve the riddle and save Thebes from the scourge of the Sphinx. In the end, *thinking and behaving like a lawyer* was his downfall. As the play unfolds, he summons and cross-examines witnesses, until finding none other than himself guilty of the parricide and incest that allowed him to become king. In scouring out his own eyes, Oedipus sentences himself to a life of blindness. He is prosecuting attorney, judge and convict, rolled into one—at one level, a cautionary tale out of the conflict of interest rules; at another, an enactment of the jurist's credo that the public interest must come before personal advantage. Law is integral to tragedy because the well-known device of a hero's *hubris* is a crime of heresy, and the outcome of the plot is a sentence imposed by the gods. Although they are not lawyers, Shakespeare's Hamlet and Milton's Satan bring about their own downfalls by over-thinking and by asking too many questions. Not by accident, the original literary term for plot is "argument," what lawyers do.

Whereas the lawyer hero of tragedy is brought down by law, their comedic counterparts employ law to deliver happy endings for others. Debate over anti-Semitism in *The Merchant of Venice* has made it hard for modern audiences to embrace the iconic lawyer of comedy, Portia. (Truth be told, much of our ambivalence derives from the portrayal of a woman in the role of jurist.) Rumpole of the Bailey, a lawyer hero in the ha-ha type of comedy, refers to colleague Phyllida Erskine-Brown as 'the Portia of our Chambers,' a put-down that has nothing to do with the Bard's treatment of Shylock. Despite her gruesome logic, what Portia *does* to arbitrate between the antagonists is simply to restate a principle of contract law. The *contra proferentum* doctrine requires courts to construe contractual terms narrowly when secured lenders seek enforcement.

The fictional lawyer-hero archetype proves that law permeates popular consciousness far more than the public appreciates. Real courtroom drama can keep the planet glued to their sets (the O.J. trial). Here, even a corporate insolvency case will have us cheering for a Canuck (Jim Balsillie's attempt to buy the NHL's Phoenix Coyotes). But law as spectacle translates poorly into public policy. It implies a lawyer's function is to deliver sweeping gestures. Lawyers, unlike Harry Potter, cannot chant something clever in Latin and make problems disappear.

Unfair Expectations Hurt, Too

Do not underestimate the harm the denigration our work causes to public policy. Where it hurts most is in Access to Justice. Lawyers take personal risks, work harder than other professionals, and keep working after the money's run out. Yet we have a reputation of being elitist 'fat cats.'

Some criticism of the bar and bench is warranted. We have utterly failed to promote leaders who are representative of a diverse Canadian demographic. In its June 7, 2011, editorial, *The Globe and Mail* rightly decried the lack of racial diversity in the bench and bar and reminded us: "The legal profession is one of society's most important pillars of democracy, as well as a pipeline to other leadership roles, including political office

and corporate board appointments.' Our failure to ignite public support for a justice agenda means governments of all stripes underfund our legal aid plan, our courts and our administrative tribunals. The failure of the bar and bench to be *like* the public is a source of alienation.

A reputation of privilege and power creates the expectation that it falls on lawyers to burden themselves with shortcomings in the justice system. We have heard the message, *que la noblesse oblige*, as if the legal profession were a feudal estate.¹ The fallacy that lawyers decrease access to justice because of a high profession-wide median hourly rate not only alienates the public from the profession, but also diverts attention from the state's role in providing a working justice system. The fees of Main Street lawyers have very low margins after they pay for rent and support staff. (Should lawyers in business law firms charge legal aid rates to blue chip companies and multi-nationals?) Our collective failure to invest in the justice system creates backlogs and adjournments, defensive practices and lengthier proceedings. Yet still we are blamed.

Marvel at the public's reluctance to pay for justice and at the blank cheque written to Medicare. (Although Canadians see the shine coming off the fully public model.²) The health industry's billion-dollar lobbying power ensures it remains atop everyone's list of priorities, at the expense of everything else. What is left pays for everything—from defending our borders, to filling potholes on the street where you live. Justice, alas, is the classic taken-for-granted girlfriend or boyfriend of Canadian politics. Our belief that the public cares about justice programs like legal aid or court reform is a conceit. What stirs our souls, does not stir theirs.

Fear of Needing Lawyers—The Real Reason We Don't Want Real Lawyer Heroes

If a lawyer entering a burning building could incite the public to start thinking about our crippled justice system, we may even find some volunteers. In many parts of the world, buildings are ablaze with lawyers inside. Lawyers brave and suffer imprisonment, torture or death for performing their work. The existential reality of our calling is that people value an independent bar only when backed into a corner by an oppressive regime, with lawyers standing between and them and arbitrary detention. The Robert Mugabe's of the world know this. *When lawyers are our heroes, we know we're all in trouble.* When the problem is that of our neighbour, or of those who live in communities we do not enter, we like watching lawyers in the theatre or on TV, and 'get' what they do. Let us then hope Canadians never have lawyers for heroes. Let us instead invest in law and justice. In the true spirit of heroism throughout the ages, lawyers say: That is all we ask.

¹ "Legal system doesn't work for ordinary people, top judge says," *The Vancouver Sun*, February 14, 2011

² Ensight, 2011 *Post-Election Report: Mind Your Majority, Eh?* May 6, 2011, p. 6