Ethics and Criminal Justice

The recent Enron affair has important lessons for lawyers of what can happen if they do not keep their ethical house in order. Accountants have allowed their professional role in providing objective audits to be compromised by lucrative consulting work. The result is not only a lack of confidence in the accounting profession, but significant incursions by governments on the self-governing nature of that profession.

Lawyers, however, should not be complacent. There are signs of an emerging ethical crisis in the profession of law. This crisis is by no means restricted to the practice of criminal law, but criminal justice issues have, as usual, been at the forefront of debate. Law schools and law societies, as well as others in the legal sphere, must respond before an Enron-type scandal diminishes remaining support and allows governments to make inroads on the long tradition of self-governance of the legal profession.

The Ken Murray affair has been something of a mini-Enron for the legal profession. In this special issue, both Mr. Murray’s lawyer and his prosecutor contribute articles on some of the ethical and legal issues arising from that important case, which stemmed from Murray’s retention of videotapes taken from Paul Bernardo’s house. This journal does not subscribe to the view that counsel on cases should be disqualified from writing about them. To take that position would deprive readers of the thoughts of some of the most knowledgeable people about any particular case. It is important that readers know about the writers’ involvement and where they are coming from, but all commentators come from somewhere and the false myth of detached neutrality is best abandoned in this, the twenty-first century.

The Murray case raises important questions for all those who practice criminal law. Regardless of one’s views about his acquittal or the Law Society’s decision not to pursue disciplinary action, no criminal lawyer wants to be placed in the position in which Mr. Murray found himself. The reputation and careers of lawyers can be ruined by allegations of wrongdoing. The profession and the public will not be well served by reliance on either criminal or disciplinary prosecutions as the prime means to articu-
late ethical standards. Criminal prosecutions are quite properly based on proof of guilty knowledge beyond a reasonable doubt and disciplinary prosecutions continue to be dominated by clear cases of misappropriation of funds and ungovernability, as opposed to tough ethical issues. Guidance before and during the fact is more useful than the difficult task of apportioning after-the-fact blame.

This issue also includes articles situating the Murray case in the context of broader substantive and evidentiary law and examining the Law Society of Upper Canada’s proposed rules to deal with the retention of physical evidence. The proposed rule is not without flaws, and some of them are outlined in the pages that follow. Nevertheless, it is vitally important that our elected benchers work through these difficult problems and provide some leadership and guidance on this and other important ethical issues. Benchers have a full plate at the best of times, but nothing is more important to the long-term future of the profession than its ethics. There must be some changes to the rules of professional conduct that respond to the Murray case.

Increased mobility in the profession also raises the issue of the harmonization of the difficult ethical rules established by the various law societies. How many lawyers honestly can say they are aware of the different rules that apply in different jurisdictions? A blue ribbon national task force with members from the bar, bench, the academy and non-lawyers should present a national vision for the ethical rules of the profession. It should be the type of task force that will provide leadership and ensure that harmonization does not become a race to the bottom. All law societies should use the harmonization issue and the increased post-Enron focus on ethics as an opportunity to revise and improve their rules of professional conduct.

Ethics are the responsibility of the entire profession. Although each lawyer’s perspective will inevitably be influenced by the role that he or she plays, ethical debates should not degenerate into wars between defence counsel and Crown counsel. Defence counsel must recognize that even the most important rules respecting solicitor and client confidences are not absolute. The important issue of preventing wrongful convictions should not be abused as a reason for defence counsel to retain incriminating evidence. Crown counsel must recognize the importance of the role of defence counsel and that confidentiality goes to the core of the defence lawyer’s role.

We should also make greater use of the wisdom and independence of the judiciary to help us resolve ethical dilemmas. Justice Gravelly suggested that among the options in the Murray case were handing the tapes to a judge or litigating the proper disposition of the tapes. Unfortunately, the proposed new rules make no use of these valuable options. Instead, they contemplate that a law society committee will authorize retention of evidence not only for testing, but on the vague and problematic grounds that the lawyer reasonably believes that a wrongful conviction may be prevented if the property is first disclosed at trial because its disclosure to the Crown or the police will significantly diminish its value. If this sort of judgment must be made, it is better made by an independent judge. The judiciary cannot provide all the ethical answers, but they can provide some.

It is also important that the law schools and the law journals take the issue of ethics seriously. This issue contains a review of an outstanding new book that examines many of the difficult ethical issues that can arise in the practice of criminal law. There has been a recent resurgence of scholarly interest in ethical questions and this can only work to the long-term benefit of the profession. But the law schools in particular must do more. Law schools are rightly independent from the governing bodies of the profession, but they cannot in good conscience ignore the ethical issues confronting the legal profession and their own students. Luckily the serious study of ethics is consistent with the mission of the law schools. It is best conceived not as a matter of studying the rules as they are laid down, but rather of examining what the rules and, by implication, what the legal profession ought to be.

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