



Episode 1: Constitutional Law and Legal Ethics with Adam Dodek

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Guest Speaker: Professor Adam Dodek

Interviewers: Olivia Filetti and Alex Sibley, Senior Editors

TRANSCRIPT

Olivia Filetti: Welcome, everyone, to the *Ottawa Law Review's* inaugural podcast. My name is Olivia Filetti and I'm a Senior Editor at the *OLR*.

Alex Sibley: My name is Alex Sibley, I'm another Senior Editor at the *OLR*.

Olivia Filetti: And we're very excited to be sitting here with Ottawa's very own Adam Dodek, who was recently elected as our Dean for the Section of Common Law, English.

Adam Dodek: Well, thank you very much, and it's a great pleasure to be here, and I'm looking forward to taking over leadership of the Common Law Faculty on January 1st, 2018.

Olivia Filetti: Wonderful! We're so excited to have you. Professor Dodek is a constitutional law expert as well as a legal ethics scholar and today we're going to be delving into that with him.

Alex Sibley: We're very excited to have a constitutional law expert like Professor Dodek here with us, because the *OLR* will be publishing a Constitution150 special issue shortly, so that's great.

Olivia Filetti: And as we are a bilingual law review, a transcript of this podcast will be made available in French.

Alex Sibley: Audio equipment and technical assistance today was provided by Zoom Productions. And we would also like to acknowledge that we are here at the University of Ottawa, which is on unceded Algonquin territory.

Olivia Filetti: Alright, let's get into the questions.

Adam Dodek: Super.

Olivia Filetti: Professor Dodek, you have written extensively and regularly about the Canadian Constitution. You not only wrote a book entitled *The Canadian Constitution*, but you were a spearhead of the Constitution150 conference in March 2017. In your view, why should Canadians care about the Constitution?

Adam Dodek: Well, thanks very much for those questions, and it's been great to be able to work with the *Ottawa Law Review* over the past few years, and I look forward to continuing to do that.



Why should Canadians care about the Constitution? First of all, there's the obvious point that the Constitution is fundamental law that governs all of us and sets the ground rules for how law is made and what the institutions of government can and cannot do, and also contains the *Charter of Rights and Freedoms* and Aboriginal rights.

But even more so, to me, Canadians should care about the Constitution because the Constitution is the story of all of us. It's the story of how Canada was created; it's also the story of our aspirations. And it's the story of what we hope our country and our society can be, and we all own our Constitution. I don't think that the Constitution is simply the property or the exclusive domain of lawyers, or law students, or law professors, or judges. I think it belongs to the Canadian people, it certainly does belong to the Canadian people, and I think that every citizen has the right to take ownership of the Constitution and contribute to the debate about the society that we want to have here in Canada.

Alex Sibley: I think that's a very interesting perspective, to look at how it applies to all Canadians because I don't know if everyone necessarily thinks of it that way: to really actually think of it as something that represents Canadians that aren't just law students, lawyers, professors.

Adam Dodek: Yeah, I mean people tend to think in Canada as compared to the US where every man, woman, and child can quote sections of the US Constitution: the Second Amendment right to arms, the Fifth Amendment, right to remain silent. In Canada, we tend to think that our Constitution is boring, that it's for politicians and judges. And again, I think nothing is further than the truth. I think that the stories—our constitutional stories, our history—is incredibly interesting; dating from the 'Persons Case' in 1929 that recognized women as persons under our Constitution, to battles going on this very day about Indigenous rights, and about... I was chuckling because I wasn't thinking about Indigenous rights, I was thinking about beer and a case going to the Supreme Court of Canada from New Brunswick, called *Como*, about the right to import beer, which is perhaps not as lofty an issue as the future of Indigenous rights, but is maybe more a day to day concern, certainly for people in New Brunswick, but also people across Canada.

Alex Sibley: Right, absolutely. So, I guess our second question then would be, building off of that, the focus of constitutional debate has changed a lot over the last 150 years. Early constitutional jurisprudence focused on the division of powers and the notion of "watertight compartments." More recently, the Supreme Court of Canada has considerably interpreted the *Charter of Rights and Freedoms*. So, what do you think are the next major constitutional interpretation trends?

Adam Dodek: Well, I think what we've seen, as you've articulated, is setting out the boundaries or the basic doctrine in the interpretation of rights in different areas and the division of powers over the course of the last 150 years. I think what we're starting to see now, especially in the *Charter* era, 35 years in from the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, is instead of asking questions like what does freedom of religion mean, what does freedom of expression protect, we're seeing more and more the clash of rights. How do these provisions interact with each other?



How does equality interact with freedom of religion? So, we're seeing cases involving the clash of rights.

Trinity Western University is about the clash of freedom of religion and equality. We're seeing a case that was heard this past month at the Supreme Court involving a lawyer from Toronto named Joe Groia, which is a clash between rights of freedom of expression: the right of an accused to a full answer and defence, to defend themselves in a criminal trial. We're seeing cases involving Indigenous rights and other aspects of the Constitution. And those, I think, are much harder issues and I think they're really interesting issues.

In terms of building on Indigenous rights, I think that the biggest challenge going forward for the Supreme Court and for our society is reconciliation. And the Supreme Court, in the last 20 years, has made a lot of statements about reconciliation; the challenge is how do you operationalize that? How do you operationalize that in law, and how do you operationalize that and actualize that in society?

Alex Sibley: Right, that makes a lot of sense, because I think it's one thing to discuss reconciliation and say, you know, it is necessary moving forward, but it's another to actually implement that and see what does that really look like.

Olivia Filetti: Exactly. And keeping in line with the discussion of the Supreme Court, the 150th anniversary of Confederation coincides with the departure of Chief Justice McLachlin from the Supreme Court of Canada this December. So, the Chief Justice will be retiring after nearly 20 years, as we know, and in that time she has contributed significantly to Canadian constitutional law. Are there any overarching trends that you've noticed, other than you've mentioned, that the McLachlin Court has set out?

Adam Dodek: Well, I think first of all, there's a tendency when we're sort of close to events to maybe exaggerate their significance. And so, when we're close to Chief Justice McLachlin, and for many of us she's the only Chief Justice that we've known, and she's been the Chief Justice for 18 full years, there might be a tendency to exaggerate her significance. I actually don't think that's the case. I'm not sure that in ten years we will look back and think that she was less influential than we think she was today. I think that she will go down in history as one of our most influential Chief Justices.

We'll put in a plug for a conference that we're holding in April 2018, in partnership with the *Ottawa Law Review*, about the legacy and the influence of Chief Justice McLachlin. But I think part of the thing that she has done, which you don't really see externally, is build consensus within the Supreme Court. And it's important for Canadians and for the legal community that the Supreme Court speak clearly on issues. When she took over in January 2000, the court that she took over had been deeply fractured for a decade. As any law students who read Supreme Court decisions from the 1990s knows, when you're reading the decision in the equality cases, like *Egan*, where there are three or four different decisions, the case is 80, 90, 100 pages, the court was very divided. Not only is that difficult for law students who are assigned to read that, that's difficult for lawyers and Canadians to understand their rights.



Chief Justice McLachlin succeeded in creating consensus within the court, having the court speak in a clear voice on a number of issues. And I think we'll be able, with some hindsight, to divide her very long tenure into different periods. And I think if you look at the first decade, or the first half of her tenure as Chief Justice, up until about 2008, it was a period of consolidation. A period of trying to, whether by design or effect, protect the court, trying to strengthen the position of the court after a decade of political attacks for judicial activism. Trying to speak a little bit more clearly in a number of areas. And after that, after that period of creating, I guess strengthening, the legitimacy of the court, what you saw post-2008 was a willingness on behalf of the Chief Justice and the members of her court to wade into more contentious public policy issues. So, in decisions like *Bedford* on the legalization of prostitution, or decisions like *Carter*, striking down as unconstitutional restrictions on physician-assisted suicide, it is very hard to imagine those decisions in the first half of the McLachlin Court. And those decisions, as many listeners will know, overturned precedents from previous courts. Those decisions, in a way, ushered in or responded to social change in Canadian society. Legalizing physician-assisted dying or legalizing prostitution are matters that involve great great, social change. And the legalization of same-sex marriage by the Court in 2004...those are big issues of social change that the Supreme Court has been involved with.

I think paradoxically, the Court's involvement in those areas has perhaps been easier than the Court's attempt to change legal culture. And by that I mean if we look at some of the most recent Supreme Court decisions in the matters of the administration of justice—decisions in the criminal justice sphere like *Jordan* on trial delay, or its equivalent in the civil justice sphere, *Hryniak*—those are attempting to change legal culture. And in a sense those things are not as big issues as prostitution, or physician-assisted dying, or same sex marriage. But I think those things have turned out to be much, much harder to change. And a much bigger challenge for the Supreme Court as the leader of the legal system, and the legal leader of the judicial system, than in those other areas of social policy.

And so, my last point about the McLachlin Court, which will be very much an open question, is that the McLachlin Court, I think, was the first Supreme Court to take reconciliation seriously—to really, in its statements, accept the legitimacy of Indigenous peoples as founding peoples of Canada, as the First Peoples of Canada, and whose perspectives are constitutionally recognized, whose rights are constitutionally recognized. The challenge for Chief Justice McLachlin's successor, as we've already touched upon, will be how do you breathe life into those statements and assertions.

Alex Sibley: Interesting. So, our next question then...I guess you've sort of touched on it already...but Canada150 has been praised by many and criticized by others. It's been viewed as an opportunity for celebration but also sober reflection. So, I don't know if you could explain a few more of the controversies surrounding the 150?

Adam Dodek: When you told me about this question, I reflected more on this than probably any other. And I thought that this was a great question. And I think that birthdays or anniversaries are often, you know, there's a cake, celebration, but there's also an opportunity for reflection. Not all birthdays people want to celebrate. People have different perspectives on their 30th birthday, or their 40th, or their 50th birthday, *etc.* So, there's a lot of Canada150 that is worthy of celebration and is



opportunity for celebration, but there are other aspects that make for pause for sober reflection and self-criticism.

And so, if we think about...to me when I think about Canada150, I don't necessarily think about 1867. I think about the path pre-dating 1867, and 1867 as the beginning of an ongoing dialogue. That's what a constitution is to me, it's a living dialogue. So, obviously, in 1867, if we think about the "Fathers of Confederation," just that term that's a gendered term, it excluded women, there were no women formally involved in Confederation. Indigenous peoples were totally excluded. There were no religious minorities, *etc.* But if we think about the process as a developmental one, of change, since 1867 we see a process; to me, our constitutional history and our history in Canada is one of more and more inclusion—recognition of different Canadians as citizens, as worthy of equal respect and participation in Canadian society. And so, when I think about 1867 and then 1982, to me, one of the big impacts...in our Constituion150 project we used three themes: Confederation 1867, Patriation 1982, and Reconciliation, which we would see as 2017 continuing. And so, to me, when we look at Canada150, and look at different hallmarks or different events, I look at 1982 as a big event, with not just the patriation of the Constitution but the recognition and the participation of other groups in the making of our Constitution in a way that recognized their legitimacy for the first time: women's groups, religious minorities, other citizens groups, and especially Indigenous Canadians.

I understand why some groups, and certainly Indigenous Canadians, might be very critical of not seeing a lot to celebrate in Canada150. I think that's completely a legitimate perspective, and I think we can learn from that, and that we would be wrong to just look at Canada150 as just about cake and fireworks. It's an opportunity to celebrate our successes, our advances, but it would be a lost opportunity if we didn't reflect upon the mistakes and the abuses that have occurred in those 150 years and take the opportunity to ask ourselves what should we be working on now.

Olivia Filetti: I find it really interesting the way that you describe these issues not only from a legal perspective but also from a social change, and culture, and policy perspective. I think that's really important to identify and develop both sides of that narrative. And that does lead into our next question very well. We want to switch gears and discuss your other area of expertise, which is legal ethics. And so, of course, this is an important area for lawyers in a professional landscape that continues to undergo rapid change. So, can you tell us about some of your most recent research in that area?

Adam Dodek: Sure. Well, coming out in the *Alberta Law Review* in early 2018, I've got an article that I worked on for a couple of years with Emily Alderson, who's a graduate of the [Ottawa] Law Faculty and is now working at the Department of Justice. And we spent a couple of years looking at the way that law societies traditionally regulate lawyers. And the way that they do it, for the most part (and we're seeing some change), has been [to] wait until there's a complaint against lawyers and then they investigate that complaint. It's a very reactive form of regulation, and it's traditionally how many regulatory bodies used to operate.



But many regulatory bodies, really since early 2000s, started changing the way they regulated. And in the last decade, something called risk regulation has been much more popular. And the idea of risk regulation is you identify what the objectives of your regulatory body are, you identify what the risks are to that, and you then focus on addressing or hopefully preventing those risks. And so, our article talks about some efforts that have been made in this respect in other professions, and in the regulation of lawyers in other jurisdictions, and in places in Canada like Nova Scotia and other jurisdictions, but particularly Nova Scotia. And we argue that law societies should move to that model. And to be specific, what we mean is, well, what are your objectives? The law societies are supposed to regulate in the public interest. That's a really amorphous term; nobody can really define what the public interest means. And we argue that law societies should focus on protecting clients, protecting the public. Those are their overriding goals and that they should identify what are risks to the public, what are risks to clients, and, also, I think, what are risks to colleagues and people that lawyers interact with?

And so, one of the examples I give, I've talked about Joe Groia before, and I've written about civility...I think that in 20 years, if not sooner, when we look back on law society regulation in the 2000s and the 2010s, people will ask themselves: why were law societies fixated on this idea of civility, of lawyers behaving rudely? Why did they spend so much money and time chasing after this one lawyer in Toronto who no client or no other lawyer ever brought a complaint against? What was the risk? What is the damage to his clients or other clients? What [was] the damage to the public? You know, I hope we have time to talk about access to justice, but instead of focusing on access to justice, which I think is an important issue, law societies were focused on this idea of civility. And again, I think on a very narrow, almost 19th century patriarchal vision of civility. I would like to see the law society focus on a different sort of civility, which is a problem that as a professor and as a member of the legal profession I see, which is how lawyers treat their junior colleagues, how they treat especially younger women in the profession, how they treat their staff. To me, that's a serious problem of incivility. That's not what law societies have been focused on.

Alex Sibley: So, do you think that this focus on civility in the 19th, 20th century patriarchal sense is because it hits the public eye more? And that as a self-regulatory body, maybe the law society is more concerned with being seen to properly manage and address issues that appear to be controversial?

Adam Dodek: That's a great question. That's sort of worthy of...I don't know if you're planning graduate work but that would be a great master's thesis for you or any of the listeners. I'm not sure; it requires some much, sort of, deeper sociological analysis as to why the law society is fixated on these. I don't think it's because of the public nature of these. Because...clients are concerned about much more down to earth matters. Clients tend to be concerned about are their lawyers doing a good job, are their lawyers responding to their emails or returning their phone calls, are they providing good client service?

And this is much more than about how lawyers are treating each other. Which, again, I'm more concerned about harassment, intimidation, and bullying within the legal profession, which we know goes on, which law societies have done very little to address because of the risk regulation problem.



What articling student, what young female lawyer, is going to complain to the law society about their principal, about a lawyer they're working with, or even a lawyer on the other side of the file? For all the reasons that we are reading about the in press, about power imbalances, and sexual harassment in the workplace, we know that everything is structured that makes it so hard for women and for vulnerable men to complain against these power abuses in the workplace. So, why the law society has fixated on these things that at their highest level can really be acts of rudeness, I don't know. And, again, part of my criticism of the *Groia* case from a regulatory perspective is the activity being complained about in the *Groia* case all occurred in court before a judge, right? This is not something that occurred in an office like the harassment and bullying that I'm talking about. It's in open court, there is a judge, there was a judge presiding; it is his responsibility—in that case it was a male judge—to manage the courtroom.

Lawyers are regulated, yes, by the Law Society, but if they're in court, they're officers of the court, and judges have the power to regulate them and, I think, have the responsibility to regulate them. And if Joe Groia did something wrong in court, if any lawyer does something wrong in court that is rude, inappropriate, *etc.*, then I would say it is incumbent upon the judge to address that misbehaviour. Whether the Law Society should as well after the fact [is] an efficiency problem, the Law Society is not there. The judge is there. You need to respond to negative behaviour when it happens, when it happens in front of you. And, again, that's part of the problem with the whole incivility movement.

Olivia Filetti: Professor, on our level as well, as students about to enter the workforce, this legal workforce, how do you suggest we inoculate ourselves against these types of issues?

Adam Dodek: That's an incredibly important question. I wish that I had the answer or an answer to it. It's an issue for me that [has] become one of my top priorities, and I feel responsibility now as somebody, you know, at least more senior than you in the legal profession. I think there's a responsibility in the legal workplace. When you ask how do you inoculate...it's not the responsibility of new or younger members of the profession who are entering the workplace to take responsibility that they are not subject to harassment or intimidation; they are the victim of harassment, intimidation, or bullying. It is the responsibility of everyone in the workplace and especially those in power. Especially the partners, especially a managing partner, governing committees in a corporate workplace or in a government workplace, management, *etc.*; it is their collective responsibility to make sure that there are supports in place for people in the workplace, for everyone in the workplace, and to do everything possible to make sure that bullies and harassers are not tolerated in the workplace.

It is an unfortunate truth in the legal profession in this province and in this country, like in many other professions, that bullies and harassers are tolerated because they are seen to be powerful or bring in money. When you asked, Alex, about the public image of things, I think that is incredibly short sighted by those legal employers. Because, ultimately, whatever money they're bringing in is not worth the poisonous effect in the workplace and the risk.



Getting back to risk regulation, we're seeing right now the revelations in Hollywood and in other sectors what that damage does to the brand of a company. And for law firms out there that have these people in their offices, that risk—whatever money they're bringing in—that risk that they're holding onto, I don't think is worth whatever money those folks are bringing in. So, the responsibility lies with people in power. For the advice that I would give graduates and new people entering the profession is make sure that you have a support network. Talk to each other. Get together with each other. When somebody is a victim of harassment, bullying, discrimination, there may be a tendency to think that they are the only one in that position, they are the only one that has gone through that either at that firm or generally. When you come together as a community, you realize that there are many shared experiences and, also, that you are not alone, that there are people that you can go to for help and advice. In Ontario, there's a discrimination and harassment counsellor that provides confidential advice. I think that the Law Society, the legal associations, and our law school need to do more to support new graduates, new entries into the legal profession. And that's where resources for regulation should go, and resources from legal associations.

Alex Sibley: I guess that takes us into our last question then, and we've already kind of touched on it; in an article from several years ago, "An Education and Apprenticeship in Civility," you mentioned that Access to Justice is one of the main crises affecting the legal profession, as opposed to civility. So, do you think that remains true today? Should that be the priority of the law societies, of the profession in general? And if not, what has changed?

Adam Dodek: Well, Alex, I wish I could tell you here in 2017 that my talks about crises—my writing about crises, the access to justice crises in 2011 and 2012, whenever I wrote that article, are historic and have been addressed, but I don't think that's the case at all.

I'm not sure how much progress we've made in terms of the access to justice crisis in the last five years. The only progress I think we've made is a greater recognition that there is a crisis. But actually addressing that crisis is really hard. And I think part of the great difficulty is there needs to be more of a recognition that we in the legal profession, and that means everyone in the legal profession, from the law schools to the judges, to the lawyers, to government, we're part of the problem. And that's the first step to realizing that there's a tendency to look for others for the solution. The solution's not going to come from government, you know, dropping a billion dollars into the legal system. There's a tendency to sort of view that "oh, if only government gave more money." No, we're in this together. We have created this problem. And, ultimately, in terms—Canadians are going to hold us accountable, and rightly so. So, again, to me, I've said this for years, I've seen the greatest threat to self-regulation in the legal profession being access to justice, not being rogue lawyers or civility or something. Law societies aren't necessarily directly responsible for the administration of the courts, obviously, or the legal system. They're increasingly recognizing that either if it's part of their statutory mandate, like the Law Society of Ontario, formerly known as the Law Society of Upper Canada, or even if it's not formerly part of their statutory mandate, access to justice is a key aspect of their work and a key priority. We need to get over our sort of fear of innovation in the legal system.



Some of the best writing about access to justice in North America talks about needing to adopt a user approach to the justice system. We've tended to create a justice system that works for lawyers and judges, but it doesn't work for the people that are actually using the justice system. And so, our justice system looks very much like how banking was when I was a little kid growing up in the '70s. When I was a kid growing up in the '70s, banks were open, there was something called bankers' hours, which looks very much like how court hours are. Banks were open Monday to Friday, ten to four. And then they started opening Thursday night, late. And you could only bank at one bank, at your home branch. And then they opened inter-branch banking. And then there was the ATM. Then there was telephone banking. Now, of course, you can bank, you know, on your mobile phone. Compare that to the justice system. Our justice system looks like banking in the 1970s. And we need to change it to respond to the needs of the users, and we need to do that quickly. Not over the course of the next thirty years, really over the course of the next decade, or else we really risk losing the confidence of the public in our justice system.

Olivia Filetti: Okay, thank you so much for your thoughtful insight today, Professor. We've really enjoyed hearing your thoughts about these issues and we look forward to speaking with you again. So, on behalf of the *Ottawa Law Review*, we'd once again like to thank you for speaking with us today.

Adam Dodek: Thank you very much. It's been a real honour to be here today, and a special honour to be your inaugural interviewee as part of this great series that I look forward to listening to.

Olivia Filetti: Everyone stay tuned for upcoming episodes and remember to follow the *OLR* on Facebook, LinkedIn, and Twitter. Thanks very much.