THE CHIEF JUSTICE OF ONTARIO'S ADVISORY COMMITTEE ON PROFESSIONALISM: 10TH COLLOQUIUM ON THE LEGAL PROFESSION

"CHALLENGES TO THE STANDARDS OF PROFESSIONALISM IN THE LEGAL PROFESSION"

March 28, 2008

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** The author gratefully acknowledges the insight and the assistance of her colleague, Meghan O'Brien.

Introduction

I have been asked to speak on "Challenges to the Standards of Professionalism in the Legal Profession", picking up as well as I can from where Justice Rosalie Silverman Abella left off in her 1999 address to the Law Society Benchers. Justice Abella and I are opposites. She is vertically challenged and I am tall – she is a Justice of the Supreme Court of Canada and I am not – she has a fascinating family history and I don't. The organizers really wanted her to come today but she was busy and I was available. Everyone in this room will know she is a tough act to follow and in accepting the invitation I knew I was accepting an impossible challenge.

Justice Abella's address was made not too long after what may have been the most important vote in the Law Society's history. The benchers who participated in this vote and the accompanying debate in 1996 were facing what could have been a most significant turning point for the profession. The issue was whether the profession's powers of self-government should continue to be exercised in the interest of the public.

Fortunately, Convocation chose to stay the course, concluding that "it is only if the profession is seen to be serving the public interest that it will maintain public confidence and command public respect."[1]

Despite that vote, the debate about self-regulation still rages and, interestingly, is not confined to the legal profession.

Unfortunately, however, on the face of things, it does not seem that the Law Society's Role Statement has been effective in rehabilitating the profession in the eyes of the public. Statistics from 2004 show that only 44% of Canadians trust lawyers. Since then, the relationship between the public and the profession has continued to deteriorate, arguably reaching its nadir last year with the *Maclean's* magazine cover story declaration that "Lawyers are Rats". I became aware of the article when my neighbour, a university professor and *Maclean's* subscriber, called and urgently asked me to explain to him what was behind all the fuss. He also quickly offered his opinion that I was not a rat! Despite the valiant efforts of the Canadian Bar Association to react to that story, unfortunately, as so often happens with media coverage, the damage was done.

This begs the most basic of questions: why is our profession so vilified? Why do lawyers provoke such a visceral reaction from the public? The lawyer, whose

[1] Commentary to the LSUC Role Statement (1994).

very raison d'être is built upon trust, is no longer trusted but rather regarded with wary scepticism, if not outright venom and scorn.

The public perception is that we are self-interested, money-obsessed champions of the corporate world and not the allies of "the little guy". The people we are supposed to serve no longer have faith and trust in us. In their view, lawyers are just like politicians: not to be believed, fickle and motivated by self-interest.

It may not be surprising that the public has so little time for our profession, when, at times, it seems that we may have forgotten what a life in law is supposed to be about. Perhaps we, as a profession, have ourselves, to some extent, lost sight of the fact that law is not simply a business. It is a calling. It is no coincidence that the words "advocate" and "vocation" both come from the same Latin root: *vocare*, meaning "to call".

The law truly is a vocation, and, as such, it demands a very special commitment from those who have the privilege of calling themselves lawyers. In the words of Benjamin Cardozo, the former Associate Chief Justice of the U.S. Supreme Court, "[m]embership in the bar is a privilege burdened with conditions."[2]

The privilege is obvious: we are given a self-regulating monopoly on the provision of legal services.

[2] *Re Rouss*, 221 N.Y. 81, 84 (1917).

The conditions of this privilege should be just as obvious:

- integrity and therefore principled conduct;
- trust and therefore discretion; and
- the paramountcy of the public interest and therefore the pursuit of justice.

With these conditions, the self-regulated monopoly that is the legal profession should work, and work well, in the public interest. Without these conditions, we are little more than the purveyors of costly consumer services.

We may want to pause here to take note of a recent phenomenon whereby some of these services are obtained off-shore at greatly reduced cost and with assurances of comparable quality. As has occurred in manufacturing and other industries, this trend can reasonably be expected to expand as clients become increasingly reluctant to pay high fees.

The challenges to “staying the course” remain largely the same today as when Justice Abella spoke about these issues almost a decade ago, although arguably they are even more acute. As she described, two of the biggest challenges come from the economic pressures of the practice and from the preoccupation with process in the civil litigation context and the delays occasioned by this process preoccupation.

Economic Pressures

The demographics of the profession have changed a great deal in recent years. Many people from diverse socio-economic and cultural backgrounds have become lawyers. While it is to be hoped that this trend continues, the rising cost of a legal education poses a very real threat to this welcome diversity. As a result, there are now many lawyers who did not have privileged backgrounds now saddled with significant debt and great expectations.

It is trite to say that lawyers should get paid for their work. At the same time, it is disconcerting that a lawyer's worth is increasingly measured **solely** in terms of dollars. More and more, financial considerations have become the guiding force behind the modern law firm. While financial considerations are obviously important, we must consider the ultimate cost of an emphasis on money to the exclusion of other values. Our challenge and our goal must be the attainment of the appropriate balance.

Extreme financial pressure can be the enemy of the good lawyer. Without sufficient time for reflection and analysis, the work and the advice which is the product of that work, may suffer. The sacred trust that is at the very heart of the solicitor-client relationship can be undermined by the need to meet ever-

increasing financial targets. Deserving clients and causes may be turned away because they do not meet new client acceptance policies.

The future of the profession is also imperilled if financial pressures result in lawyers not embracing “non-billable” activities, such as pro-bono work, mentoring younger lawyers and involvement in professional organizations. Young lawyers need to see and learn from the example set by those with more experience. Along with case studies, this “learning by example” has always been at the foundation of legal education.

In focusing on the large law firm, we cannot forget the role of the sole practitioner and the small firm. They are not always regular guests at the banquet of excess, but often struggle for their daily bread. Our profession was built by many of these sole practitioners and small firms, as the large, national law firm is a more modern creation. We cannot afford to lose this important part of the independent and private bar, many of whom are the only points of contact the average member of the public will have with our legal system.

An over-emphasis on the billable hour can also feed disillusionment as lawyers derive no satisfaction or sense of accomplishment from their work. We need to remember that we chose law school over business school for a reason.

There is certainly no dearth of writing, both by academics and in the popular press, about the growing ranks of dissatisfied and disillusioned lawyers. This is almost universally linked to the now ubiquitous themes of "lifestyle" and "work-life balance". Not surprisingly, these issues are usually raised in the context of responding to the needs of women with childcare and other family responsibilities. While more than one-half of "new calls" in Ontario are women, a significant number of women continue to leave private practice, choose alternate careers or simply cease working outside the home.

Needless to say, this is disconcerting. As former Supreme Court of Canada Justice Bertha Wilson stated in her 1993 report on equality and diversity in the profession, "private practice is the paradigm for the legal profession."[3] Women who have succeeded in private practice have brought a new perspective and a new set of skills to the job of lawyering. The profession is richer and our clients are better served as a result.

Years ago it was thought that external factors, such as gender discrimination, discouraged both the entry and retention of female lawyers in private practice. However, there is now a growing recognition that it may not necessarily be the proverbial glass ceiling that has led to the exodus of women from the profession.

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[3] *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

Rather, it may be the different goals and priorities of the next generation of women lawyers, many of whom seem to be driven by factors other than money.[4]

These changing goals and priorities are not, however, restricted to this particular demographic. Statistics maintained by the LSUC reveal that the incremental growth of all lawyers in private practice is dropping dramatically: from 65% in private practice in 1994, to 53% in 2005.

In order for our profession to continue to exist as a self-regulated one, we must recognize and respond to the changing attitudes, goals, priorities and egos of the "next generation" of lawyers. We are truly living in different times, but we have taken and continue to take our time to recognize the changes and to adapt to them. More and more lawyers, not only female, are making it abundantly clear that they don't want or need to be one of the "Top 40 under 40" or a "Lexpert"-recommended expert in their field. More and more lawyers are saying that they don't want or need to make millions and may not even want to join the partnership.

Clearly, we must recognize and address this and offer options and choices, to **people**, both male and female, including options and choices about hours, status and remuneration.

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[4] This view was most recently expressed in S. Pinker, "Legal Dropouts", *Globe and Mail Report on Business* (February 29, 2008).

While the source of this shift in attitudes may be the subject of debate, its important implications for the profession are not. If law firms don't begin to address the situation, the consequences will be enormous, particularly in terms of succession management. To put it bluntly, in twenty years time, there will be no one left to "run the show".

These "lifestyle" issues clearly can no longer be ignored. At the same time, however, the reality is that the practice of law cannot ever really be an exclusively 9 to 5 or "flextime" job. The corollary of the law being a profession means that lawyers have a unique and special relationship with those for whom we work. These people are clients, not customers, and the shop does not close at 5 pm. Their problems do not always arise during normal business hours. Ours is a fiduciary relationship where everything we do must be in our clients' best interests. Just as the doctor must respond to a patient in need, so must we when a client calls with a pressing matter, even if it's technically "after hours".

Make no mistake, the law will always be a demanding mistress. This is the inescapable reality of our vocation. It is one of Justice Cardozo's "conditions" which burden the privilege of membership in our esteemed profession. It is, quite simply, one piece of the price we must pay to call ourselves lawyers. For me, this price has always been worth it. I am proud of our profession and truly feel privileged to have been a member of it and to have served my clients faithfully for over thirty years. But with that privilege comes the ongoing obligation to ensure

that there will be others ready, willing and fully prepared to take up the clients' causes.

Process Preoccupation

The law and lawyers have also fallen out of favour with the public due to the increasing problems in accessing justice, whether as a result of lengthy delays in the courts or because of the rising cost of litigation. It is not uncommon to hear a lawyer today say "I couldn't afford to hire myself" or "I couldn't afford to pay my own account".

The protracted litigation at the centre of Dickens' *Bleak House* illustrates the suffering that can be caused by the inefficiency of the law, as well as the correspondingly troubling conclusion that "the one great principle of English law is to make business for itself." Regrettably, it seems that many members of the public in 2008 would share Dickens' 1852 opinion of the law and lawyers. Litigation continues to be costly and lengthy, for many reasons, not all of which can or should be laid at the feet of the lawyers.

Many, including Justice Abella, say that the root of the problem with the civil justice system is the obsession with process, which thwarts the prompt and fair resolution of disputes.

I am careful here to restrict the following comments to the **civil** justice system. There may be similar problems with the criminal justice system, but there are also important reasons why "process" must be specially protected in the criminal context, regardless of the cost that may be associated with it. The rights of the individual are at stake and "process" may be the only bulwark against the power of the State. While this may be costly at times, it is the price we must pay for living in a free and democratic society.

The concern over "process" is not the same in the civil context. This is not to say that I do not believe in some process in the civil justice system. Quite the opposite, process is integral to an effective civil justice system.

There **should** be a cost to access the justice system: otherwise every citizen's dispute, no matter how trifling, would be brought before the courts for resolution. Not only would this completely overburden and ultimately paralyze our courts, it is also not the kind of society most of us would want to live in. We must encourage our citizens to resolve or at least attempt to resolve some disputes directly. The very essence of community depends of this type of informal dispute resolution.

"Process" therefore does serve a purpose. Process also provides us with the tools we need to do our job. It is our job as lawyers, however, to carefully select what tools are necessary to best get each particular job done. This requires

judgement, some of which may be instinctual, but most of which is learned through experience. We should not be expected to turn over every stone. Rather, we should be expected to figure out which stones need to be turned over.

A good carpenter does not use every tool known to humanity to build a cabinet. Similarly, a good lawyer does not ask every fathomable question on examination for discovery, bring every conceivable motion, retain five experts to comment on the same issue or throw everything but the proverbial kitchen sink into a factum. The exercise of judgement is required in order to ensure that we, as lawyers, remain the masters and not the slaves of process.

Unfortunately, the modern practice of law is at times the enemy of judgement. There is a reduced time for reflection and analysis, partly as a result of the financial pressures of the practice. The exercise of judgement also requires a certain level of confidence in our own ability and a willingness to make and stand by our decisions.

Young associates are often focussing solely on churning out the work, sometimes without actually thinking about what it is they are really trying to achieve. Partners who have similar financial pressures have less and less time to spend on mentoring and teaching. The “open door policy” may no longer exist in some firms and associates with questions may therefore feel intimidated

approaching partners for fear of wasting their time. Much spinning of wheels may ensue, to the detriment of both the lawyer's professional development and the client's best interests.

Technology, often heralded as the saviour of the modern practice of law, can also play a more insidious role. E-mail in particular is a culprit, where bombardment with hundreds of messages over the course of the day coupled with an expectation of instantaneous replies results in no time for reflection or analysis.

Due to the harried pace of the modern practice of law, some lawyers can quite simply no longer see the forest for the trees. Judgement is not being exercised properly, if at all, when the factum on a simple motion to dismiss for delay is 35 pages long and cites 50 authorities. Similarly, there is no judgement being exercised when useless motions are brought which have no reasonable prospect of success.

And judgement is what the client is paying us for. Anyone can read the Rules of Civil Procedure. The exercise of judgement is the "value-added" service we as lawyers provide to our clients. As lawyers we should be asking ourselves "where does the client need to go and what is the most direct route for me to take to get him/her there."

In assessing how best to meet a client's needs, there is of course one important *caveat*. A lawyer must always be wary of becoming the dupe of an unscrupulous client. As such, a client's instructions should only be carried out where they do not conflict with the lawyer's ultimate duty to the administration of justice.

The modern practice of law has also unfortunately brought with it a crisis of confidence in the litigation bar. Young civil litigators rarely get inside the courtroom these days, let alone actually try cases. As a result, the few civil trials that do proceed are complicated and protracted when they don't always need to be, often due to counsel's lack of confidence to make key strategic decisions.

It seems that the public has fastened on to the fact that we as a profession have not done such a great job at exercising judgement lately. As the saying goes, it only takes one bad apple to spoil the barrel and recent notable cases of questionable conduct by our colleagues certainly do nothing to help our cause as a profession. For many years, there has also been a general public malaise surrounding civil litigation in particular, where the overburdened judicial system now again seems at risk of grinding to a halt.

It is clear that if, as professionals, we can't exercise judgement, then it will be done for us. The most recent example of this is the Ontario Civil Justice Reform Project, headed by The Honourable Coulter Osborne, where hundreds of very useful recommendations have been made to improve our flagging system.

These include many that would seem intuitive to the barristers of old, but unfortunately likely somewhat foreign to many of today's practising litigators. For example, he recommends that limits be placed on the length of examinations for discovery and on the use of experts. Certainly, the judiciary can and should also play a role in controlling the process, particularly where it looks like counsel aren't doing the best job at exercising judgement in the handling of a particular matter.

At the same time, not all of the problems plaguing the civil justice system are caused by lawyers. There are the obvious institutional resource issues that play a role. One example is in the area of technology where, despite best efforts, the obvious benefits of case management software are not always available to streamline trial administration.

There is also a growing trend to judge lawyers who take cases to trial as having failed because the case was not settled. Despite all comments about our apparent preoccupation with process, I caution against the view that a trial signals a failure of the system or of those who play a role in it. Trials are necessary, for a lot of legal and social reasons, not the least of which is to develop a rich body of jurisprudence to guide us into the future. The civil justice system should not become a value-neutral dispute resolution mechanism. The well-considered and judicious choice to take a particular case to trial is not a

failure but rather a laudable contribution to the continued flourishing of our common law system.

Moreover, an interesting theory has been advanced that instead of making the civil justice system less expensive and more accessible, settlement can actually contribute to expense and delay by encouraging frivolous litigation. William Sanders writing in *The National Law Journal* put it this way: "More lawsuits burn up legal time, court resources and the funds of both parties and the public."[5] Mr. Sanders also accused the judiciary of "fanning the flames of meritless lawsuits by urging mediation, settlement conference, ADR—anything to get lawsuits off court dockets by getting settlements based on expediency rather than whether the defendant was right or wrong."[6]

An interesting corollary of this theory is that encouraging settlement, particularly in meritless cases, may actually serve to increase public scepticism of the justice system. In such cases, the justice system is seen as more akin to a lottery than a vehicle for the furtherance of societal goals, including the redressing of wrongs as between citizens.

The bar cannot cure all of the ills that plague our civil justice system. However, I believe that it would do much to rehabilitate the profession in the eyes of the public if the lawyer once again focussed on being a problem solver: someone

[5] William H. Sanders, "Companies that Roll-Over May End Up Dead", *The National Law Journal* (May 16, 1994).
[6] *Ibid.*

clients can trust to find the most effective, expeditious and inexpensive way to achieve their ultimate goals.

Conclusion

So, where have we come since Justice Abella's thought-provoking piece in 1999? The answer is "NOT VERY FAR". We certainly do not seem to have progressed and we may have even lost a little ground. No doubt we will make some advances today as you hear insight from the stellar individuals listed on the program. But one thing is very clear: we must work individually and collectively to rehabilitate the public perception of our profession by starting at first principles. We must remind ourselves why we became lawyers in the first place. For most of us, it was to serve the public interest through the pursuit of justice.

If we keep this in mind as our ultimate goal, the current emphasis on the billable hour will not destroy the core values of our profession. This will also ensure that, as the gatekeepers to the justice system, we keep the system running effectively and efficiently. We must be the masters and not the slaves of process. Hopefully, the welcome corollary of this will be to reawaken the joy and sense of accomplishment that comes from helping others. For this is what the practice of law really is about. And make no mistake, the law firm that understands these issues – diversity, accommodation, trust and service - and that addresses them appropriately and with sincerity and conviction – will have cracked the nut. With

its contingent of lawyers freshly re-instilled with the pride of membership in the profession, that law firm will be best able to regain and continue to deserve the sacred trust of the public.