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THE LAW SOCIETY OF UPPER CANADA PROFESSIONALISM REVISITED

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This speech is about values. My thesis is that there are three basic values which merge in a good lawyer: a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the two other values. My sense is that while there is a crisis neither of competence nor of ethics, most lawyers having both in laudable abundance, the same cannot be said of the spirit of professionalism. I speak to you as someone with an idealized and romantic view of the power of law and of lawyers. I think the rumours of the death of legal professionalism have been greatly exaggerated. I graduated from law school in 1970 and have been proud every day since of being a member of this profession. But I am not unaware that there are many out there who are watching the justice parade with growing concern for the quality of the floats.

Justice may be being done, but it is not necessarily being seen to be done, and justice must be seen to be believed. Law is central to democracy. The public thinks that law and democracy are about justice, that justice is about fairness, and that lawyers should be, as people who live in the house of justice, the fairest of them all. Can we as lawyers look in the mirror and say we truly are?

There is nothing new about the public's scepticism about our profession. Sir Thomas More's Utopia had no lawyers in it; Chaucer's The Canterbury Tales had the odious Sergeant of Law; and Kafka's Trial had no discernable law at all. Margaret Atwood once observed that when Sidney Carton, the heroic lawyer in "A Tale of Two Cities", was about to be guillotined and said "Tis a far far better thing I do than I have ever done", he was "putting the practice of law into its proper perspective."

It was the same Margaret Atwood who, after noting wryly that in the Old Testament there is a Book of Judges but no Book of Lawyers, offers the deflationary insight that "In the Judaeo-Christian tradition, God is, among other things, a judge; an equation that some judges ... are inclined to reverse."

But although historically we in the legal system have never been able to declare a clear victory over the public's affections, I would argue that the intensity of the public's disaffection is now so palpable that it has started to affect the profession's own perception of its professionalism.

When I graduated from law school, no one taught ethics or professionalism. In the Bar Admission course, the then Chief Justice of the province gave a one-hour lecture on how lawyers should behave. He told the over 500 students never to wear brown suits and white socks, a largely irrelevant observation for the 10 women in the room who nonetheless shared the Chief Justice's view of brown suits.

Yet despite the fact that the only lecture on being a lawyer in four and a half years of my legal education was about what a lawyer should look like, there was a tacit consensus about what it meant to be a lawyer. It meant being a professional, which meant all of those romantic notions about decency, civility, trustworthiness, and fairness, to name a few. The lawyers who had good reputations were the lawyers

who practised law with these adjectives as conduct guides. Some of them made a lot of money, which no one begrudged them or presumed. And quite a few of them were very smart. But they were also overwhelmingly white, male, able-bodied, and socially advantaged. Diversity was a word we used to describe the variety of cases we handled, not our consumer or collegial environments.

We have come a long way. When I was appointed to the bench in 1976 there were fewer than a dozen women judges in Canada. I was the first pregnant woman to be made a judge. That pregnancy offered me my first close-up of stereotyping. I was home on maternity leave 2 months after my appointment with our 3 year-old son, Jacob, having given birth to his brother, Zachary, two months earlier. I was reading to him what he obviously found to be a tantalizing book called "If I Were a Bus Driver." When I finished the book he said, "When I grow up, I want to be a bus driver." "Don't you want to be a judge?", I gently pressured. He looked up at me, confused, and replied assertively, "Only girls are judges."

That 3 year-old is now articling, and his baby brother has just started law school, but they are graduating into a very different professional environment from mine three decades ago. It is bursting with diversity, far better educated about ethics, far better paid, and far more stressful. But it is also a professional environment where the consensus about what it means to be a professional has broken down, as has the consensus about what the criteria should be for awarding good reputations.

What worries me about this is not so much the absence of a consensus, although this is undoubtedly an unsettling reality, it is the threat I fear to the very legitimacy of the profession, and to the professionals and institutions in it. Although I quickly concede that this is not a new issue, it has a feel of urgency to me in this ideologically polarized, intellectually sclerotic, and frenetically fluid era.

There is undoubtedly a crisis of professionalism generally, and that crisis in turn is having a supply-side impact on everyone, including lawyers. It should surprise no one that lawyers are affected by the spirit of the times, but neither should it surprise lawyers that the public expects them to rise above it.

The fact that the public is so nervous should at least give us pause. It is certainly true that we cannot expect to be popular with the public all the time. The independence of the Bench and Bar means we have to be prepared to be unpopular with the public from time to time, and even on occasion controversial; but our independence does not absolve us from the responsibility of listening and being open to the possibility that the public's suggestions and criticisms are relevant. We cannot, of course, accede to every request for a response just because it comes from the public, but neither should we decry every criticism as irrelevant just because it had never occurred to us before, or came from an unfamiliar source, or met with no support from our colleagues.

Justice may be blind, but the public is not.

The public is our audience, the people for whom we perform the justice play. They do not direct us, but they are very interested in what is going on. If they stop clapping, we are in deep trouble. We have to figure out if it is because of the script, the props, the cast, or all of them. We know we will always have an audience, because the play is called the Rule of Law, and the public's attendance is mandatory. Since we give the public no choice about whether or not they are subject to the rule of law, we have to care about whether they like the performance. They may not always be right, but they always have a right to be heard.

This is how, in large part, we discharge our accountability to the public without compromising our independence: through an empathetic hearing of its concerns, being open to the possibility that its concerns may be valid, and responding as effectively and quickly as possible when they are.

To me, the Law Society got it right when it said in its 1994 Role Statement that the legal profession exists in the public interest to advance the cause of justice and the rule of law. So did the American Bar Association's 1996 Professionalism Report on Teaching and Learning Professionalism, when it said that professionalism was about "dedication to justice and the public good."

High-sounding and high-minded ideals, but they are for me not mere rhetorical flourishes - they are bedrock aspirations. They are how we should be seeing ourselves, how we should be seen by others, and how we should continually strive to be seen. Professionalism is more than about being a lawyer - it is about why we are lawyers.

But in my view, two headwinds are polluting, or at least threatening to pollute, the ideal professional environment, and therefore the centrality of our relationship with the public: economic pressures and a misplaced preoccupation with process. These Zeitgeist forces create a kind of turbulence in our pursuit to narrow the gap between our professional ideals and the competing realities.

1. Economic Pressures

Lawyers, like everyone else, relished the boon economy of the 80's, and raised their financial aspirations and expectations accordingly. Many people got rich in the 80's, including many lawyers, and, understandably, no one was eager to give any of it up. When it looked as if they might have to, fear of loss took over. It was, I think, this intense fear of losing the economic benefits so intensely accumulated in the 80's that largely sedated people's impulse for generosity.

The fear of economic loss played out in different ways for different groups, but among lawyers it played out in rigid billing requirements, increased competition, and a restricted willingness to acknowledge requests for lifestyles that included living a life.

But to me, the most worrying repercussion of the economic Darwinism at work in the legal profession was the extent to which its impact was a perception by the public that the profession had adopted many of the practices not of a profession, but of a trade. When the public starts thinking of the practice of law as a trade like any other trade, it may well start asking itself why the practice of law should not be treated like a trade. Why, for instance, if lawyers are going to behave like a trade, should they be self-governing? Or why is a lawyer needed at all if lawyering is simply a matter of skill and not professionalism.

The economic amenities lawyers pursue must be seen as the earned rewards of the primary pursuit of serving the public. If they are, no one will begrudge their fair, and even generous, accumulation. If, on the other hand, they are seen as the object of the exercise, we risk ultimately being judged unworthy of the presumption of professional independence.

On the other hand, sometimes the economic pressures lawyers face, especially lawyers in small or sole practitioner firms, arise from not being able to keep up with the extraordinary costs - technological and otherwise - of doing business today. Pressure from clients to do more faster and for less, competition from non-lawyers, the relentless pace and face of change, reduced legal aid work at staggeringly stagnant tariffs - all these and more impose enormous tensions which should be acknowledged.

But in my view economic pressures, while generating inevitable stress for lawyers which may require responsive policy measures from a governing body, cannot be seen as a legitimate excuse to avoid practising in a professional way. Nothing justifies the absence of professionalism for a lawyer, at either end of the economic continuum.

2. Process Preoccupation

We have moved from being a society governed by the rule of law to being a society governed by the law of rules. We have become so completely seduced by the notion, borrowed from criminal law, that process ensures justice, that we have come to believe that process is justice. Yet to members of the public who find themselves mired for years in the civil justice system's process, process may be the obstacle to justice. It may be time - again - to rethink how civil disputes are resolved.

For a start, we need to sever the philosophies of dispute resolution in the civil and criminal justice systems. The dispute in criminal law is between an individual and the state. Process protects that individual's presumption of innocence from the overwhelming power of the state, and necessarily so. But

civil justice is usually a dispute between two private parties. Can we honestly say that the fair resolution of such a dispute requires several years and resort to hundreds of rules? It would be worth asking a client who has just lost a lengthy trial how good he or she feels about having had the benefit of an elaborate procedural journey. Would it really surprise anyone if we learned from such a client that the result was of more interest than the process, and that all he or she wanted was a fair chance to be heard? People want their day in court, not their years.

Even alternate dispute resolution mechanisms, hailed at first as the expeditious alternatives to cumbersome court procedures, are themselves turning into procedural mimics of the court system. Arbitrations all too often end up being almost as lengthy, complex, or expensive as a court case.

In 1906, the then Dean of Harvard Law School, Roscoe Pound, made a speech to the American Bar Association entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." And what was the main cause of dissatisfaction in 1906 according to Pound?

Uncertainty, delay and expense ... [are] direct results of the ... backwardness of our procedure.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.

Let's put Pound's almost 100-year old observation in historical context. The horse and buggy of 1906 have been replaced by cars and planes; morphine for medical surgery has been replaced by anaesthetics, and the surgical knife by the laser; caveat emptor has been replaced by consumer law; child labour has been replaced, period; a whole network of social services and systems is in place to replace the luck of the draw that used to characterize employment relationships; the phonograph has been replaced by the compact disc player; the hegemony of the majority has been replaced by the assertive diversity of minorities; and adoring wives have been replaced by exhausted ones.

And yet, with all these profound changes in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Could a doctor from 1906 feel the same way in an operating room?

If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal profession in conscience resist experimenting with old systems of justice in order to find better ways to deliver it? How many lawyers could themselves afford the cost of litigating a civil claim from start to finish?

We cannot keep telling the public that this increasingly incomprehensible, complicated process is in their interests and for their benefit, because they are not buying it any more. If our defensive arguments make no sense to the public, how much sense can they be said to make, period.

The public does not believe it should take years to decide where their children should live, whether their employer should have fired them, or whether their accident was compensable. Maybe for a constitutional case, but decidedly not for the resolution of a dispute between two private parties.

We cannot talk seriously about access to justice without getting serious about how inaccessible the result, not the system, is for most people. The public knows we are the only group who can change the process. They are very interested in, but less understanding of, our explanations as to why we resist streamlining the system from the inside. When we say, "It can't be done," and the public asks, "Why not," they want a better reason than "Because we've always done it this way."

Our monopoly puts us in a fiduciary relationship with the public. We are the gatekeepers and groundskeepers of the fields of the law. As such, we should be on the front line for reform, taking on outmoded systems, and being seen to be putting the public before our pockets or our prestige. Process is

the map, lawyers are the drivers, law is the highway, and justice is the destination. Lawyers are supposed to be experienced about the best, safest, and fastest way to get there. If, much of the time, they are unable to get there because the maps are too complicated, then, as Gertrude Stein said, "There's no there, there." And if there's no "there, there," there's no point in having a whole system to get to where almost no one can afford to go.

I know this has been a difficult time for the legal profession. Through it all, most lawyers carry on with pride and professionalism, and with more than a touch of frustration at their seeming inability to synchronize their professional reputations with fluctuating public expectations.

There remains, however, one public expectation that does not fluctuate. It is the expectation that the profession will always, no matter the times or their permutations, behave professionally. It is an expectation to which the profession has always expressed a deep commitment, and it is an expectation to which most lawyers remain deeply committed.

The legal system represents the ideals of the public, and because as lawyers we are the interpreters and translators of those ideals, it is therefore a system that deserves our idealism, courageously and optimistically.

Having set the cluttered stage, what can be done to reinstate a commitment to professionalism as the lawyer's - and the public's perception of the lawyer's - transcendent vision? And, more particularly, what can be done by the Law Society?

The Law Society has two constituencies: lawyers and the public. These are utterly compatible and indispensably linked. The Law Society should be seen to be the profession's best professional voice and the public's best ear. Unfortunately, it is not seen at all, or, when it is seen, it is seen by lawyers when it announces a restrictive or expensive measure, and it is seen by the public when it announces the consequences of professional misconduct. These sightings may be unavoidable and, at times, even salutary, but they are not happy messages. Not that the Law Society needs to keep everyone happy. It can't. But if these anxiety-producing pronouncements are all we see, can we be faulted for wondering if there isn't a more positive message the Law Society could be seen to feel responsible for.

According to the Earnscliffe Report, the Law Society's Nielsen ratings ranged from "never watch" through "hardly watch" to "hate to watch." In other words, somewhere between irrelevant and obstructive. This is troubling to someone like me who sees the Law Society theoretically as crucially relevant as the guardians both of our independence and of the public's confidence in our right to be independent.

I see the report, therefore, as a wake-up call and a wonderful millennial opportunity for the Law Society to reformulate its relationship to its professional and general publics, and to redefine its functions accordingly. It will undoubtedly be a difficult task, but as Isaiah Berlin observed, there's no pearl without some irritation to the oyster.

If you do decide to embark on an institutional adventure in search not only of relevance, but of perceived relevance, here are some thoughts:

1. The Law Society cannot solve all the problems lawyers face in the practice of law. Not every market force is surmountable and not every contingency is preventable. It may be time to stop the hand-wringing over how many lawyers should be allowed to practise on the head of a pin, and more on how many are doing it as professionally as possible. Establish your priorities in a way that facilitates as many ethical options for as many lawyers as possible, but don't try to be all things to all lawyers.

2. On the other hand, a lot of lawyers are hurting. It is worth knowing why, and which are the most vulnerable. What services could they use from the Law Society, besides a Code of Conduct, to help them navigate the breathless rates of change in law, information, and technology. In other words, how much more of the Law Society's energy and resources could or should be spent on facilitating access to what

small firms, sole practitioners, and non-Toronto lawyers need to practise law as effectively and professionally as possible.

3. Having welcomed women into the profession in droves, we wallowed in smugness at our generosity, then forgot to pay attention to the droves who were leaving. To what extent are we acknowledging that life in a law firm may be no life? I appreciate that the environment is hotly competitive and that fear inspires desperate measures, like 2000 hours of billings a year. But not only are we ignoring the reality that the gender that historically made and cared for babies still wants to, we are also forgetting that we spent the 60's and 70's telling the other gender that they too are important to children. So not only will female lawyers be either depressed, torn or childless, so will the males. Life matters - movies, books, friends, and family keep us humane, and if we are not humane we cannot deliver a humane justice system to the public. We should take as much pride in how diverse and accommodating our law firms are - for both men and women - as in how big their billings are.

How many minorities and women run major law firms. How many are partners, or Bar leaders? It's no good talking about the merit system any more because the curtain's been pulled and, like Dorothy, we know that the Wizards who make promotions and appointments are just real people. The "merit system" always operated idiosyncratically, and words like "qualified" tended to mean "who'll fit in best." So we should stop pretending about why the profession is still so top heavy with able-bodied members of only one of this country's official genders and colours and get on aggressively with making it possible for the public to see itself reflected at all layers in the lawyers who serve it.

4. In his masterful 1991 diagnostic study on how we teach lawyers to be professionals, Professor Brent Cotter reactivated the haunting and persistent refrain sung by decades of young lawyers - why do we have articling and Bar Admission courses. Whose interests does this pedagogical gauntlet really serve? It has for too long survived the establishment of the university law schools whose absence was the original rationale for its existence. Is there really an evidentiary foundation for concluding that this is the most reasonable way for the Law Society to ensure that people entering the profession have the requisite educational arsenal of knowledge and skill? Has anyone taken a survey to gauge the utility of, or consumer satisfaction with the humiliating beauty pageant that is the gatekeeper to articling, or with the Bar Ad's income- delaying months which either repeat the job the law schools were doing, or teach the courses few graduates will ever need. How positively can a newly emerging lawyer be expected to feel about a Law Society which imposes either the frenzy of the match programme or the irrelevance of an accounting exam. Are the gains really worthy of the financial burdens these educational enhancements impose on students?

5. I applaud Bob Armstrong's initiative in meeting with Ontario's law school deans. A sense of professionalism may well start before law school, but there is no doubt that it can take full flight in those three formative years. A good legal education teaches not just technical proficiency with laws and rules, but an ability to exercise judgment empathetically and wisely by blending that proficiency with the particular client or conflict. This is a lifelong career requirement that starts in law school and continues until retirement.

But that good education will atrophy if the professional culture in which it is applied shrinks the idealism most students graduate from law school with. This professional culture is in the Law Society's jurisdiction, and it could do worse than spending time thinking about how to keep that idealistic sense of professionalism vibrant. Cultures are generated by shared values and expectations. It's time to concentrate on how to make those of professionalism culturally transcendent. It may in fact be useful to revisit the excellent 1986 CBAO Committee Report chaired by Ron Manes and think about a Law Society-sponsored variation of the proposal that there be a centre to study the ongoing professional concerns of lawyers and clients.

6. Which brings me to Leadership. We learn by watching and we teach by example. Who are the profession's designated role models and what are they saying? Are they talking about how many people find the legal system too cumbersome, costly and inaccessible, or are they talking about the opportunities globalization offers? Are they Generals in the war against disadvantage, or are they on the front lines of

the battle to protect the honour of the status quo? Do they promote taking risks on behalf of social justice or do they promote complacency on behalf of a collegial life? Who we venerate today determines who we are served by tomorrow. Is the Law Society prepared to take a leadership role, or will it hide behind the impossibility of a consensus from its almost 30,000 members before it confronts the public's cynicism? Will it continue to jerk from agitating crisis to critical agitation, or will it undertake to prevent the legal system's ambush at Credibility Gap by a public who got tired of waiting for us to understand that their confidence was a sacred trust? Will its misconduct preoccupations remain fixated on the sanctity of the trust fund or will it rebuke professional incivility and discourtesy? The gratuitously insulting crankiness which has now replaced critical analysis with depressing frequency, is a hole in our profession's ozone layer and requires the Law Society's protective public response, not only to remind the public and the profession that professional discourse is different from schoolyard discourse, but to maintain a professional culture lawyers should be proud to be a part of and clients should be proud to be served by.

It is not just a question of what the Law Society stands for, it is also a question of what the Law Society stands up for.

7. And finally, how will we define success in this profession? By money? By partnership? By hard work? Of course. But also by integrity, by decency, by compassion, by wisdom, by courage, by vision, by innovation, and by idealism.

If we venerate these qualities and reward those who have them with our respect, we send signals to the profession that our shared values and expectations exceed the tangible economic consequences of the expertise we enjoy. Lawyers have many contributions to make in many different ways. And they should feel pride, despite the reality of their fears and tensions and challenges, in what they do, who they do it for, and how they do it.

And this the Law Society can do best - promote that sense of pride, repair it when it suffers injury, and satisfy the public that we have earned the right to have them share in that sense of pride.

Let me end with a story that explains one lawyer's passionate belief in the justice system. Seventy years ago, a young Jewish man from a small town in Europe won a scholarship to the Jagiellonian University in Krakow to study law. There was a quota on the number of Jews, and he was one of only 4 admitted to the law school in a class of over 100. The Jewish students were assigned special seats in the lecture rooms. Rather than sit in them, he stood through most of his first year at University. World War II broke out one year after his graduation as a lawyer and on the day of his marriage. He and his wife spent 4 years in a concentration camp. Their 2 1/2 year old son and the man's parents and three brothers died at Treblinka.

After the war, the man and his wife went to Germany. They had two more children. He learned English and German, and was appointed by the Americans to develop the system of legal services for displaced persons in Southwest Germany and to act as their senior legal advisor. He developed a deep respect for the American legal system, which he passed on to his children. He applied for, but was denied entry into Canada because his legal training was not a skill then considered necessary to Canada.

He eventually was permitted entry after teaching himself and passing licensing tests. He was admitted as a men's underwear cutter and as a shepherd, and arrived in Canada in 1950 with his wife and two children. In Canada, he was not permitted to become a member of the bar because he was not a Canadian citizen. This would have taken five years so he became an insurance agent instead to support his family.

He did very well as an insurance agent, and for the rest of his life felt deeply grateful for the opportunity to come to a new country and raise his two daughters in freedom.One of his daughters became the lawyer he couldn't be, but he died two months before her graduation. That daughter stands before you today, believing as did her father, that democracies and their laws represent the possibility of justice, and that lawyers are the people who have the duty to make that justice happen. I am very proud to be a lawyer, but I will never forget why I became one.