The Changing Face of The Judiciary and Legal Profession

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Some of you may know that we have a glass and concrete palace that we call the Law Courts in Vancouver. But as I sat here this evening enjoying superb food and company in this magnificent old hall, I was reminded of a discussion I had with our architect when we opened our new court house sixteen years ago. I commented that it was functional, but it did not look like a court house. He said, "Don't worry, in one hundred years, it will look just like a court house."

Well, if our law courts building lasts one hundred years, or even one thousand years, it will not be as lovely as this grand old hall. You should be immensely proud of it, and I envy the treasure you have here.

I am deeply honoured to be invited to speak this evening. I understand I am the second speaker from British Camelot to address this learned society, the other being Madam Justice Beverley McLachlin whose outstanding career has greatly enhanced my reputation as a recruiter of judicial talent. She is the only jurist from our province who dashed through most of our courts faster than a speeding bullet or a speedy trial. We are immensely proud of her. In fact, she was with each of our courts for such a short time that she evokes those wonderful lines of Wordsworth:

She was a phantom of delight
When first she gleamed into my sight
A lovely apparition sent
To be a moment's ornament.

I'm not sure it's safe, these days, to describe anyone as an ornament because it might be said to marginalize, stereotype or trivialize all

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phantoms of delight. I hope, however, that a moment’s ornament rather than a person, may withstand critical scrutiny. I hope so. Anyway, that’s how we remember Beverley, and I am proud to follow in her gracious footsteps.

When Beverley left our trial court for the Court of Appeal, one of our best and most senior trial judges sounded this warning:

Beverley, he said, some judges say they don’t mind being reversed, but I want you to know that I take it personally!

She replied by saying that she had been speaking to some of her new colleagues, and had expressed doubts whether she would be comfortable reversing her friends on the trial court. One of her new colleagues — also a former trial judge — comforted her by saying:

Don’t worry, it will be a little difficult at first, but after about two weeks you actually get to enjoy it!

When invited to speak tonight I was asked to furnish a label for my remarks. I answered that I would talk about the changing face of the judiciary. I respectfully seek an amendment to my label as I want to speak not only of the changing face of the judiciary but also of the changing face of the legal profession. This is because I have not found it possible to speak comprehensively about the judiciary, without speaking also about the bar.

The amendment having been granted, I wish to disclose a long-standing bias. I like lawyers. I was a lawyer myself for 28 wonderful years, and I am truly grateful for that marvellous, diverse, entertaining, and rewarding experience.

Like many of you, I am frankly sick and tired of the endless criticism heaped upon lawyers for so long. Aren’t you weary, as I am, of critics and editorial writers trying to be too clever, trotting out all the old wisecracks about killing all the lawyers, and that the law is an ass? Someday, someone should write a definitive explanation of those superficial sayings. Don’t these cynics understand that the suggestion of killing all the lawyers in Mr. Shakespeare’s Henry VI, came from Dick, an associate of Jack Cade, a terrorist and would-be tyrant, who had already burnt the library at the Inns of Court and planned to take over all of England. The wily Cade knew that only the lawyers stood between him and absolute power. How, I ask rhetorically, could any self-respecting commentator so convolute such an analogy to support a criticism of lawyers.

And Mr. Bumble, in Oliver Twist, did not say that the law is an ass. He said, “If the law supposes that a woman acts only at the direction of her husband, it is an ass, an idiot.” This is obviously quite different from
the way it is used, because the law never supposed any such thing, and
we all know it is not true.

To critics who stoop to such pretensions, I remind them of Pope's
observation in his *Essay on Criticism*, that a little learning, as opposed
to a little knowledge, is indeed a dangerous thing.

What troubles me most is that the criticisms I hear of lawyers are
so hopelessly one-sided. One would think our Canadian lawyers are
simply parasites upon society, making no contribution to what is recog-
nized as the highest quality of life in the world. Let me mention a few
positives, which are seldom mentioned in any serious discussion of the
legal profession.

First, what other profession warrants the honesty of its members
and assures adequate insurance protection for other failings. Consider-
ing the broad risk exposure, these measures alone deserve public
recognition and appreciation.

Second, what other profession has never shielded its members from
scrutiny? It has always been possible to get one lawyer to sue or give
evidence against another lawyer, which is not the universal rule with all
professions.

Third, what other profession has subsidized the cost of furnishing
proper legal representation for those who cannot afford counsel. While
we now have expensive legal aid plans, the lawyers taking such cases
are not paid the going rate for legal work. As a legal aid lawyer once
told me: "I lose money on every case, but I try to make it up on volume!"

Fourth, do the critics consider the skill that legal practitioners bring
to the care of client's property and assets? This was brought forcefully
to my attention recently by a visitor from an emerging country that does
not have a conventional legal profession. He commented that lawyers
are coming to be appreciated in his country because they have the skill
and knowledge to provide security for wealth, property and investment
without which capital and wealth cannot be attracted or created for the
benefit of the entire country. As trial counsel I often used to treat my
solicitor colleagues with measures of friendly abuse, but now I realize
that they, in their own way, probably contribute at least equally with
adversarial counsel in securing a peaceful and orderly society.

Fifth, lawyers never get credit for doing so well what they do best,
which is to resolve disputes, usually without trial. In my last year as a
trial judge in 1988, about 18,000 proceedings were initiated in our
Vancouver Registry. About 7,000 cases were actually set for trial, and
only about 700 were actually tried. The numbers are much greater now,
and they would be several times those numbers here in Toronto. The
rest were resolved in some other way. Peacemakers are called the
Children of God. When did you last hear lawyers getting any credit for being the nation’s top peacemakers?

This is not to say that there are no problems in the legal profession. It has growing pains of monumental proportions, but the profession still furnishes much leadership at the community, provincial and national level, and I have noticed two interesting phenomena: whenever our critics get themselves in trouble they always retain a lawyer; and they all want their sons and daughters to be lawyers. So lawyers must be doing something right.

The Judiciary, is one of my favourite institutions, after lawyers, and vacations. We judges are like most of my friends — our spouses just don’t understand us. Of all state institutions, the courts are the most open to public scrutiny. Judges’ salaries are publicly fixed, or frozen, sometimes without consultation; we need a note from the Governor-in-Council to be absent for 30 days; we live and operate in a fishbowl; we must justify our decisions with reasons which are scrutinized critically by the bar, the academic community and the media; all but nine of us are subject to appeal in public; and we endure almost endless criticism from many who neither read nor understand our decisions.

Let me get directly to the point. How is the legal system changing?

Modesty does not prevent me from saying that our judges and lawyers today are vastly superior to those of just a few generations ago. There is no point trying to compare Bobby Orr with Wayne Gretzky because they played in different times, against different competition. Lawyers and judges performed well in earlier times but not with today’s volumes, problems, and intensity. Our daily tasks are so much more complex and difficult than they were just a few short years ago that we have to be better, just to survive.

When I began my legal career a mere 45 years ago, I saw nothing but giants striding purposefully through the legal woods. Some of them were very, very good. I am sure it was the same here. Ontario has always produced great lawyers. I need only mention Tilly, Cartwright, Arnup, Martin, Robinette and the Greenspans and many others. I believe some of ours were just as good. I wondered, as all young lawyers wonder, how I would ever measure up to their lofty standard. But I found that I could, as most of you have, and today I see many, many young and middle-aged lawyers who are as good or better than the best of their predecessors. The work ethic is exceptionally high; computers and systems have made lawyers more efficient; and they don’t drink nearly as much as my generation did. While I suspect they don’t have as much fun, by and large, I think they are better lawyers.
The same is true about the judiciary. When I started practice in 1950 there were only six trial judges in B.C. — mostly tired old men. None had a law degree, and most had bad tapers. Today, there are over 100 men and women trial judges in British Columbia: all are better educated; before appointment most had busier, and probably wider relevant practice experience. They preside over more difficult cases, and they are vastly more polite, patient and civilized than the old tigers. You will not be surprised to hear that many lawyers say our women judges are better listeners and more willing to be persuaded by reasonable argument than their male colleagues, which I believe is true.

These substantial changes in the face of the legal system has produced a remarkable anomaly for the judiciary. Notwithstanding the differences I have mentioned, distant and recent generations of judges were protected and respected to a remarkable degree. Now our present judiciary is under almost constant attack, and public respect for our legal institutions is being seriously undermined by other forces in society.

So the question becomes, do we deserve this loss of respect? I would be a poor spokesperson for the judiciary if I did not take the high ground and say that we do not, and I have already given some reasons. More importantly, however, it is necessary to recognize that, while we need to constantly search for ways to improve our legal institutions, we must not turn our back on our core values. We cannot surrender those things we hold dear.

In my view, lawyers should not give up the governance of their profession, at least not without a fight, because we all know that a bar cannot be mainly, or mostly, or partly independent. We should remember the eloquence of Erskine in his defence of Tom Paine when he reminded the jury that England would never succumb to the frontal assault of a tyrant. But the greater risk, he said, was that we would lose our liberties imperceptibly “by slow degrees.” He also warned us that plausible pretences will always be found for removing what he called “those sentries who are posted by the constitution of a free country, for warning the people of their danger.”

I believe an independent bar and an independent judiciary are sentries posted by the constitution to guard our people of their danger. A re-born Erskine would remind us that our greatest threat is not from insurrection, but rather from earnest, misguided, well-intentioned philosophies that suggest some combination of Jeffersonian democracy and Harvard Business School efficiency could organize the legal system better, if troublesome judges and lawyers would just get out of the way.

It is therefore startling to me that some distinguished lawyers, of all people, are recommending both that the adjudication of complaints
against judges be transferred from the judiciary to an administrative tribunal, and that intermediate sanctions be created that would clearly and substantially dilute judicial independence.

I do not wish to become controversial in such polite company, and in the presence of so many members of the Canadian Bar Association, but I cannot overlook this opportunity to remind the most influential Bar in Canada that an aggressive, well funded Committee of the Association is actively promoting such changes. If you wish confirmation about the activities of that Committee, just look at its most recent publication, called *Touchstones* that was delivered last week. It is slick, and it is misleading because it postulates sufficient judicial misconduct to justify such radical changes without any supporting material. In fact, it reminds me of the occasion on the eve of the Battle of Waterloo when Wellington was asked what the French thought of his army. The Duke replied that he didn't know what the enemy thought of his army, but he added “It sure scares the hell out of me”, and it would scare the hell out of you.

I say there is no crisis in judicial conduct. We have nearly 1,000 federally appointed judges and we have about 165 complaints each year — 133 to date, with three months to go. Upwards of 90% of those complaints are disguised appeals made by parties who think they should have won their case.

More importantly, while there were some insensitive and hurtful statements made by a minuscule number of judges a few years ago, there are very few gender related complaints being made against superior court judges at the present time. In fact, in the latest figures I saw, there were four complaints about gender bias against men and the same number, four, against women. More significantly, the seriousness of those complaints was quite insubstantial and in most of them, the result of the case was the stated basis for the bias. While every complaint must be taken seriously, none of those who would throw the baby out with the bath water have made any study of the number, nature and lack of seriousness of the complaints that are now being made against the Canadian Superior Court judiciary.

But I will not attempt to further argue that question this evening because, as Chairman of the Judicial Conduct Committee of the Canadian Judicial Conduct Committee, I may be thought to lack sufficient objectivity to defend the *status quo*. But, in fact, I do not do so. Before there was an Equality Committee, the judiciary was already having non-judges on disciplinary inquiries, and we have been taking what I think are responsible steps to open up our complaint process, as has the Bar, in recognition of a genuine public interest in more visible account-
ability. We commissioned Professor Friedland, who many of you know, to study these questions. He has already published his preliminary views which include many matters we judges have suggested. One of our objectives, as I stated earlier, is to accommodate openness with our core values. In these matters, I hope the judges will have the support of the Bar, for the Bar’s own sake, because, if our independence is compromised, then the Bar must expect to suffer the same fate.

An even greater threat to the judiciary and to the rule of law, in my view, is the risk that judges will be affected by endless criticism and uncertainty about their independence and some may find themselves, subconsciously, fashioning popular judgments. I hope and expect all judges will be brave, and that they will always resist this temptation.

So the forces causing changes to the face of the legal system are subtle, dangerous and very determined. We all want to be thoroughly modern lawyers and judges, but we must resist these small, well organized groups who seek to impose their views upon us far too strongly. I hope all of you will pause from time to time in your busy lives to remember that we have to change, to make the process more affordable, and to keep it current with evolutionary, technological and sociological forces. But we must always be mindful that the precious principles upon which our country is founded are always at risk, and we must be, as Erskine urged, forever vigilant.