

**EIGHTH COLLOQUIUM ON THE LEGAL PROFESSION
THE CHALLENGES OF LEADERSHIP**

What Would Henry Think?

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The apocryphal words of Henry II² echo down through the centuries: “Will no one rid me of this turbulent priest?”

Henry II’s conflict with Thomas à Beckett, the Archbishop of Canterbury, began with a dispute over whether the secular courts could try clergy who had committed a secular offence. The church courts instituted by William the Conqueror had become a safe haven for criminals of varying degrees and ability, for one in fifty of the English population qualified as clerics. Henry wished to transfer sentencing in such cases to the royal courts, as church courts merely demoted clerics to laymen as punishment for secular

offences, regardless of how serious they were. Beckett vehemently opposed the weakening of church courts.

While only in his mid-twenties, Henry II who reigned from 1154 - 1189, established courts in various parts of England and first instituted the royal practice of granting magistrates the power to render legal decisions on a wide range of civil matters in the name of the Crown. His reign saw the production of the first written legal textbook, providing the basis for today's common law. Henry's reforms allowed the emergence of a body of common law to replace the disparate customs of feudal and county courts. Jury trials were initiated to end the old Germanic trials by ordeal or battle.

He reinstated the concept of the assize whereby the law came to the locality and justice was dispensed locally. By the Assize of Clarendon in 1166, trial by jury became the norm. Jury trials replaced trial by ordeal and wager of battle, which English law did not abolish until 1819.

As a result of his reforms, nobody has since been thrown into a pond to see if they are innocent or guilty of the crime of which they stand accused. (Innocence is to sink, guilt to float). No woman has had molten iron placed in her hand to prove whether or not she has committed theft or murder.

(If the burn heals within a certain number of days, she is acquitted. If not, she is punished). No disputes over land

thereafter were settled by wager of battle, a practice where champions representing each disputant fought until one or the other was killed or cried "craven" and threw down his sword and surrendered. Instead, the case was considered by twelve men, who then told the judge whether or not the case was proved. The common law changed the ancient, jumbled inheritance of laws whereby Barons or Lords could pronounce sentence on wrongdoers – hanging or not according to his powers.

Henry the II's legal reform is one of the greatest contributions to the social history of England. This was a time when English law leapt out of darkness and

superstition, into light. Indeed, Henry the II earned the sobriquet, “The Lion of Justice”.

On Monday, July 17, 1797, a full sixty years before Confederation, ten lawyers gathered at Niagara-on-the-Lake, Ontario.

The ten, representing two thirds of all of the lawyers practising in the colony, had come together to found the Law Society of Upper Canada. The piece of legislation that had brought them together was ‘An Act for the better regulating the Practice of the Law.’ The Act spoke about the value of forming a society of lawyers ‘as well for the establishing of

order among themselves, as for the purpose of securing for the Province and the Profession a learned and Honourable body to assist their fellow subjects as occasion may require to support and maintain the Constitution of the said Province.’ The new Society was directed to appoint its senior members as governors or ‘benchers’ and to make rules for its own government.³ Of significance, it gave members of the Society the monopoly of practice at the bar of his Majesty’s courts in Upper Canada. The early benchers of the Law Society of Upper Canada fashioned their Society after the Inns of Court in England – they were in awe of the English legal tradition.

In 1950 the largest law firm in Canada, Osler, Hoskin and Harcourt had only 24 lawyers. The size of large firms would double by 1961 and triple by 1971.⁴

Despite growth and modernization, law firms resisted yielding to innovation and progress in other areas. At the Blake's Law firm about 1950, a proposal to hire a Jewish lawyer had been dismissed as threatening 'the beginning of the end of the Blake Firm'. The embargo against hiring Jewish lawyers was collapsing by the 1960's. In 1958 the Lawyer's Club removed its ban on non-Christian members, ending its exclusion of Jews.⁵

In 1974 Sidney Robbins, the first Jewish Treasurer of the Law Society, encouraged the Society to become the first in Canada to make non-discrimination a rule of Professional Conduct. That same year, the benchers of the Law Society declared, “with apparent pride, that 77 years after Clara Brett Martin began to practice law, a bar of some 9,000 lawyers included 468 women.⁶ (That was less than one percent of the bar). Today, women represent 53% of the new lawyers called to the bar each year.

In January 1983 when convocation rejected proposals to limit entry to the bar admission program, (a method proposed to control numbers in the profession), the dissonance between

the will of the profession to limit numbers, and
convocation's decision not to impose limits, was stark and
obvious. Lawyers wanted protection from competition.

They expected the Law Society to act for them.

“Convocation was obliged however, to consider the public
interest....”⁷ Faced with the scrutiny of a “sceptical
government, and backed by public opinion”, any attempt to
limit entry into the profession would have been viewed as
an abuse of the power of self government.⁸

Remarkably, it was not until April 1988 that convocation
was open to the profession or the public. Prior to this time,

convocation was conducted in secret. That historic event occurred only 19 years ago.

The development of the regulatory Code of Conduct is also relatively new. In 1959 a standing committee on professional conduct had been created by convocation. The committee stated that it did not intend to create a Code of Ethics but to educate the profession by wider circulation of conduct rulings which the Society had made. The first handbook was circulated to the profession in March 1964. The handbook contained early discipline case rulings. Acting for both sides in a mortgage transaction was declared

permissible; keeping the interest on trust accounts was ruled out.⁹

From the late 1980's to the mid-1990's, Ontario's lawyers began a revolution in how they were represented in convocation. Benchers elections, which began in 1871, elected lawyers who were only notionally representative of their profession. Benchers were the elite and the elder statesmen of the profession – male, white and privileged. When that began to change in the mid-eighties, it was women lawyers who made it decisive. Ten women were elected in 1991. In 1995, women became one third of elected benchers – actually ahead of their proportion in the profession at that time.

Convocation of the late 1980's and early 1990's saw a reform agenda focussed on openness.

In 2007, the elected benchers in convocation, 19 of them women, are a very diverse group of lawyers. As Professor Harry Arthur noted in September 1992: "The bench is no longer a bench of notables....many of you were elected because you were perceived to represent elements in the profession which identified with your candidacy...."¹⁰

Today we are splintered, and some might say fractured profession - organized into sub-groups of large firms and

sole practitioners, of young lawyers and equity seeking groups, to name a few.

As the Honourable Madame Justice Rosalie Abella observed:

“the hegemony of the majority has been replaced by the assertive diversity of minorities.”¹¹

The Transitions Report ¹², which was a survey of lawyers called to the bar between 1975 and 1990, took a critical look at the gaps between male and female lawyers in income, work experience and job satisfaction and how the cultures of male dominated firms impeded the progress of women, particularly those with family commitments.

The report made the case that while modern legal culture was typically inhospitable to women, it was not healthy for anyone. While the report began with gender issues, it advocated a general transformation of the profession. The report contained vivid quotations from male and female lawyers such as, ('the profession is killing the quality of their lives', 'large legal factories are turning young lawyers into billing machines', 'there is never adequate time to do a comprehensive job', 'the trends are destructive and dehumanizing', 'I have hated my experience as a lawyer so far'.)

Or as William L. Prossner described the practice of law,
“Your lawyer in practice spends a considerable part of his
life in doing distasteful things for disagreeable people who
must be satisfied against an impossible time limit in which
are hourly interruptions from other disagreeable people who
want to derail the train; and for his blood, sweat and tears,
he receives in the end, a few unkind words to the effect that
it might have been done better and a protest at the size of the
fee.”

Mary Ann Glendon observed in her book “A Nation Under
Lawyers”¹³: “Over the past three decades strange new
currents have been flowing among the hundreds of

thousands of practitioners who make up the backbone of the legal profession”.

What the regulator faces and what we have been dealing with has been the confusion caused by the enormous changes that have taken place in judging, practising and studying the law over the past four decades. We have watched the unravelling of a familiar network of institutions and attitudes. All is not well in the world of lawyers.

As Alexis de Tocqueville noted “...lawyers constitute a power which is little dreaded and hardly noticed; it has no banner of its own; it adapts itself flexibly to the exigencies of

the moment and lets itself be carried along unresistingly by every movement of the body social; but it unwraps the whole of society, penetrating each component class and constantly working in secret upon its unconscious patient, till in the end it has moulded it to its desire.”¹⁴

On the other hand, according to Jerry Seinfeld: “...a lawyer is basically the person that knows the rules of the country.

We are all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem, a lawyer is the only person who has read the inside top of the box.”

Because of the unique role of law and lawyers in the social fabric, a significant advance of arrogance, unruliness, greed and cynicism in the legal profession is of grave concern. As lawyers increasingly admit that law is, among other things, a profit-making business, all too many seem to believe that all ethical bets are off. They are engaging in a strategy of ethical agility rather than ethical adaptability.

A breakdown in self discipline in lawyers cannot be without consequences for the wider society.¹⁵ To what extent will our citizens be able to count on lawyers to subordinate their interests to those of their clients and public service?

Legal ethics has only a tenuous relation to the systemic difficulties currently afflicting the legal profession. Formal codes of conduct are not directed at capturing the entire ensemble of understanding that lawyers observe in their dealings with one another, with clients, and with the courts. The Law Society of Upper Canada's Code of Professional Conduct for example, sets forth a small number of fairly obvious duties with which lawyers must comply on pain of discipline or disbarment.

"Where ethical problems of great complexity are concerned, formal canons afford little guidance. They are often least helpful where most needed.¹⁶ Changes in the rules of ethics

appear to go with the flow of systemic problems in the profession rather than helping to counter them. Often, the explanation for deleting ethical considerations is that once the regulator gets beyond such obvious no-no's such as stealing clients funds, the consensus on what is right and wrong for lawyers is diminishing."

The most hotly debated issue in connection with the Law Society of Upper Canada's revision of its Rules of Professional Conduct in 1998 - 2000, was whether a lawyer should be required, rather than merely permitted, to disclose information he or she had reason to believe was necessary to prevent a client from causing death or serious bodily harm

to another person. The proponents of mandatory and fairly extensive disclosure to prevent the harm, lost out to advocates of iron clad client confidentiality, striking a questionable balance between client confidentiality and the victim-to-be of a serious crime.

The promotion of the client loyalty ideal at the expense of the independent counsellor and court officer roles, appears to mask a systemic version of an old problem: a defacto priority for the lawyer's own concerns. For example, contingent fees do provide many people with access to justice, but frequently make the lawyer the real party in interest.

San Francisco attorney, Alan Marks has observed that ethical rules leave the most severe ethical dilemmas untouched.

The “real” dilemmas, Marks argues come mostly from “the powerful compulsion of self-concern”.¹⁷ Marks claims that while lawyers argue in public about what constitutes over zealous representation, they are in practice, often engaged in underrepresentation. The appearance of lawyers operating unabashedly and openly on their own account is something relatively new. The members of this new breed would posit that they are rebels against the notion that law is not a business. As Glendon observes: “Now that lawyers are beginning to say that they want to run their business as a

business, many seem to suppose that they are exempt from ordinary decent behaviour".¹⁸ Lawyers' self-interest is apt to run amok when anyone, who places court and client above profit, is branded a hypocrite or a chump. A lawyer who takes his duties to the court and the legal system seriously will often be at a greater disadvantage than a less scrupulous adversary. As Abraham Lincoln urged:

"Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and a waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. Many lawyers are fearful that in today's

competitive environment, contrary to what Lincoln said,
good ethics may not make for good business.

Lawyers are reporting that the stories they heard in law
school about independents, public service and
professionalism don't match up with their everyday
experiences. Many are dispirited.¹⁹

People choose a career in the law for many reasons. Some to
advance political ideals. Others for power and prestige.

And some for money. Underneath the external goals that
lawyers aim to achieve through the practice of law, lawyers
also hope that their work will be a source of satisfaction in

and of itself. As Anthony Kronman wrote in his book “The Lost Lawyer”, “not everyone who becomes a lawyer looks for this kind of fulfillment in his or her work. But many do, and the professional pride of lawyers as a group has always depended upon a belief that what they do has the potential to be rewarding in this way.”²⁰ The growing doubts about life in law and its ability to offer fulfillment is a spiritual crisis that is striking at the heart of professionalism. An older set of values, that until several decades ago played a vital role in lawyers’ aspirations, is on the decline. This trait of character was becoming a person of good judgment and wisdom, and not just an expert in the law. This is the ideal

of the lawyer-statesman. Kronman notes that this ideal is now dying in the legal profession.

But it can also be said that no other group except lawyers, has more to offer society in building on what it does best. A trained eye for the issue allows a lawyer to constructively disagree with their own clients as well as narrow the scope of conflict. This training also suits lawyers for the increasingly important roles as mediators. The lawyer's experience in delineating the issues that divide people also gives her a feel for the common ground that even determined opponents may share – and the ability to frame settlement in terms that opponents can accept. Even when

issues are clarified and agreements are reached in principle, someone has to give understandings a concrete form.

Mastery of the apparatus of the law requires awareness of its range of uses and a clear understanding of its limitations.

Another feature of good lawyers is a lawyer who tries hard to accomplish a result without ever going to court – a result where disputes are settled so as to minimize festering resentment and renewed eruption of conflict. Problem solving skill results in the most rewarding moments of law practice: the point when a lawyer devises a viable solution to a problem that has brought a client to their knees; when lawyers resolve the conflict in a way that improves the outcome for all concerned. Strong tolerance in representing

other people in amicable and adversarial situations develops in lawyers an ability to enter empathetically into another person's way of seeing things while retaining a certain detachment.²¹

Learned Hand wrote that we should possess and develop a "temper which does not press a partisan advantage to the bitter end, which can understand and will respect the other side, which feels a unity between all citizens – real and not the factitious product of propaganda, which recognizes their common fate and their common aspirations."²² This "temper" is one of the great hallmarks of professionalism.

All of these traits have one feature in common. “The more a lawyer excels in the, the less likely it is that his or her work will receive acclaim beyond the circle of those immediately benefited. Peacemaking, problem-solving lawyers are the legal profession’s equivalent of doctors who practice preventative medicine. Their efforts are generally overshadowed by the heroics of surgeons and litigators. The plain fact is that much of what lawyers do best is exacting, unglamorous and unadvertised – the reasonable settlement that averts costly litigation, the creditors’ arrangement that permits a failing business to regain its health”²³

“The exultation of litigation, money-making and efforts to achieve social transformation through law in recent years has been at the expense of useful services that have always given lawyers in the aggregate, their best chance to achieve personal satisfaction while contributing to the wellbeing of their fellow citizens.”²⁴

What would Henry think? What would he think of the governors and the governed?and the public they serve?

For the reform minded, progressive man of action and absolute monarch that he was, I suggest he would be roundly disappointed at our progress, or the lack of it.

The law that he tried to bring uniformly across his nation to be made open and fair to the citizenry, is mysterious and inaccessible to most in our society. He would perhaps bemoan the fact that he helped to create a system of common law and today we are drowning in legislation, regulation and litigation. He ended the practice of wager by battle, but we need only to look to the adversarial process as its modern day replacement. Trial by ordeal continues but in modern form - it is the uncertainty, delay and expense and the injustice of deciding cases on points of practice that make this system, for the ordinary member of public - trial by ordeal.

“Litigation is more about the lawyers than the litigants. The civil justice system is too extravagant, complicated, expensive and inaccessible for what it delivers and to whom.”²⁵ notes Justice Abella.

The challenges for the regulator are many:

To know our legal profession – who we govern; and to understand the public this profession serves;

To bring vision and sensitivity to the realities of the lawyers we govern and the public we serve;

To be honest, open and willing address, understand and respond to the needs of a highly diverse, dynamic, rapidly changing greater society;

To challenge governments whenever there is injustice dealt
its citizens – both at home and abroad;

To provide effective and courageous leadership in
developing and implementing policies and ethical standards
that help counter systemic problems in the profession –
canons that address, rather than ignore the most severe
ethical dilemmas – those that stem from “the powerful
compulsion of self-concern.”

And perhaps, we need the vision of another Henry.

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² Henry II of England (March 5, 1133 – July 6, 1189)
King of England (1154 - 1189)

³ Christopher Moore, “*The Law Society of Upper Canada and Ontario’s Lawyers 1797 – 1997*” (University of Toronto Press, 1997), p. 13-15

⁴ Moore, 267

⁵ Moore, 267

⁶ Moore, 269

⁷ Moore, 308 – 309

⁸ Moore, 309

⁹ Moore, 272 - 273

¹⁰ *Professor Harry Arthurs, September 1992*
Moore, 282

¹¹ The Honourable Madame Justice Rosalie Silberman Abella, *Justice and Literature*,
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¹² Law Society of Upper Canada, *Transitions in the Legal Profession: A Survey of
Lawyers Called to the Bar between 1975 and 1990* (Toronto: Law Society of Upper
Canada, May 1991)

¹³ Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal
Profession is Transforming American Society*, (Harvard University Press, 1996)

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- ¹⁴ Tocqueville, *Democracy in America*, p. 270
- ¹⁵ Glendon, p. 12 – 13
- ¹⁶ Glendon, p. 78
- ¹⁷ Alan R. Marks, “*Where is the REAL Conflict of Interest?*” (American Bar Association Journal, February 1993) p. 112
- ¹⁸ Glendon, p. 82
- ¹⁹ Glendon, p. 84, *Transitions in the Legal Profession*
- ²⁰ Anthony T. Kronman, *The Lost Lawyer*, (Harvard University Press, 1993)
- ²¹ Glendon, p. 102 – 108
- ²² Learned Hand “The Contribution of an Independent Judiciary to Civilization,” *The Spirit of Liberty*, p. 155, 164.
- ²³ Glendon, p. 107
- ²⁴ Glendon, p. 107 - 108
- ²⁵ Abella, at p. 11, supra endnote 9