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WHY THE INDEPENDENCE OF THE BAR MATTERS

I have taken the topic of today's colloquium and reformulated it to state an affirmation and to offer an explanation.

To explain why I say that the independence of the bar matters, we need to consider two related questions:

1. What is the meaning we should give to the independence of the bar; and

2. What purpose is properly intended to be served by that independence?

Here let me just acknowledge a point that I will elaborate on a bit later on. It is that the independence of the bar is not synonymous with the self-government of the legal profession that is the prevailing practice in Canada.

As a judge, I start to think about this question of the independence of the bar in relation to the independence of the judiciary. These two institutional frameworks are related in important ways. The underlying principle was succinctly expressed in an exchange between Chief Justice Rehnquist of the United States and Chief Justice Lamer of Canada during a dialogue in which they took part at Duke University in the Spring of 1991. In response to a question as to what institutions are fundamental to the preservation of a free society, Chief Justice Rehnquist replied: "an independent judiciary" and Chief Justice

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Lamer added "an independent bar", because as he put it, "you can't have one without the other". What is at stake is, of course, the right of citizens to enjoy the benefits and protections afforded by the law. The independence of the legal system is the institutional underpinning of those rights.

At the risk of stating what may seem obvious, I would like to unpack what I take to be the meaning of these comments.

A free society is necessarily a society that maintains a structure of order to ensure freedom. But there are various kinds of social order and everyone knows that many of them do not ensure freedom. Adherence to the rule of law as a basic principle is generally accepted, at least with respect to our concerns today, as a fundamental way of ensuring that social order supports freedom. In practical terms, the rule of law works via a simple premise. To ensure that government treats citizens equally and citizens can know the prospective consequences of their actions, the government governs by legislating and administering laws. But, with important and also limited exceptions, government does not determine the interpretation and application of the laws. If it could do so, the general nature of the law could be suspended to enable government to take whatever exceptional action it wished in particular circumstances, without the approval in advance of the legislative assembly of the citizens. Examples will come to mind readily of governmental assumption of the power to make exceptions.

So the task of interpreting and applying the law is given to the courts. To ensure that the courts are not an instrumentaility for the government to impose its own preferred interpretations and applications, the courts must have professional expertise in the law and must be in a position to make their decisions impartially, without being influenced by the wishes of government (or, of course, of other interests as well). And to ensure that courts are able to make impartial decisions, the judicial system must be independent.

The working of our judicial system depends on the bar in fundamental ways. Our judges come from the bar. The courts depend on counsel to present cases to the court so that the courts can form the best view of the law as it applies to the cases at hand. So, the courts must be able to rely on the professional expertise of the bar and on counsel's understanding of their responsibilities to the court as officers of the court. For counsel to be able to carry out their responsibilities to the court, they must themselves be independent of outside influence. Of course, counsel have their duties to clients, but the rules of professional conduct are designed so that those duties are compatible with their responsibilities to the court.

As I said, all this may be obvious. I have spelled out the points a bit because I think it helps us to identify at least one fundamental respect in which the independence of the bar matters. It matters because without it the independence and professionalism of the courts would be impaired.

I do not suggest this is the only rationale for the independence of the bar or that the independence of the bar is necessary only for this purpose. Another obviously important aspect of the proper working of the judicial system and the public order is the ability of citizens to get competent independent advice from lawyers in order to order their affairs.

So this line of thought, in a nutshell, is that the independence of the bar matters principally because it is fundamental to the assurance of ordered freedom in our society.

Now, if that is the principal reason why the bar must be independent, it seems to follow that that concern should predominate in considering how the bar should be governed or regulated; *i.e.* in what respects it should be regulated, or not regulated, and who should make the decisions about such regulation. And those questions about regulation must also include the question of accountability, to ensure that the regulatory arrangements, whatever they are, are working properly and not being abused.

The form of regulation that is addressed by the title of the first session of the colloquium is "self-regulation". When I was active in Law Society affairs I was always proud to say that the bar in Ontario was a self-governing profession. That was intended not to be a claim of privilege, but rather a recognition of public responsibility. The bar was then, and is now, a self-governing profession. But, in considering the various issues that are current with respect to self-government, including models that might seem fundamentally to eliminate or drastically reduce it, I think it is also important to keep in mind all the other bodies and institutions that have some direct or indirect impact on the governing of the legal ;profession in Ontario. I am not sure I can name them all. In no particular order, they include the Attorney-General of Ontario, the Legislature of Ontario, the Law Faculties in the Universities, the County and District Law Associations, paralegals and the lay public. That said, it is important to remember that the present system is still fundamentally one of self-government. But it is one that is designed to work with a range of other bodies and institutions. And the system of self-government protects the necessary independence of the bar.

These comments lead me to the following view about proposals for an alternative model of the regulation of the bar. Whatever alternative model is under consideration, a centrally important question to be asked is: Will the proposal maintain and/or enhance the ability of the bar to perform its responsibilities in our justice system to provide independent professional advice and representation for our citizens and our courts?

Now I wish to draw attention to the fact that the present model in Ontario is one of self-government and the self-government of the profession as we know it in Ontario involves more than the term" self-regulation" necessarily implies. Self-regulation is a form of regulation. Regulation of a class of professional service providers, in concept, involves the enactment and administration of rules for the establishing and maintaining of educational and professional standards and dealing with client claims and complaints in respect of the regulated professionals. All of these activities are part of our model of self-

government. But The Law Society in Ontario undertakes a range of activities that go beyond these core areas of regulation. To give only a few examples, The Law Society has been active in promoting the role of women, First Nations members and members of visible minorities in the legal profession. The Law Society has been active in programs to advance access to the justice system, In keeping with a tradition that began with the initiation of the Legal Aid program and later included the community law clinics.

While many of these initiatives have a connection to government, they have typically become associated with The Law Society because they reflect the role of a self-governing profession to ensure that the lawyers are undertaking efforts to enhance the quality and availability of the resources of the justice system. These efforts are in keeping with the ancient origins of the law societies as guilds devoted to ensuring the proper provision of their services to the pubic. When viewed in this light, I think it is apparent that our law society is best understood, not simply as a type of regulatory agency, but as an intermediate representative association. Intermediate institutions typically stand independently between government and citizens. By offering a form of association that is also recognized by law as fulfilling essential pubic functions, The Law Society provides a nexus for lawyers to engage in furthering valuable social goals.

So, when we come to think about the idea, and indeed the contemporary phenomenon in some jurisdictions, of other different models of governing or regulating the legal profession, it is advisable to take into account that The Law Society model provides this extra dimension of service. It is fair to wonder whether a different model would succeed in encouraging the commitment of time and effort that is now given by all those who participate in the work of The Law Society.