COMMENCEMENT ADDRESS

The Legal Profession in Transition

THE HONOURABLE CLAIRE L'HEUREUX-DUBÉ*

Dean Alfini, distinguished guests, graduates, families and friends, chers amis. It is a pleasure to have the opportunity to address you today. I am particularly thrilled since, unless I am mistaken, Chief Justice Rehnquist and Justice Blackmun of your Supreme Court have also been guests of the faculty of law here at Northern Illinois. Being in such company is an honour indeed. From the province of Québec, where I was born and raised, to Ottawa, where I now sit as a judge, blending both civil and common law, as well as English and French, coming here today allows me the opportunity to experience yet another jurisdiction and legal culture, for which I am grateful.

May I be permitted first to congratulate the graduates on being the newest members of our profession. Your friends and families are very proud of you and you have every reason to be proud of yourselves. A good deal of time and effort went into winning the right to sit among the graduates today. Countless cases have been read and digested and you have taken part in challenging discussions and debates. You hopefully had your share of fun along the way and concluded friendships which will last a lifetime. During your stay here at this young but progressive faculty you have perhaps been made to feel variously brilliant, silly, exhausted, exhilarated, and fulfilled. Above all, you have been challenged and you responded well under the intense pressure which learning the law can pose at times. You richly deserve all of the accolades which you will receive.

It is natural perhaps that on occasions such as this, I am reminded of my own convocation. The day I graduated from Laval University in Québec City, long ago as you must know, was a day not unlike this one. While I was proud, I was also more than a touch nervous. I worried about what was lying in wait on the other side of the doors

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* Justice of the Supreme Court of Canada. Justice Dubé's address was delivered at the Graduation Ceremonies of Northern Illinois University College of Law in DeKalb, Illinois on May 23, 1992.

of the auditorium. Law school was, after all, more than just a bit comfortable and there was no telling whether I would be ready when a living, breathing client came my way. In many ways, of course, embarking upon a new stage of one's life is very exciting — it is like opening up the first page of an epic adventure and, to a large extent, being able to write the plot oneself. In other ways though it can be terribly disconcerting and if you feel somewhat squeamish, believe me, I understand.

Since the day of my own convocation tremendous changes have occurred — both in my own country and here in the United States. Those changes have transformed our profession for the better and for the poorer.

When I began my career in the early nineteen-fifties, for example, the practice of law was basically local. If you were acting for or otherwise advising a particular party in a given matter, usually the other party or parties would be located in the same city. It is no accident, therefore, that, in conflicts class, choice of law rules were premised on closeness of participants being the general rule and on distant trade and commerce being the exception. Rules such as "formal validity of a contract is governed by the place in which that contract was concluded" made sense because most commerce was transacted between neighbours who shared some degree of physical proximity.

Now, of course, the world is a very different place. No longer do persons engaging in business merely do so with those in the same city, region, or even country. The "global village" is truly a reality and the practice is only now coming to grips with its implications. Law firms which once went about their business in relative isolation are now finding that professional associations with overseas colleagues are not only profitable, but often necessary, in ensuring that the needs of their clients are met. I would add that when one contemplates the ramifications one must not stop with the commercial fields or international trade. Though the increasing propensity to deal with foreign interests is probably most apparent in these areas, increased mobility will also have an impact on such traditionally domestic domains as family law where, for example, reciprocal enforcement treaties are taking on more significance.

It is highly unlikely that the process of internationalization will abate. Technological advances in telecommunications and transportation will no doubt continue to be made at blinding speed. Economic facts like the Common Market, the emergence of the Pacific Rim and the signing of the Free Trade Agreement between our two countries will ensure that our village will continue to shrink. For better or

worse, the profession will have to adapt and it will take more than a fax machine to do so. For one thing, a greater emphasis will have to be placed on comparative legal studies. Because the legal rights of everyday persons will be increasingly affected by foreign states, the most eminent scholar will surely fail her client unless she has some idea of the legal parameters which those states set out. But even legal savvy is not sufficient. Language and cross-cultural experience must also be a part of the services tomorrow's lawyers offer to their clients and, as importantly, to themselves. English-speaking North America for too long has permitted itself to believe that its language is the natural one of commerce and the legal profession has been symptomatically intransigent in so far as transnational linguistic considerations are concerned. The legal profession will no longer have the privilege of being solipsistic in its outlook. Opportunities following the possible signing of the Canada-U.S.-Mexico Free Trade Agreement, for example, will go to those firms who are able to function effectively in English, French and Spanish and it does no good to sit on the shore of the ocean like some King Canute commanding the tide not to come in.

As for the make-up of the profession, when I graduated from law school there were very, very few women who even practiced law and of course no female judges. There were just as few, if any, members of visible minorities who practiced and no minority women. Everything around us said tacitly or explicitly that law was, *de facto,* the exclusive domain of white, middle and upper-class, able-bodied men. From what I have read, I am only able to conclude that the situation was no different here in the United States.

It is not altogether surprising that the legal profession was unwelcoming to historically disadvantaged groups when the substantive law itself conspired against us. To take the example of the additional hurdles women faced, the example with which I have had the most personal experience, law reinforced sexual stereotypes and made rationalizations easy so that when we finally overcame certain barriers and simply attempted to gain entrance into the traditionally male bar, we were greeted with hostility — or worse — patronizing smiles. I was able to find the following statement from your Supreme Court on the question of women seeking access to the Bar of Illinois. Reassuringly it was made in 1873:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy

> which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . .
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> The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the creator. And the rules of civil society must be adapted to the general constitution of things.[1]

Of course, I would not wish to give the impression that women were the only ones who, as a group, found barriers to entrance into the practice of law. As I alluded to previously, visible minorities, among others have been the object of systemic difficulties which have impaired their ability to take part in the juridical and social formation of your country and my own.

Happily, some of the sacrifices made by courageous members of such groups who were not content simply to accept their lot in life are beginning to pay off. I know, for example, that a full quarter of the class which I now have the honour of addressing are members of what have traditionally been described as minority groups. Persons who were once excluded from mere admission in the profession are now reaching its upper echelons and, in so doing, are paving the way for others. In Canada, until the retirement of my colleague, Madam Justice Bertha Wilson, three of the nine members of our Supreme Court were female. Another of my colleagues is of Ukrainian descent and still another of Italian. These are facts in which my country takes great pride. However, that it is newsworthy that just over half of the population is represented in a group of nine citizens shows that there is much more work to be done.

It should not be surprising that the process is far from complete. After all, no one really expected that vast periods of socialization and stereotyping could be eradicated in the course of a generation. On the contrary, every successive generation must also do its part to ensure

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1. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring). It should not be thought that the United States was alone. Similar statements on the same issue may be found in Langstaff v. The Bar of Québec, 25 B.R. 11 (1916).

fairness. As members of many historically disadvantaged groups are undoubtedly better off in your generation than in mine, so too must you work to ensure that the situation improves between now and the time your children graduate from a university. This is a large responsibility, but one for which you are particularly well suited given your training and the privileged status you now enjoy.

For these reasons, and of course out of a larger concern for our fellow citizens, I would encourage you to explore such areas of practice as human rights law. First, as I have just indicated, there is much work still to be done in those areas and I have difficulty conceiving of a more satisfying manner of making one's living than assisting those who have traditionally been disenfranchised. As a practical matter, I would add that the trend towards equality is an inevitable one and may well become what financial analysts term a "growth area" in the near future. In any event, it will result in the increased reliance on international instruments such as the United Nations' *Declaration of the Rights of Man*[2] and the *European Convention on Human Rights*.[3] Finally, these areas are eminently conducive to alternative dispute mechanisms such as mediation and arbitration which promise to become more popular as the public gets tired of the win-lose, all or nothing nature of our present methods of conflict resolution. Hence, entrance into them permits you to practice on the cutting edge of the way society sorts itself out in Anglo-Canadian law.

When I entered the profession, I had the impression that there would be nowhere for me to make my mark, that every aspect of the law had become firmly settled over the centuries. I was, of course, extremely naïve. Areas of practice have continued to expand with the enactment of new laws and, in my own country, the entrenchment of the *Charter of Rights and Freedoms*[4]. The less seemly side of human nature does the rest and assures the profession of litigation work for the foreseeable future, or at least until the alternative dispute mechanisms I was just discussing come to the fore. As one humorist has suggested, the adage is no longer "love thy neighbour" but rather "sue thy neighbour."

That takes me to what I would describe as the ethos of the profession. Lawyers are generally perceived in the community as being concerned about money. This perception is not new — it has unfor-

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2. G.A. Res. 217 (III), U.N. Doc. A/810 (1948).

3. *La Convetion de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales*, Sept. 3, 1953, 213 U.N.T.S. 21.

4. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

tunately formed part of our image for a quite a good period of time. In fact my colleague, Mr. Justice Frank Iacobucci, likes to tell a story about Lloyd George who, long before he became Prime Minister of the U.K., was a lawyer in his native Wales. One day he passed the young daughter of a client in his carriage and offered her a lift into town. On the way he made valiant, even herculean, attempts to engage the little girl in conversation but only managed to evoke yes or no answers to his questions. Later that week he again saw the little girl, this time with her mother. He asked the mother why the little girl had been so shy and, when the mother looked puzzled and turned to her daughter, the little girl looked up and said, "But Mummy, everyone knows you have to pay lots of money to speak with Mr. George."

Clearly, the practice of law has never been a purely charitable occupation. People have always entered and will continue to enter the profession in order to earn a living and, of course, there is nothing wrong with that. What I find disturbing, however, is the propensity for seeing our trade in solely pecuniary terms. This trend towards commercialization has resulted in a "bottom-line" mentality so that success is not judged, as it should be, in terms of whether one has performed honestly and diligently so that one's client is satisfied with the work performed for him or her, but rather whether or not a sufficient amount of income was generated through that client's case in order to make taking him or her on a profitable venture.

This commercialization can only mean that the human part of the job, the part which I found most rewarding before I was called to the bench, suffers. Hence, the profession about which Alexis de Tocqueville once said: "Lawyers . . . form the highest political class and the most cultivated portion of society . . . . If I were asked where I place the American aristocracy, I should reply without hesitation that . . . it occupies the judicial bench and the bar"[5] and about which Lawrence Cooke, the former Chief Judge of the State of New York, commented: "[T]his is the most hallowed type of work outside the clergy. To determine the rights, property, life, civil duties of other people is sacred work,"[6] is at the point of becoming a commodity to be hawked, marketed and made the subject of various efficiency and quality control measures like some kind of latex paint or hamburger.

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5. Alexis de Tocqueville, DEMOCRACY IN AMERICA (1966), *cited in* THE QUOTABLE LAWYER para. 75.64 (David S. Shrager & Elizabeth Frost eds., 1986).

6. Lawrence H. Cooke, SULLIVAN COUNTY DEMOCRAT, Dec. 18, 1984, at 1, *cited in* QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS 217-18 (Eugene C. Gerhart ed., 1988).

Your Chief Justice, William Rehnquist was characteristically more subtle than I am being but the sentiment, I think, is identical. In 1986 he commented:

> The practice of law has always been a subtle blend between a "calling" such as the ministry, where compensation is all but disregarded, and the selling of a product, where compensation is all important. The movement over the past twenty-five years has been to increase the emphasis on compensation — to make the practice more like a business.[7]

My colleague, Mr. Justice Sopinka, has spoken on this subject on a number of occasions.

This commercialization is detrimental in many ways but there are three or four by-products of it which I find particularly insidious and which I would like to share with you. First, it further contributes to the public's mistrust of what we do. Every action we take is, unfortunately, greeted with a presumption of mistrust and avarice.

Secondly, it is not healthy for us. The increasing commercialism I have been discussing has brought about changes such as the "billable hours system," where clients are charged according to the amount of time spent on his or her file. This appears to make intuitive sense, but it has many drawbacks, not the least of which is that young lawyers sometimes feel that they are under enormous pressure to bill the requisite amount of time lest the powers-that-be perceive them not to be working hard enough.

I am fully prepared to admit that our profession is not one which lends itself to getting home routinely at 5 p.m. I also concede that there will be weeks where you will not be able to see loved ones as much as you would like. However, what we do should never become who we are. By requiring young lawyers to bill an exorbitant amount of time, firms prevent them from fostering the type of collegial links needed to talk over cases amongst themselves, to read in a particular area before going off to draft a statement of claim, or to exercise and maintain a healthy body as well as a healthy mind. It also means that any activity which is not, in and of itself, financially rewarding takes a back seat. The instruction of young lawyers by senior members of firms generates no funds — at least in the short terms, and consequently might no longer be a priority. Worst of all, young, bright, energetic people like yourselves may well think twice before

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7. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 157 (1986-87).

joining our ranks. This would be truly tragic for the profession because we need people like yourselves. It would also be tragic on their own account because the good in the practice still vastly outweighs the bad and they will be missing out on what could be a very fulfilling life of public service.

Thirdly, increasing commercialism has made legal assistance a luxury many people cannot afford. In an ever-increasing attempt to attract the best candidates to their particular institutions, firms are paying associates quite a bit of money. In return, they must bill out these associates' hours at a commensurate rate and, consequently, rates for legal advice can only rise. In 1988, in the United States, over 40 billion dollars were billed out by firms to their clients and this figure would not appear to be in any danger of falling.[8] And, unfortunately, pro bono work which might otherwise have picked up the slack is, by its very nature, unprofitable and, for the reasons which I mentioned a moment ago, is not encouraged.

The result is that the legal profession risks pricing itself out of existence. It is entirely possible that, instead of regarding legal advice as an essential service, potential clients will make an economic choice and decide to forego advice and let the chips fall where they may. In this scenario, our services would only be provided to wealthy persons and entities who need them the least given that they have other resources at their disposal with which to protect their interests. Even if these fears are not realized, at a minimum, the general public may clamour for greater accessability to paralegal services which are perceived, rightly or wrongly, to be more cost-efficient but just as effective.

It is my sincere hope that the overbearing element of commercialism is transitory and that it too will dissipate. I am not gifted at telling the future but I would find it difficult to accept that legal traditions which had been maintained for close to nine centuries and which served us well over that time would be wiped out entirely in the space of less than four decades. I do know that whatever happens you must be active participants and not casual observers in the process. This leads me to my next point.

I fear I might have painted a fairly stark and bleak picture for you. However, I have not forgotten that this is a happy day for everyone here and so now I come to the good news: it does not have to be this way. There will be a great temptation when you leave this

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8. *See* Sol M. Linowitz, *Keynote Address*, 73 CORNELL L. REV. 1255, 1257 (1988).

university to accept a great many institutional factors as "faits accomplis," as simply, part of the greater scheme of things. I urge you not to abandon your critical faculties, the ones you must have had before entering law school and which have served you so well while you have been here.

As young lawyers you will find that you are able to exert a considerable amount of influence on the direction which your profession takes if you so wish. By getting involved in committees and groups, both within your place of employment and within the framework of the profession at large, and by taking advantage of the critical abilities which got you to this point, you will be given an opportunity to take the profession in new directions. After all, our profession is, by and large, self-regulating. Beginning today you are part of that self and in a small way responsible for the way in which that profession is governed. You will therefore personally have the good-fortune to make decisions of true importance. Looking out from this podium today I have every reason to believe that the profession is in very good hands. The tools you have been given combined with the talents you possessed before you started will stand you in good stead to make those decisions and to represent the law admirably. I, for one, contrary to the impression I might have given earlier, am not overly worried about the future.

It is traditional on such occasions for the person addressing the graduates to convey sage words to his or her audience. Those of you who might be familiar with my judgments will know that I am not prone to concision and have great difficulty reducing anything to some pithy phrase. Furthermore, I have always been an adherent to the school of thought which teaches that free advice is worth what you pay for it. Nonetheless, with your leave I will attempt to see you into the world with some words of encouragement.

As I mentioned, it is important that you participate in the shaping of the profession. This does not have to take the form of being the head of the bar association — your contribution can be made in many ways — writing for journals come to mind. However, I think that you will find that you will derive an enormous benefit from being part of the legal profession and it is only fair that some be given back.

Look outside. A great deal can be learned from examining the manner in which foreign jurisdictions conceptualize and resolve problems. I think that you will find that the better understanding you possess of other systems, the better you will understand your own. This is especially true in matters of public law but is also applicable in matters of private relations between individuals. This is another

place where your critical abilities may be used to the advantage of everyone.

Take time for your friends and family. Your professional obligations will compete heavily for your time, of course, but contact with loved ones will help you to meet those professional obligations. Besides, I have heard of very few occasions where people drawing close to the end of their lives wish they had spent more time working.

Finally, read! It is no accident that most European societies view the study of law under the framework of what we would call Liberal Arts. It is only recently that the profession here has become less of a study and more of a trade. This is truly tragic for it is counter to all common sense that such a powerful voice in society — the law — should be seen as something wholly separate from the most beautiful elements of that society — the products of its authors. As Mr. Justice Frankfurter of your Supreme Court said in an address to Harvard Law School in 1960:

> [The law is] a learned profession. That means drawing on the juices of your life . . . from almost every domain of learning, because if the law is concerned with the regulation of problems concerning society, then it is necessary to be informed or at least aware of the multitudinous, multifarious forces with which society is concerned, and which affect society.
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> So that in becoming a lawyer, in whatever capacity . . . you attach yourselves to a great heritage which, to be true to, must be pursued in the context of that heritage. Which means a deep and wide cultural life. No lawyer is entitled to be deemed a lawyer who doesn't keep abreast in his own mind, through reading, through which we gain what the past has afforded, through wide and persistent reading, with what it is that society is concerned with, and about.[9]

I can do no better than to remind you of these words — the words of one of your most eminent jurists.

I leave you with my sincere wish, and those of my colleagues in Ottawa, that you all succeed in the noblest of professions which is now your own. To serve the law well is a demanding exercise, but a challenging and rewarding one. The privilege and duty with which you are entrusted today remains unparalleled: the privilege and duty of ensuring that the best measure of justice is rendered to every citizen

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9. OF LAW AND LIFE AND OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER: 1956-1963 149-50 (Philip B. Kurland ed., 1965).

of your country. This will be your greatest satisfaction and a reward that no money can buy.