

THE CANADIAN LAWYER IN THE TWENTY-FIRST CENTURY

By Ian Holloway, Q.C.

Civility is Canada's charm. Complacency is its curse. We are renowned for our politeness. Yet in a much less becoming way, we have an occasional tendency to turn that reputation into a smugness, an assumption of moral superiority, especially as against the United States. We are "a beacon of fairness".¹ "Our judiciary is the "envy of the world".² These, and other comments like them, underlie our assumptions about our place in the world.

This type of self-satisfied hyperbole has its counterpart in the legal profession. We lawyers take for granted that we are important, and we assume that the public needs to be reminded that this is the case. Various "outreach" initiatives in recent years have focused on public relations.³ But this misconceives the real task that lies ahead for us: to reconstruct our profession in a way that meets the present and future needs of Canadian society. The fact is that the Canadian legal profession is in danger of losing the stature it has enjoyed among the learned professions.

HOW WE BECAME "IMPORTANT"

Lawyers became perceived as important because they were *relevant*. It is critical to remember that the common law actually began without lawyers. Indeed, it developed for a century or more before a class of people known as "lawyers" came to exist. And for the first couple of centuries of our professional life, the law was for most of its practitioners a rather humble calling. The word "attorney", which was the most common expression used to describe lawyers until the 15th century (and which remained in common usage in British North America until the middle decades of the 19th century), is simply an anglicized version of the Norman French expression for what today would be described as an agent, for that is what the early lawyers were: people who could speak Norman French, which was the language of government and hence the courts, when ordinary folk could not. The title "solicitor" is perhaps even more telling, if one considers that to solicit in other contexts remains an offence in most jurisdictions within the Commonwealth. And it is worthwhile to note that according to conventional understandings about these things, solicitors were not gentlemen. Solicitors were common—in the old-fashioned sense of the word.⁴

Lawyers began to achieve the status that we take for granted today when they became a necessary adjunct to the apparatus of government. We take pride in the fact that ours is a self-governing profession, independent of the state. But the reality is that we are as necessary to the proper functioning of our system of government as either Parliament or the civil service. When I teach first-year students, I tell them (perhaps with more than a little hyperbole on my own part) that by coming to law school, they stand on the verge of becoming part of the Constitution. They often are startled to hear me put it this way, but I go on to say that our Constitution—our constitutional tradition of liberty—exists because there are lawyers who are willing to act to defend it. But obscured by my rhetoric is actually a deeper point—that our civil society is dependent upon the existence of lawyers to facilitate its operations. When Felix Frankfurter is supposed to have said that he would rather live in a society governed by Soviet law and common law procedure than one governed by common law and Soviet procedure, he was in fact talking about the role that lawyers played in differentiating the great Anglo-American democracies from the totalitarian regimes that emerged after the Russian Revolution.

As with most things in the common law system, the evolution from legal agent to member of a legal professional was gradual, but the shift in status was evident by the dawn of the Stuart period, when King James I began regularly to use lawyers and found it expedient to create the rank of King's Counsel. To put it another way, by the time that governmental powers evolved into separate categories in such a way that conflict arose among the branches (in other words, when something that could be called constitutional law could be said to exist), government could not operate without lawyers.

It was in the latter half of the 19th century that we began to see the Canadian legal profession first displaying the characteristics that today we take to be the norm, including the formation of law firms whose client base is centred in the business world, and also including the idea of the lawyer as an active player in business. Perhaps not surprisingly, this began with the commencement of large-scale industrial projects: the building of shipping lines, railways, dams, mines, etc. Many of the leading lawyers of the day served on boards of directors of the major banks and trust companies, and were otherwise active players in business.⁵ To cast this another way, lawyers came to enjoy the stature we do because we helped the country work better. Long before anyone began to talk about a “service economy”, lawyers were contributing to the common wealth by providing not goods, but services—services that were essential to the functioning of a constitutional monarchy and the operation of a market.

THE IMPERATIVE OF COSMOPOLITANISM

With this in mind, let us look at what is going on in society today. It scarcely needs saying that the issue that characterizes our age is the economic transformation known as globalization. Every time we fill up our car, we see globalization in action. Every time we shop at Walmart (and realize that we can no longer shop at any of the regional department stores that used to occupy a regular place in mercantile life in Canada), we see globalization in action. And so on and so on. But there have been consequences for legal work, too.

First, and most significantly, there has been a migration of regional legal work, particularly of the high-value variety, to Toronto. But the legal-equivalent Highway 401 doesn't stop there, for there has been a shift of the *highest-value* legal work to the United States. If, for example, one looks at the list of "Big Deals" in any issue of *Lexpert* magazine, one sees that in almost every significant transaction in Canada today, U.S. counsel are involved. And we are starting to see an outsourcing of some routine legal work to India. As if all of that is not alarming enough, we are seeing the commoditization of other aspects of routine legal work through the rise of the paralegal. One assumes that it is just a matter of time before places like Walmart and Costco attempt to break into the legal market by providing a range of basic legal services such as wills and residential real estate transactions. The point is that the Canadian lawyer of today is being squeezed at both ends of the value chain.

In other words, there is—and it is not just a risk, it is actually beginning to happen—a loss of the centrality of the legal profession to the economic life of Canada. For simple matters, others can do the work more cheaply. For complicated ones, others are seen as having greater sophistication. This is not to say that there won't be a continuing need for lawyers in Canada. Of course there will be. But the question Canada's lawyers need to ask themselves is whether they will continue to be seen as a linchpin, without which Canada will be a poorer place. Of that, there is no clear answer.

So what needs to be done? To my mind the prescription is simple, though the formula is rather more complicated. To state it simply, the Canadian legal profession must become less provincial, and more cosmopolitan. At the moment, the profession of law in Canada remains a fragmented amalgam of ten provincial and three territorial law societies. To be sure, the Federation of Law Societies is attempting to act as a unifying vehicle for the provincial and territorial bars on issues of common importance. And the National, Quebec and Territorial mobility agreements represent a significant step forward in terms of allowing lawyers actually to represent the needs of their clients on a national basis. Yet it is hardly a source of pride, or of confidence in the ability of the profession to ready itself for the future, that it took until 2002 for

the initial agreement to be concluded, and until 2010 for the national scheme to be perfected. The truth is that we are a long way from being able to claim that we have a genuinely Canadian legal profession.

If we are to become *Canadian* lawyers, rather than Nova Scotian or Quebec or Manitoban lawyers, we need to commit fully to the movement of legal services and lawyers across borders, both national and international. And in a country with extremely well-trained lawyers (a point borne out prior to the economic downturn by the recruitment statistics of young Canadian lawyers in New York and London) that presents opportunities. This is why the conclusion of the three mobility agreements was such an important event. For what the agreements represent is not a threat, but an opportunity. The next step will be to replicate them on an international stage.

THE LAWYER AS ENTREPRENEUR

This leads to another thing that the Canadian legal profession needs to do if it is to continue to flourish in the 21st century, which is to become more entrepreneurial. The importance of tradition in the common law system is difficult to overstate. It is the philosophical underpinning of the system of *stare decisis*. It is, moreover, a glue that binds our otherwise unwieldy scheme of judicature together. But far too often, “tradition” serves as an excuse among lawyers for complacency.

When one hears lawyers lamenting the fact that “law is becoming a business”, it is difficult not to react cynically. The fact is that the law has *always* been a business—otherwise, lawyers would never have been able to make a living. To be sure, it happens to be a business in which the purveyors have been blessed to enjoy a monopoly in which the consumers are often not terribly discriminating. People will, for instance, generally spend far more time doing research before they buy a new washing machine or a vacuum cleaner than they do before they purchase the services of someone to whom they will entrust their livelihood. But it is a business all the same, with the same competitive pressures that every other business faces. And because we live in a globalizing world, the pressures nowadays come from everywhere, whether from a U.S. law firm (that might employ Canadian lawyers) trying to scoop highly profitable transactional work, or from an office in Bangalore providing support services at a fraction of the rate that a North American firm would charge (and which is doing it overnight, to boot).

As King Canute proved, no one can stop the tide. We cannot will global competition away. Nor can we keep the world at bay by making reference to things like “the need to protect the public”. This is, of course, an important duty. But it is cold comfort to tell a working-class person that because of the need to protect the public, he or she cannot have access to legal services at

all because it is too expensive to hire a lawyer. And it is nothing short of ridiculous to say to managers of corporations with worldwide operations that it is for their benefit that they have to hire someone locally, when in fact their legal work for the rest of the world is being done out of New York, London or Singapore.

What Canadian lawyers must do is embrace globalization and exploit the new opportunities to generate work. *That* is how we will continue to be relevant to our society. And with modern technology, it is quite possible to do so. An example can be seen in the area of class-actions litigation. This is still a relatively new and emerging field of law in Canada, but it is interesting to note that among the leading plaintiffs-side firms in the area are firms in Regina, Windsor and London, Ontario.⁶ What all three firms, which are otherwise quite different in history and character, share is a spirit of entrepreneurship, and an eagerness to use technology to expand the bounds of their practices. As a result, all three have truly national, and in some respects, *international* practices—despite the fact that none of them are in a major metropolis.

Being cosmopolitan is a lesson that the Australian legal profession learned some time ago. Outwardly, the Australian legal profession retains a decidedly English appearance. All of the major cities maintain as a separate branch of the profession barristers (even where the profession formally is fused), and in some states wigs continue to be worn in court. Yet in almost every substantial respect, Australian lawyers have become far more entrepreneurial and adventurous than we have in Canada. The Australian version of the National Mobility Agreement, for instance, dates from the early 1990s—and now includes New Zealand. And unlike Canadian law firms, which are still at an early stage of penetrating foreign markets, several Australian firms have been able to develop truly global practices. To take Asia as perhaps the most pertinent example (given the increasing importance of China and India to the world economy), Canadian lawyers are still trying to establish a toe-hold there. But Australian lawyers have a presence in Asia that, to an extent, rivals that of English and U.S. law firms.⁷

Closer to home, in 2007 the Australians pulled off a major coup. The Law Council of Australia (the Australian counterpart to the Federation of Law Societies of Canada) convinced the U.S. Conference of Chief Justices, which represents the chief justices of all 50 states, as well as the Chief Justices of the U.S. federal courts and the Chief Justice of the U.S. Supreme Court, to recommend that an Australian law degree be accepted as a basis for admission to practise anywhere in the United States without the need for further study.⁸ By itself, this does not have any force or effect. Like here, admission to practise in the United States is determined on a state basis. Nonetheless, to have the senior judges in every jurisdiction speak out like this is a pretty

powerful endorsement. And it is an endorsement that we in Canada have never had.

PARTNERSHIP IS THE PROBLEM

A substantial part of our problem in Canada is that we remain wedded to the partnership model in terms of firm governance. Grounded as it is in a philosophy of democratic egalitarianism, the concept of partnership has a romantic appeal to it. And as a means of distributing profits, it retains a certain logic. But as a means of running the business of a law firm in the 21st century, one wonders whether its day has passed. For one thing, partnerships tend to downplay or obscure the roles of strategy and leadership in a law firm. Moreover, partnership is an inherently inefficient way of making decisions. It also tends to focus the minds of the partners on the next quarter, or the next draw, rather than on the next decade, which is where they need to be focused.

Paradoxically, only two types of law firms are well positioned to compete in today's world. The first is the "cutting edge" firm, which, even if it purports to be a partnership, has embraced a corporate model in terms of firm leadership—a model, in other words, that combines authority and accountability. The second is the very old-fashioned style of firm, which is run as a benevolent dictatorship—provided, of course, that the dictator is not only benevolent but visionary. For many law firms, though, the partnership structure is a source of competitive weakness rather than strength.

A NEW CONCORD BETWEEN BAR AND ACADEMY

One other thing that needs to happen if the Canadian legal profession is to retain its stature among the learned professions in Canada is that a new understanding must develop between the practising arm of the profession and the law schools. In other words, the legal academy needs to be part of the solution, too. The central problem is that neither side readily accepts that the academy and the bar live in a symbiotic relationship—or, rather, neither accepts what *flows* from our relationship of symbiosis. This is curious, because every Canadian law dean will tell you, for instance, that he or she simply could not operate were it not for the generosity of the practising bar, both in terms of financial contributions to the law schools and in terms of volunteering (often for no pay) to teach as adjunct professors.

To state it in slightly caricatured terms, we in the law schools think that the practising bar is the embodiment of philistinism. For its part, the bar thinks of us as hopelessly out of touch with the "real world" and as a bastion of left-wing politics. Of course, both are quite wrong. Most lawyers think about legal issues. The pressure of business limits their time for repose, but

it is just not true that they do not consider legal principle in their work. And most legal academics today—at least the good ones—really do want their students to become good lawyers. So the foundation for the development of a common sense of mission already exists.

But what would this mean? What would happen if there were a new understanding, a greater sense of common cause between bar and academy? For one thing, there could actually be a constructive conversation about the entirety of legal education. The accepted theory is that law school and then articling and then the bar admission process are meant to be a continuum. That was the basis on which the law societies and the universities reached agreement about the division of labour in 1957. But the truth is that there is no systemic connection whatever between law school and articling, apart from the fact that one follows the other.

If it is important for the Canadian lawyer of the 21st century to be cosmopolitan and entrepreneurial-minded, then the law schools should be accepting people for admission with this in mind. But we don't. Most law schools select primarily on the basis of raw intelligence as demonstrated by a blend of Law School Admissions Test score and undergraduate grades. Plainly, being intelligent is a significant part of being a good lawyer. But our colleagues in the medical profession would tell us that intelligence is just one of the factors they look for when deciding who to admit. They also look at what they might formerly have called bedside manner but that we now call "emotional intelligence". And they look for evidence of community involvement, as a proxy for a desire to help the human condition.⁹ One assumes that they make mistakes from time to time, but surely the experience of medical schools suggests that we could do better in the way in which we select people for admission to the legal profession. In order to do so, though, we would have to have some understanding about which qualities are actually important in a lawyer. The only way to do that is for the bar and the academy to work together.

Likewise, a sense of common purpose could engender a mutually beneficial discussion about the curriculum. This is not to say that law schools should give over to the law societies the authority to set the syllabus. Far from it. That is something every law dean would resist. Yet at the same time, it surely behooves us to appreciate that the vast majority of our students come to law school because they want to spend a part of their working lives, at least, as practising lawyers. If this is true (and it is), then oughtn't we to be open to a genuine dialogue with the bar about what sorts of things putative lawyers should learn? And shouldn't practising lawyers be open to hearing legal scholars offer views about what the needs of Canadian society (and hence, the Canadian legal profession) are likely to be in the future?

This leads to a more general question about the place of skills training in the law school curriculum. The *Carnegie Report*¹⁰ has fomented a major debate about this in the United States, but the discussion is at a much less developed stage in Canada. All legal education in North America today is predicated on the barrister model of legal practice. Yet we know that the majority of our graduates go on to work in the main as solicitors. Of course, all lawyers need to know how to reason and how to craft an argument. But they also need to know how to read statutes—something that no law school teaches in as intensive a way as it teaches how to read cases. And just as importantly, they need to learn how to work in groups, how to manage complex projects and how to negotiate—all things which, in a systematic way at least, are absent from most law school curricula. Likewise, the clients who today's students are going to represent will increasingly have legal interests that transcend the bounds of a single jurisdiction—yet one would be hard-pressed to know this by looking at the structure and content of the compulsory curriculum in all but a few law schools.

The fact is that North American legal education is based on a curricular structure that was designed to meet the needs of the United States at the height of the Industrial Revolution. The way in which we teach law is firmly rooted in the 19th century—19th-century Harvard, to be precise. While, clearly, some of this remains relevant, much could stand to be changed. But unless we talk to one another, and unless we behave as if we are members of the same team, it is difficult to conceive how real progress can be made.

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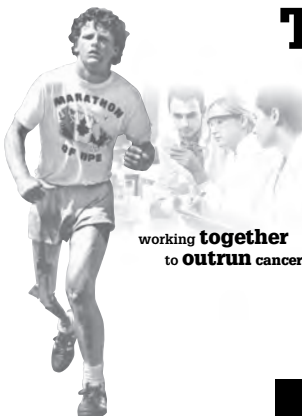
The legal profession became important because it served an important role in society. We facilitated the transition from feudalism and absolutism in government to democracy and the rule of law. And we assisted with the flow of capital that fuelled the Industrial Revolution. We did this, possibly without even realizing we were doing so, by recalibrating our professional orientation in response to the changing needs of society. The recalibration was camouflaged, for in many ways we look and speak very much like our forebears did in centuries past. But it was a profound change all the same. The skill set that good lawyers brought to the table after the Glorious Revolution, for example, was different from the skill set they had used during, say, the Plantagenet period. And the perspective that good lawyers brought to bear during the Great Depression had evolved markedly from the mindset of their predecessors during the Industrial Revolution.

The question now is what outlook and skills must we bring to bear in the current revolution—the *global* revolution—that is taking part in our society. But there is an important difference between then and now. The transition

from feudalism to constitutionalism took 300 years. The Industrial Revolution took 150. The development of the welfare state took three generations, and it was punctuated by two world wars and a cold war. But the global revolution—the information revolution—is taking pace at breakneck speed. We don't have the luxury of a gradual, multi-generational transition that our professional forebears did. *That* is why this project—a project of collective self-adjustment—is so terribly urgent.

ENDNOTES

1. See, for example, Michael Valpy, "A beacon of fairness", *The Globe and Mail* (1 July 2008).
2. "Canada must maintain a judiciary that is the envy of the world": "Judicial Compensation", in *Canadian Bar Advocacy*, vol 3 (2008) at 5.
3. For example, see the Canadian Bar Association's Law Day, online: <<http://www.cba.org/CBA/LawDay/main/>>.
4. I remember that when I was an articulated clerk, we found in our firm's library an old etiquette book published in the early part of the 19th century. The book warned people about being seen in public with their solicitors, because it could harm their reputation.
5. For a fascinating discussion of the evolution of the Canadian law firm, see the essays in C Wilton, ed, *Inside the Law: Canadian Law Firms in Historical Perspective* (Toronto: The Osgoode Society, 1996).
6. The Merchant Law Group LLP; Sutts, Strosberg LLP and Siskind, Cromarty, Ivey & Dowler LLP, respectively.
7. To offer but three examples, Allens Arthur Robinson has offices in Thailand, China, Hong Kong, Viet Nam, Indonesia, Cambodia and Singapore; Mallesons Stephen Jaques has offices in Hong Kong, Beijing and Shanghai; Minter Ellison has offices in Hong Kong, Shanghai and Jakarta.
8. See the Honourable Warren Truss, MP, "US Chief Justices Urge Better Access for Australian Lawyers" (1 March 2007), online: <https://www.trademinister.gov.au/releases/2007/wtt017_07.-joint.html> . See also A Freiberg, "Deaning Down Under" (2007) 38 *U Toledo L Rev* 617 at 618–619.
9. To be fair, this is something that some law schools, led by the University of Windsor, are starting to pay greater attention to in making admissions decisions.
10. *Educating Lawyers: Preparation for the Practice of Law* (San Francisco: Jossey-Bass, 2007).



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