Canadian Bar Association's Canadian Legal Conference—The Legal Profession in a Smart and Caring Nation: A Vision for 2017

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CHECK AGAINST DELIVERY

Good afternoon. Thank you for inviting me here to address you.

I am a lawyer by profession, although my involvement has come mostly in teaching law at a number of Canadian universities and through public service in the context of the law. Put simply, I love the law. I am especially proud to be a member of this noble profession, which is why I accepted your invitation with alacrity.

When I was asked to serve as governor general of Canada, I had much to learn. Despite my background as a student and professor of law, I had to relearn our constitution and its conventions, as well as its legal principles. That is one lesson I want to emphasize today. We are on a continuous learning journey. And in so doing, I have developed an even more profound admiration for how precious the rule of law is in our country, and how thin and vulnerable its veneer can be.

And by rule of law, I mean the prevailing legal system in Canada centred upon the constant, relentless pursuit of justice. Law without the pursuit of justice is just a statement of words.

The rule of law, married to the constant pursuit of justice, is what makes us free. How do we take a strong foundation and make it better? Or, as the coat of arms adopted when I became governor general, says, *Contemplare Meliora*: "To envisage a better world."

When I was installed as governor general last year, I entitled my remarks: "A Smart and Caring Nation: A Call to Service." In 2017, we will celebrate the 150th anniversary of Confederation, and I have been inviting Canadians across the country to imagine what a smarter, more caring nation might look like in six years' time, and how we can turn our vision into a reality.

I now make a formal request to you, members of the Association who best represent the legal profession, to please join together in this dream for our 150th anniversary as a nation. I suggest our birthday present be to ask ourselves: how do we craft a new definition of the lawyer as professional?

Let us begin with our current definition of professionalism. I am a member of the Ontario Bar, so let's start with that.

In Ontario, new members swear an oath: "I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me."

It continues: "I shall neglect no one's interest..."; "I shall not pervert the law to favour or prejudice any one..."; and, of overwhelming importance, "I shall seek to improve the administration of justice."

We see important duties reflected here: to the client, to justice, and to the public interest. This is consistent with the principles of peace, order and good government that underpin our concept of the good society in Canada. How do we seek the good? Through our commitment to professionalism which is focused on serving Canadians and on continuous innovation in the law and its administration.

The best modern reformulation I have seen is the American Bar Association's Model Rules of Professional Conduct, which reads:

"A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."

The ABA's Professional Committee is even sharper:

"A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service, and engaging in these pursuits as part of a common calling to promote justice and public good."

These obligations constitute the social contract the legal profession has with society.

There are three principal elements to any profession's social contract. First, the profession is characterized by specialized knowledge that is taught formally and obtained by experience and under supervision. Second, the State gives it a right to have a monopoly and to control entry and exit standards and competence and, to some degree, fees. Third, it has a responsibility to society to serve beyond the needs of specific clients.

We enjoy a monopoly to practise law. In return, we are duty bound to serve our clients competently, to improve justice and to continuously create the good. That's the deal.

What happens if we fail to meet our obligations under the social contract? Society will change the social contract, and redefine professionalism for us. Regulation and change will be forced upon us—quite possibly in forms which diminish or remove our self-regulatory privilege.

All of which brings me to our challenge.

We live in rapidly changing times. I often illustrate today's pace of change by saying it took three centuries for the printing press in 15th century Western Europe to reach a majority of the population and reinvent that society. By contrast, it took the Internet only ten years from the turn of the century to reach a majority of the world's population.

We all recognize the changes taking place. But we must go beyond this understanding. We must also be willing to embrace and adapt to change. We must scrutinize our social contract—both with the public and internally—to ensure that we stay relevant—that is, stay just—and continuously strive for the good.

How can we use Canada's sesquicentennial in 2017 to re-evaluate and update our professional responsibility? Can we craft a new definition of the legal professional?

To answer these questions, let me suggest six key relationships that may help us in our search. Each of them contains some friction, and I will dwell mainly on those instances—sometimes as stories—in the hope of being a catalyst for the good. Remember, the oyster requires the irritation of a grain of sand to produce a pearl.

Here are the six: as lawyers, we must attend to our relationships with justice, trust, education, social need, the firm and public service.

First, the lawyer and justice.

When I was a young law dean making my welcoming address to new law students, I often posed this question: "Is law just?" To answer that, one needed two different things: to know the law, and to possess a sense of justice. I would encourage students always to ask whether the particular law they were working on is just. And, if it is not, "What will you do about it?" I would then remind these new students that soon, each of them would swear an oath to "improve the administration of justice."

I would also ask students to see two movies to sharpen the distinction between law and justice: *To Kill A Mockingbird* and *Judgment at Nuremberg*.

And then I'd say this: to understand whether or not a specific law is just, you must know that law well. You must know its history, its reason for being, whether the circumstances of its application have changed, whether its interpretation has altered and, if need be, what you would do to fix it.

And then, to ensure that you measure the law against an appropriate standard, you must have a well-developed sense of justice. I would encourage them to work wisely over the next three years of their studies, and through their entire professional life, to know the law well and to refine their sense of justice. That, after all, is why each of us embarked on the study of law in the first place. The pursuit of justice is noble, idealistic, demanding and compellingly important for a good society.

One of Canada's early and significant chapters in the story of law clashing with justice took place right here in Halifax.

In 1835, Joseph Howe won a landmark case in the struggle for a free press in Canada when he successfully defended himself against a seditious libel charge brought by members of the powerful Halifax Family Compact. In his newspaper, *The Novascotian,* Howe had publicly accused the ruling class of profiting at the expense of the people. Although he had broken the libel law of the day, Howe was acquitted after he presented proof of his assertions in his famous, five-hour defence in the Nova Scotia Legislature.

John Ralston Saul recounts this episode in his recent book on Lafontaine and Baldwin, noting that Howe's argument tackled the question of loyalty versus treason. Howe was called a traitor for telling the truth, and were it not for the strength of his argument, he would have been found guilty under the law. Fortunately for us, Howe persuasively made the case for justice and reform, telling the court: "The only questions I ask myself are, What is right? What is just? What is for the public good?" Perhaps he borrowed from Thomas More in an earlier chapter of law and justice.

Howe asked himself the same question I used to ask new law students—"Is law just?"—and concluded that it was not. His history-making stand reminds us that we must continue to ask ourselves this question throughout our careers.

Next month I will be back at McGill for a presentation of the F.R. Scott Award. Many of you will remember *Roncarelli v. Duplessis*, the famous Padlock Law case where Frank challenged arbitrary law with justice and fashioned a new law constraining the state's administrative power when it was exercised arbitrarily or unjustly.

Let me now turn to a contemporary instance in which the administration of justice cries out for improvement: in the administration of our courts themselves.

In recent years, the Ontario court system has been slowed by an inordinate number of unproductive appearances and some of the longest court delays in the country. To put this into perspective, between

1992 and 2007, the average number of court appearances needed to complete a criminal case more than doubled. The average duration of a case also jumped from 115 days to 205 days.

In his study of court processing times across Canada, criminologist Anthony Doob found that in cases where no bench warrants were issued, Ontario had over three times as many cases lasting more than eight months than did Alberta. And Alberta does not exactly stand at the top of the expeditious standards list of court administration.

Ontario has made progress in reversing this trend, with the Justice on Target program and initiatives such as Streamlined Disclosure, Meaningful First Appearances and Dedicated Prosecution, but the pace is woefully slow. Each of you here knows this from personal experience.

Although I have focused on court delays in Ontario, wide discrepancies exist all across Canada, both in our criminal and civil justice system. Why? Interestingly, Anthony Doob suggests that reducing these delays would require a hard look at what he calls “court cultures”; that is, “shared expectations about how things should work” among judges, the accused, defence counsels, Crown attorneys and legal aid. In addition to understanding these cultures, a shared willingness is needed to work towards ensuring a fair, equitable and speedy end to each case, for the benefit of the individuals involved, the legal system itself and society as a whole. We need to bring a sense of urgency to that shared culture and redefine professionalism.

Judges, in particular, can help in our effort to reduce delays and improve the administration of our courts, by lending their expertise and authority to this important matter. As the individuals entrusted to preside over our courts, judges have a responsibility to ensure justice is served in all its forms, not solely when it comes to delivering judgments.

We in the legal community have a responsibility to take the lead in reforming the court system for the public good; remember our oath to “improve the administration of justice.” Justice delayed is justice denied. Or, as Joseph Howe pointed out: “He who delays or withholds justice excites discontent and sedition; [the King] would tell them that *they* were the rebels.”

The second association: the lawyer and trust.

Trust occupies several dimensions—for simplicity’s sake, let us focus on the micro and macro levels.

At the micro level, trust is determined by how fairly, effectively and efficiently the individual lawyer serves his or her client, including the terms of payment.

Trust implies that we are paid for value-added only, and not for monopoly rents, and that we constantly seek the most cost-effective solution while striving to make our practices as efficient and fair as possible.

At the macro level, trust requires each of us to have an abiding concern for how we are regarded by the public, our partners in our social contact, and how we cultivate our unique professional responsibilities towards the public good.

A powerful negative, recent illustration of the importance of trust is the collapse of Wall Street and the extraordinary collateral damage to Main Street in America and around the world. It has implications for our profession. How many lawyers “papered” the deals that involved fraudulent statements of assets, liabilities, income and valuations? How many lawyers “sounded the alarm” about conflict of interest in the web of financial transactions and creative financial instruments? How many lawyers were silent in the face of a pattern of deregulation which has left the economy naked to excessive leverage—and which any thoughtful observer knew was bound to have its inevitable pendulum swing?

And what is especially surprising is that we had a precursor seven years earlier—Pharaoh’s seven-year cycle of feast and famine, with two devastating famines.

The dotcom crash of 2001 involving Enron and WorldCom inter alia brought in the Sarbanes/Oxley regulating framework of mind-numbing rules—as opposed to principles for judgment. This framework was very costly and of questionable effectiveness at the micro level. At the macro level, it encouraged an even greater system of excess to fall into place.

Today, a principal reason why fiscal discipline is so hard in a place like Greece or Italy is because trust is eroded between law makers and the public. Many ordinary citizens believe it is the greed of lawyers, bankers and accountants that has brought their society to its knees.

Trust must also exist between the lawyer, the public and institutions such as the Canadian Bar Association and provincial and territorial law societies. Citizens must know there are effective and transparent measures in place to resolve their complaints, and they must trust in these institutions to govern the legal profession and be responsive to public need. That’s the way it works.

The third key relationship is between the lawyer and education, both at the entry level and throughout a professional lifetime.

Here I rely heavily on William Sullivan and his co-authors who wrote *Educating Lawyers*, as well as *Work and Integrity*,his parallel book on the five professions of law, medicine, engineering, nursing and the clergy. These were the studies in professionalism for the Carnegie Foundation for the Advancement of Teaching. In his work, Sullivan describes the three apprenticeships of the professions:

- the cognitive
- the practical
- the ethical-social

The cognitive is the intellectual aspect of the law—meaning knowledge of the law, its thinking and doctrine. The practical refers to the competent practitioner, while the ethical-social refers to identity and purpose.

For lawyers, education formally begins at the university level. But the foundation of knowledge for this profession is laid as far back as primary school and family experience. We learn about the rule of law, our history as a constitutional monarchy and some details of our legal system. But alas, we don't learn much.

Let me focus only on law school. We have allowed too great a divide to develop between academia and the profession. We do not cure this by forcing the profession back in, but rather by making the compelling case that the three years at law school mark the beginning of the journey of preparing professionals. We should not leave that preparation to the end—articling and the bar admission course. We should start with how we choose an entering class. I could devote an entire lecture to this subject, and I look forward to meeting with law deans to have that exploration. Beginning in law schools, we need to integrate these three apprenticeships—the cognitive, the practical, the ethical-social— as one continuum.

Let me illustrate with two stories from my younger years, during which I struggled to integrate these three apprenticeships and lacked the clarity and wisdom to see then the generalized principles that I see today. When I was a young law dean almost 40 years ago, we chose an entering class of 150 from over 2,000 applicants, largely based on demonstrated academic merit through undergraduate grades. Since then, the LSAT has been added. These intellectual criteria are essential, but should not be exhaustive. A better system would continue to use demonstrated intelligence as one filter to select perhaps 600 or 700 potential students from the 2,000 applicants. Extensive interviews should then be conducted and additional criteria employed to identify:

- Qualities for professional responsibility
- Wisdom, judgment and leadership
- Demonstrated excellence in any field
- Relationships with people
- Ethical sensibility and depth.

It is interesting to note the evolution in Canadian medicine, which has led some to the selection method I've set out above. In two of the medical schools I know best, applicants over two days visit 21 different interview stations. Each station is staffed by two interviewers, who present scenarios for the interviewee's response lasting anywhere from 5 to 10 minutes. Using this method, the schools get 42 different points of view on choosing a student for the entering class. This approach recognizes that the teaching of professional responsibility begins on day one of the university-based M.D. degree. The medical school is close to the teaching hospitals, and students see patients early on in their education. As student members of the profession, they also participate in the "white coat" ceremony in their first term, underlining the fact that they are responsible for and to their patients.

As to curriculum in law, I would integrate the bar admission course with the LL.B., similar to what medicine does. I would ensure there is a broad and extensive focus on ethics in law school, to help aspiring lawyers develop a greater understanding of the ethical implications of a proposed course of action and to see their public trustee role. I would also intersperse internships or articling throughout the academic years. I would pair academic and practising lawyers as much as possible in the curriculum.

Let me illustrate with another anecdote. Perhaps the best experience I had as a law teacher was to help develop a cluster in Corporate Law and Finance at the University of Toronto Law School in the early 1970s. Frank Iacobucci and I were young law teachers. We were lucky enough to pair with Jack Blaine at McCarthy's, Jack Ground and Purdy Crawford at Osler's. Frank, as we all know, went on to distinguish himself in so many law-related spheres. Jack Blaine was then counsel to the committee to reform the *Ontario Business Corporations Act* and completed his career as a leader of the corporate bar. Jack Ground also was a leader in the Bar Admission Course, later a bencher and Ontario Supreme Court justice and, though retired, continues in the field of alternative dispute resolution. Purdy Crawford had been counsel to the Kimber Committee to reform Ontario securities law, and then continued on as a leader in corporate law and business. His most recent, remarkable entrepreneurial task was to resolve the claims of holders of Canadian asset-backed securities following the collapse of that market.

As young law teachers, Frank and I profited enormously as teachers/scholars from this experience. And so did our students. This cluster helped establish the University of Toronto in corporate law teaching and practice and law reform. Frank, Jack Blaine, Jack Ground and Purdy are the finest of role models. I call them the three- or four-legged men. They all lived the three apprenticeships, with the third role—that of public trustee—especially pivotal in their extracurricular law reform work.

Medicine has many lessons to teach us about the redefinition of the professional. By marrying the professional and academic experiences and by combining theory and practice, it has established the framework for lifelong research, continuous evidence-based education and professional renewal. All of these responsibilities are assumed by the medical school, which is built around the hospital and clinical practice.

And, bear in mind, the first of the three elements of professionalism is specialized knowledge constantly enhanced to improve justice. The symbiosis of the university and the profession is close.

The fourth relationship is between the lawyer and social need.

For many today, the law is not accessible, save for large corporations and desperate people at the low end of the income scale charged with serious criminal offences. We must engage our most innovative thinking to redefine professionalism and regain our focus on serving the public. Here are some headings for our task:

Simplify legal procedures and render them more cost-effective.

Avoid the tort law morass of U.S. law.

Examine the scope of practice to unbundle activities which do not require legal professionals, and work with paralegal associations to enhance their competencies.

Move the industry standard of pro bono work, including cases, teaching and law reform, from the current rate of less than 3% to 10%, and build these “honourable hours” rigorously into the firm’s revenue structure.

If we wish to avoid having change forced upon us, we must embrace new ideas and innovation. Let me illustrate the point with a medical story that is set out in Richard Creuss and Joseph Hanaway’s history of McGill Medicine in the 19th century. All Canadians should know of Dr. Thomas Roddick, for whom the McGill entrance gates are named. After studying medicine at McGill, Roddick went to Scotland, where he graduated in surgery at the University of Edinburgh. There he studied under Joseph Lister, who was a pioneer in the use of carbolic acid to disinfect the operating room. Lister was so convinced of the medical benefits of carbolic acid as disinfectant that he damaged his hands and lost his ability to operate.

Roddick returned to McGill to open a third operating room alongside the two senior professor surgeons who had taught him at McGill before his Edinburgh enlightenment. In his first two years of practice, his patients’ mortality rate from surgery was less than 2%, all because of the disinfecting power of carbolic acid, with which he bathed his operating room. The two senior surgeons—who refused to use carbolic acid in their operating rooms—saw mortality rates of more than 20% among their patients, due to cross-infection. At this point, Dr. William Osler, then a young McGill professor (who went on to write *Principles and Practice of Medicine*—which went through over 40 editions—and to become the Regius Chair of Medicine at Oxford) intervened and threatened to publish the comparative statistics in the local newspapers if the two senior surgeons persisted in their refusal to use carbolic acid. They relented, and mortality rates dropped accordingly.

There are several lessons from this anecdote. First, it clearly illustrates the importance of using best practices from other jurisdictions and of being open to the ideas and energy of younger members of the profession. Minds, like parachutes, work best when open. Second, the most senior and respected members of the profession must be prepared to intervene to ensure the public good. Third, there must be a culture of constant renewal and continuous improvement in practice and evidence-based learning. Fourth, there is the need for sunlight, for the public microscope—the need to ask ourselves what the public expects, and what members of the public would say if they really knew what was going on. And finally, there is the compellingly urgent need to keep the public good foremost in our minds.

The fifth relationship is between the lawyer and the firm.

Earlier, I spoke of the internal social contract within the profession. This contract speaks to how firms treat their members and staff. Let me illustrate only two aspects of this contract, of which there are many.

Our first obligation is to ensure that the firm allows for a reasonable work/life balance. Let us not penalize those with a family but support them so that they are able to succeed in the field while supporting the most important aspect of their lives: their spouses and children. If we wish to draw from the entire nation’s talent pool in attracting our most promising young people of both sexes into our profession, we must find a better balance and strive to keep employees motivated and fulfilled.

I am the father of five daughters, the eldest three of whom are lawyers and parents with seven children among them. I have witnessed their courage with amazement and, at times, incredulity as they have built both their careers and their families. And they have done so in spite of their firms. In my professional lifetime, I have seen the shift from having one woman in my graduating law class to a majority today, largely because of the ability, tenacity and application of women. But something happens in the firm just as many women are contemplating families, with or without supportive husbands (and the firms are hard on supportive husbands, too). And the harsh scorecard is how few firms count women among their senior partners. The women simply disappear along the way.

The good news is there is some progress in the law school. There was only one woman in my graduating law class; today, 7 of the 19 Canadian law deans are women.

A second friction with the firm is how we deal with the national and the international firm in a global society. As we have seen, there are interesting lessons to be learned in this matter from the accounting profession.

The final key relationship is the lawyer and public service.

Lawyers are particularly well-prepared for public service, and yet substantially underrepresented. Let me illustrate with my own case. I was all set to commence articling for a career in law in 1965, when my dean asked me to join the Law Faculty as a teacher. I took a one-year leave of absence from my law firm, now in its 45th renewal. Purdy Crawford, to whom I was to be articled, once ended a letter of reference for me by saying: "You'll be lucky if you can get this man to work for you." The reality is, I have never worked! I enjoyed university life so much I never left until I was 69-and-a-half years old, when I was asked to join the public service—my current job. I have often said that all of the important things in life I have learned from my children, and all five are in the public service. So I followed their example. And I am very grateful I was given that one year, renewable leave of absence.

We do well in our appointments to the Bench. For the most part, we have an extremely high level of competence and trust and—to the credit of our profession—our most accomplished colleagues are prepared to reduce their level of compensation to join the public service. We must guard and build on this precious tradition of competence and integrity on the Bench.

However, we must do much more to ensure all other areas of public service are able to draw from our profession. And we must ensure that the quality of the work, the opportunities and the function of all professional levels are rewarded and appropriately respected in these areas. Part of the trick is to ensure that prospective law students and lawyers are fully aware of opportunities in the public service, and that we encourage movement back and forth, as Frank Iacobucci, for example, has done.

Frank is a 'four-legged' professional, distinguished in all three of the apprenticeships. He has served in the academy (professor and dean of law, university provost and president), the judiciary (Federal Court of Appeal and Supreme Court of Canada), public service (Deputy Minister of Justice) and practice early on with Dewey Ballantyne in New York, and now as counsel with Torys. Frank would say each of his experiences on one leg enhanced his ability to function on the others.

One of my most rewarding moments in the last two years came when I helped to conduct an experiment initiated by Kevin Lynch, the former clerk of the Privy Council. In his quest to renew the public service, he sent about 70 deputy and assistant deputy ministers to the University of Waterloo, where I was president, to describe their work to students to intrigue and recruit for two days. Over 1,000 of our students showed up. They told me three things that startled them—and, in another sense, myself, because I thought it was obvious.

Most students had never thought of a career in the public service. It seemed too remote and isolated.

Most students had never imagined the range of competencies required, how quickly one can have responsibility and how varied it is.

Most students were captured by the idealism of serving the public.

I referred earlier to William Sullivan's *Work and Integrity,* which discusses the Carnegie Foundation for the Advancement of Teaching's study of the professions of medicine, nursing, law, engineering and the clergy. Think of the magic of that title: *Work and Integrity*. Sullivan issues a clarion call for renewing the social contract between the professions and the wider public they serve. He envisions a new model of professionalism which aims at humanizing modern work and improving the equity and quality of contemporary life.

We need our own Canadian Bar Association Carnegie Commission on creating a new model for professionalism in law. To borrow a saying from a sister profession: physician heal thyself.

Our country does have a long history of innovation in the law, dating all the way back to Samuel de Champlain, the first governor—in all but name—of what we now call Canada. In 1608, four members of Champlain's crew staged a mutiny, plotting to murder him. Upon hearing of this treachery, Champlain laid a trap for the four conspirators and captured them—good detective work and law enforcement.

Champlain then established a tribunal to act as the court. A formal trial took place. Evidence was heard. The accused were found guilty of their crimes. They were sentenced to death. While the ringleader was hanged, Champlain tempered justice with another idea for the rest of the mutineers. He recommended they be sent back to France for the King's court to review the sentences; they were eventually pardoned, which was common in those days.

In this way, Champlain showed not only swift justice, but also mercy. Evidence was heard and a tribunal was convened to decide on the prisoners' fate. In a place where there were no courts, lawyers or civilization as they knew it, they were able to handle these crimes with ingenuity and, most importantly, fairness.

And just as we look to the past for lessons, let us also look forward to 2017 and beyond to see how we can update our vision for legal professionalism.

No doubt legal professionals are already working on many of the issues I have mentioned, and I applaud you for that.

As we continue to build a smart and caring Canada, I know that you will contribute many great ideas to propel us towards building a smarter, more caring justice system.

A renewed model of professionalism for a smart and caring nation—let that be our profession's gift to Canada on the occasion of its 150th birthday in 2017. And let me reinforce our vision with these lines from George Bernard Shaw: "Some people see things as they are and wonder 'Why?' We dream of things that ought to be and ask, 'Why not?'"

Thank you.