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DIVERSITY AND PROFESSIONALISM IN THE PRACTICE OF LAW

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I. INTRODUCTION

As I approach my 25th anniversary of being called to the British Columbia bar, I increasingly reflect on the journey to this point in my career as a lawyer. I am very grateful to the many teachers, mentors, judges, tribunal members, clients, colleagues, friends, and family who have contributed to my positive experience and to the development of my consciousness as a lawyer. I continue to be as enthusiastic about the practice of law as I was on my call date. I would not hesitate to recommend a career in the practice of law and I am excited about the balance of my career as a lawyer. For these reasons, it is of concern to me that some have not found the practice of law to be as rewarding and satisfying. My concern is made even greater because of the perceived limitations and obstacles that prevent advancement for some in the practice of law.

With experience and maturity comes a greater awareness of the importance of the core values of the legal profession and our legal institutions. Much has been written already on the subject of diversity in the legal profession. I have decided to provide my personal observations and perspectives on this subject in the hope that they will be of assistance in understanding the importance of promoting diversity in the legal profession and of advancing the goal of attaining a more diverse legal profession. Reasonable people may disagree on the subject of how to ensure that we achieve and maintain diversity in the legal profession. But on the question of whether diversity in the legal profession is necessary, there can be no question: A diverse legal profes-

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sion is fundamental and essential to the rule of law. We need to consider this subject carefully on an individual lawyer and law firm basis in order to address the concerns expressed by a significant number of lawyers regarding the opportunity for advancement and success in the practice of law.

This essay will discuss the ways in which promoting and achieving diversity in the legal profession is integral to our professionalism as lawyers. In addition, I have outlined my observations on the important ways that law firms can promote diversity by creating a culture that supports flexible working arrangements and an inclusive approach.

II. BACKGROUND

Lawyers obtain education with respect to the practice of law beginning in law school and continuing through articling and throughout the practice of law. An essential element of the education and training of lawyers is the formal and informal mentoring that we receive through our work in law firms and through various organizations that support the legal profession such as the Continuing Legal Education Society of British Columbia and the Canadian Bar Association.

Promoting diversity in the legal profession has been an important goal of the Canadian Bar Association for many years. In 1993, the *Wilson Report* was released after a CBA committee chaired by the late Madam Justice Bertha Wilson, investigated, analyzed, and considered the need for change in the legal profession to promote diversity.¹ The *Wilson Report* included many practical recommendations aimed at promoting diversity. Since that time, some progress has been made to implement these recommendations but considerable work remains. The continuing problem of an inordinate number of women leaving the legal profession highlights the need for further study as to how we can do a better job of retaining women in the legal profession. A related issue is the absence of diversity in the leadership of the profession and the relatively small number of women and visible minorities who are equity partners in large law firms. Although a range of possible explanations and

¹ Canadian Bar Association, Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (1993) (Chair: Bertha Wilson) [*Wilson Report*].

theories may be available, any perception that the legal profession is not committed to diversity is a serious challenge to all of us and must be answered.

III. PROFESSIONALISM

Any discussion of the subject of professionalism in the practice of law must begin with a reference to the timeless paper written by the late Chief Justice of the Supreme Court of British Columbia, Allan McEachern.² Although his paper does not expressly address the subject of diversity, the late Chief Justice discusses many aspects of the practice of law and professionalism providing very thoughtful guidance on how lawyers ought to conduct themselves. The paper by Chief Justice McEachern is indeed relevant to the discussion of diversity and professionalism. In his work as a lawyer and as a judge, the late chief justice established a very high standard for lawyers to strive to maintain. In his article, he stated:

“professionalism” is an inclusive word that describes how lawyers discharge their responsibilities. This paper will largely be devoted to conduct in court and some simple practice matters, because those things are easily described and easy to learn. But it must be remembered that professionalism is the product of attitude, competence and conduct, and the former two are not easily described.³

An attitude that is supportive of diversity is necessary in order to achieve the necessary changes. Each and every lawyer involved in recruiting, mentoring and law firm management must be aware of how their work and decisions will be important to achieving diversity in the legal profession. Although the standards established by Chief Justice McEachern are rigorous and not easily achieved, they provide a measurable standard which can be used to assess and possibly change our own style and practices.

² Allan McEachern, “Professionalism” (Paper prepared for the Advocacy Conference, Continuing Legal Education Society of British Columbia, Vancouver, 2001).

³ *Ibid* at 14.4.2.

IV. THE CASE FOR DIVERSITY

Lawyers enjoy the privilege of self regulation which has been granted to us on the premise that we will protect the public interest. Our obligations to society include ensuring that there is access to the legal system by all members of our community. A diverse legal profession is essential in order to ensure that there is access to the legal system by all members of our community and especially those members of our community who belong to diverse groups and who historically did not have access to the legal system. Without diversity in the legal profession, there is the risk that the legal profession will lose the confidence of the public which in turn could ultimately result in the loss of the privilege of self regulation. Given the diverse nature of our community, the bar must necessarily reflect this diversity. Generally speaking, law firms have made considerable progress in hiring practices. The students and associate lawyers of our firms reflect a diverse community. Where law firms have met with limited success is in connection with the number of women who have become equity partners in law firms. Generally speaking, the equity partnerships of large law firms do not reflect the diversity of the bar and of our community.

V. HUMAN RIGHTS LEGISLATION

In addition to being necessary to protect the public interest and to maintain the right to self regulation, human rights legislation prohibits any form of discrimination on the basis of factors such as gender, age, disability, ancestry, sexual orientation, and other grounds. Discrimination includes not only direct discriminatory acts but indirect or systemic discrimination. All of us have watched many successful challenges to legislation that was found to breach human rights principles and was declared to be unenforceable for public policy reasons. A legal profession that is not diverse is at risk of not only losing the confidence of the public but having its practices determined to be contrary to human rights legislation. For these reasons, a strong case can be made that a commitment to diversity in the legal profession is a necessary element of our professionalism.

A task force of the Law Society of British Columbia recently released its report on the retention of women in the legal profession.⁴ The mandate of the task force was to consider the specific reasons for women leaving the legal profession in disproportionate numbers and to make recommendations to address this problem. The Law Society of British Columbia prepared a business case for maintaining women in the private practice of law which included recognition of the needs of clients to be able to draw on a legal profession that is diverse.

VI. CIVILITY

The legal profession paid tribute to the late Chief Justice Allan McEachern through the publication of a text entitled *The Splendour of the Law*,⁵ which was a compilation of papers on the subject of professionalism by leading members of the legal profession. The text included an essay written by the late Richard R Sugden, QC, on the subject of civility in the legal profession.⁶ Sugden acknowledged the leadership of the late chief justice in promoting civility in the legal profession in a number of ways including the creation of the Inns of the Court Program in or about 1994. That program continues to educate and mentor lawyers on the importance of civility in the legal profession. Sugden wrote:

One legal scholar has defined incivility as any unprofessional conduct that falls short of an express violation of the Rules of Conduct; it includes poor manners, lack of social grace and any conduct that might impede opposing counsel from accomplishing his or her professional obligations.⁷

Sugden explained in his essay the role of civility within the profession and that lawyers are engaged in a “common enterprise to foster the better work-

⁴ Law Society of British Columbia, *Report of the Delivery of Legal Services Task Force* (11 December 2009) at 5 (Chair: Arthur Vertlieb), online: <http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/LegalServicesTF.pdf>

⁵ Jake Giles, ed, *The Splendour of the Law: Allan McEachern, a tribute to a life in the law* (Toronto: Dundurn Press, 2001).

⁶ Richard R Sugden, QC, “Civility in the Legal Profession” in Giles, *ibid* at 89.

⁷ *Ibid* at 92.

ing of the legal order through the rational resolution of disputes". He theorized that incivility brings into question the profession's ability to govern itself. In his essay, Sugden traced the experience of the United States in connection with "the decline in civility." Sugden suggested that the decline in civility may be related to the increased focus on the business of law at the expense of professionalism. He suggested that incivility among lawyers in the eyes of the public undermines the legal profession and may compromise the profession's autonomy and right to self governance. Sugden emphasized in his essay that civility is essential in the legal profession in order to achieve and maintain "a just society." Sugden wrote: "Civility is embedded in the rule of law and therefore forms the very bedrock of the legal profession. This is not just academic mumbo-jumbo."⁸

Although Sugden's essay on civility does not expressly reference the subject of diversity, respect for diverse groups in our community is an important aspect of civility in the legal profession. To be civil, the legal profession requires recognition of the diverse needs of our community and the importance of a diverse legal profession to serve our community. Policies and practices that do not recognize and promote a diverse legal profession are contrary to our obligation to promote civility in the legal profession. Sugden wrote:

Civility is also important to the autonomy of the legal profession. As one author argues, the law profession is its own civil society, operating within a larger society. Within this smaller society, civility operates to counterbalance individualist drive with self-restraint and public spirit. The lawyer's capacity for civility mirrors the profession's capacity for dialogue, interaction, and cooperation. Incivility within our ranks throws into question the profession's ability to govern its own affairs.⁹

All of us recognize how important it is to have a good rapport and dialogue with other counsel. The primary beneficiary of civility is the client who benefits from increased cooperation between counsel and the expeditious resolution of all legal matters and disputes.

⁸ *Ibid* at 96.

⁹ *Ibid* at 95–96.

VII. HOW TO PROMOTE DIVERSITY IN LAW FIRMS?

The *Wilson Report* included many recommendations for the legal profession to promote diversity. Historically, law firms have operated with largely unwritten policies and practices that in some cases were inflexible and premised on stereotypes and assumptions that were inconsistent with the goal of diversity. These policies and practices resulted in some lawyers being dissatisfied, being disappointed, and ultimately leaving the legal profession. Law firms must carefully consider the nature of their policies and practices to ensure that they are consistent with the goal of achieving diversity at all levels. While law firms must be profitable and business-like in how they conduct themselves, management of law firms need to carefully reflect on their policies to ensure that they support diversity in their practice. Law firms must be flexible in their employment arrangements in order to promote equality. Careful thought must be given to mentoring and hiring practices to ensure that they are consistent with the goals of diversity. All lawyers need to have access to opportunities to build their practices and to become productive and successful. Policies that do not promote opportunities for all lawyers will impede efforts of the legal profession in achieving the goal of diversity.

A career in the practice of law involves hard work and many skills and experiences that are not found in a textbook or classroom. Learning to be a lawyer involves a high level of commitment and personal sacrifice. While law firms can be expected to fulfill their duty to accommodate, lawyers must communicate the nature of accommodation necessary due to their family commitments and circumstances generally.

Law firms must demonstrate a commitment to diversity in the composition of important committees and leadership roles. For instance, firm seminars and events must feature a diverse group of firm leaders. Panels of speakers at firm events need to be carefully planned in order to demonstrate the diversity of the firm. In this way, students and lawyers will observe the inclusive approach of the firm and commitment to diversity.

VIII. CONCLUSION

The late Chief Justice Allan McEachern noted the importance of attitude that supports professionalism. A commitment to diversity requires a positive commitment to make changes to policies and practices that do not promote

diversity. The law schools, the courts, law firms, and legal organizations have made considerable progress in promoting diversity since the release of the *Wilson Report* in 1993. Law firm leaders must take up the challenge of ensuring that all lawyers receive the mentoring, training, continuing education, and professional opportunities that will permit them to be successful in the legal profession. In this way, the legal profession will achieve the elusive goal of being truly diverse.

The success of the legal profession in the province of British Columbia to date is the result of the commitment of many lawyers who have created a strong tradition of professionalism and civility. All of us have an opportunity to make a meaningful contribution to advancing the goals of diversity as part of our commitment to professionalism. I have no doubt that we will be ultimately successful. Although the late Chief Justice Bora Laskin experienced intolerance and was denied opportunities as a student and as a lawyer, the fact that he ultimately overcame the obstacles and barriers that existed and became a celebrated chief justice of the Supreme Court of Canada demonstrates that commitment to diversity is a long standing core value of the Canadian legal profession. Although we can celebrate many successes in this area, there is more work to be done.