

TENTH COLLOQUIUM ON THE LEGAL PROFESSION
PROFESSIONALISM: IDEALS, CHALLENGES, MYTHS AND REALITIES

**FASHIONING THE ECONOMIC MODEL TO PREVENT MARGINALIZATION OF
WOMEN AND MINORITIES**

Looking at the Economic Model impacts on Women Lawyers –

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Introduction

I propose to address this topic from my prospective as a women lawyer with more than thirty years of practice experience. I will discuss the various stages of my practice in the context of the working conditions as it related to gender equity at the relevant times. I also propose to discuss generally the position of women lawyers through a brief examination of the history of the Women's Law Association of Ontario and other historical documents so that you will understand my position on this topic. I will look briefly at the recent Consultation Paper on the Retention of Women in Private Practice and the experience in large American law forms before providing my opinion and conclusions.

Women entering the practice today may be surprised to know that it is a much kinder and gentler place than it was in the early 1970's. Some may argue that women lawyers still face barriers to practicing and advancing in their careers in the private sector because of their gender and because of the economic model in which the business of the practice of law operates. Are these arguments valid today? Are the expectations of the today's women lawyers entering private practice realistic? Significant changes have been made in gender equality since I started to practice .Should women lawyers be content with the status quo or are they being marginalized and merely participating at the edge of the profession notwithstanding the increase in critical mass? This is a complex issue and quite naturally my position is coloured by my experience.

History and Statistics on Women Lawyers in Ontario

At one time there was a List of Women Barrister and Solicitors in Ontario (the List) I am unsure who was responsible for the compilation and maintenance of the List which numbered and identified every women Barrister and Solicitor by name address and date of call from 1897 to 1975, from number 1 to number 552. I was provided with a copy of the List very recently by Professor Mary Jane Mossman. The person or persons responsible for the List had taken the time until the mid 1940s to note those members who were deceased or no longer practicing. I would assume that the List may have been started by or in conjunction with the Women's Law Association of Ontario which as far as I am aware is the only association with archives maintained through the Law Society which would have recorded such information This List is very informative in terms of the number of women called in each year and it also includes a number of firsts. The first woman on the List is Clara Brett Martin called in 1897. Clara Brett Martin was the first woman lawyer in the British Empire. The first woman to appear before the Supreme Court of Canada, receive a King's Counsel and become a federally appointed judge in Canada in 1943 was Helen Alice Kinnear from Cayuga who was called in October 1920 and is number 20 on the List. .Laura Legge the first female Bencher is number 132 on the List and was called to the Bar in June 1948.

According to the List the second lawyer Eva Powley was called in 1902 and the calls were one each in 1902,1907,1908 1913, two were called in 1915 ,one in 1916 three in 1918 five in 1919 and women were called in varying numbers every year thereafter. The number of calls were low even in the 1960s for example: seven women were called in 1966, number 250 to number 255 on the List, six in 1967, twelve in 1968, and in 1969, my year of call, there were eighteen women (I am number 286 on the List) There were nineteen women called in 1970. The first real jump in the numbers was in 1975 when eighty five women lawyers were called. As indicated the List ends with the 1975 calls at number 552. The numbers increased in 1976 and the following years and perhaps that explains why the keeping of such a List was not continued It is apparent from an examination of this List that the number of practicing women lawyers was not even starting to be significant until the 1980's a very recent time given the length of time that women have been entitled to practice law.

The List also illustrates why women lawyers in and around my year of call had difficulty entering the practice and practicing because of their gender .It also helps you to understand why I was always of the view that through hard work and perseverance I would be able to continue to practice law and that preferential treatment or tokenism was abhorrent and true equality would be achieved with critical mass. To a certain extent that was and is true although it has not fully impacted on private practice today.

Women called before 1980 and in private practice have been successful in private practice Factors other than gender have impacted the numbers of women in private practice not the least of which was the desire not to work with clients but to teach or research the law. Some women in my year of call chose not to practice law at all after finding that the practice was not what they wanted Unfortunately there were no studies, comprehensive or otherwise, which examined the practicing profession from a gender equality prospective until the early 1990s when the Canadian Bar Association commissioned Justice Bertha Wilson to examine the position of women lawyers in the legal profession ¹Justice Bertha Wilson was called to the Nova Scotia Bar in 1957,and practiced in Ontario with a large firm. In 1975, Justice Bertha Wilson was the first woman to be appointed to a Canadian Court of Appeal, the Ontario Court of Appeal and, subsequently in 1982, was the first woman to be appointed to the Supreme Court of Canada Her 1993 report was the first of its kind in Canada. The implementation of the recommendations in the report and the subsequent dramatic increase in the critical mass of women lawyers established the foundation for gender equality in the practice of law.

Today, according to the Law Society of Upper Canada there are 38,915 lawyers in the province of Ontario of whom 14,460 are women. There are 20,297 lawyers in private practice of whom 5,913 are women. A further break down shows 1966 in firms of 200 or more divided into 694 women and 1272 men;3610 lawyers in firms of 25 to 200 divided into 1178 women and 2432 men; 4080 lawyers in firms of 1 to 5 divided into 1168 women and 2912 men and 7330 sole practitioners divided into 1735 women and 5595 men. The 1997 *Bicentennial Report of the Law Society of Upper Canada* reported that by the end of the 1990s more than 50% of those entering the profession were women. This increase in numbers is not reflected in today's statistics on lawyers in private practice. Why is there such an imbalance in the numbers between genders in all types of practice as determined by the firm size? It has been suggested that the economic

¹ *Touchstones for Change: Equality, Diversity and Accountability* Canadian Bar Association August 1993

model for practice, the billable hour model could be a factor Is it the only factor and does this inequity in numbers mean the marginalization of women in private practice?

Before dealing with the unanswered questions a little more history and this time about the Women's Law Association of Ontario of which I am the current president The WLAO is the oldest surviving independent legal association in Ontario. It started in 1919 when there were 16 women who had been called to the Bar In the 1920s according to the minutes of the meetings of the WLAO "educational seminars topics included the law on wills, immigration matters, a review of proposed federal legislation, the advisability of women lawyers choosing specialized fields of law, practice before juvenile, surrogate, criminal, civil, domestic relations and bankruptcy courts"¹ "Their early commitment to each other, to excellence and to the mentoring of initiates demonstrated their sense of responsibility for future lawyers. However, theirs was not to be a widely followed path. For decades they toiled in highly marginalized numbers. The anticipated breakthroughs came much later than expected. The early members would spend most or all of their working careers in sole or small practices before the numbers of women entering the profession began to climb toward their numbers in society".² This Association which was formed nearly ninety years ago when gender inequality was a fact of the practice of law the WLAO helped to keep women lawyers in contact with each other and was a support group but never appears to have been a proactive lobby group. Today WLAO provides mentoring and networking opportunities for its members who represent a broad cross section of women practicing law, the judiciary and women lawyers in government and other areas of law. The survival of the WLAO is a tribute to the abilities and the tenacity of Ontario's female lawyers especially those practicing before there was any review or study of gender equality or feminist studies in the law schools

The Wilson Report and Report of the Retention of Women in Private Practice Working Group

In 1993 Justice Bertha Wilson in *Touchstones for Change: Equality, Diversity and Accountability* identified private practice as the "paradigm for the profession" This report which

² The History of the Women's Law Association of Ontario was compiled by member Abby Bushby on the www.wlao.on.ca

is referred to in the Law Society's recently released Consultation Paper *Report of the Retention of Women in Private Practice Working Group*³ⁱ is the first comprehensive report on the status of women lawyers. In the Report Justice Bertha Wilson identified two trends relating to women lawyers in private practice namely: the initial entry into sectors of the profession was higher than entry into private practice and, higher attrition than men from private practice. According to the report the problem of gender inequality in private practice required a change in the private bar as well as women lawyers attaining a critical mass and powerful positions to influence change. Although many of the recommendations in the Wilson Report have been implemented, as the statistics show, gender inequities remain. Furthermore the attrition rate of women from private practice is offsetting the possibility of attaining the critical mass

The Consultation Paper of the Working Group attributes the attrition of women from private practice to "women's realities" which "often include childbirth and taking on a significant share of family responsibilities" and the "failure of the profession to adapt to what is a neutral reality" The Paper identifies through studies a number of challenges faced by women as reasons to leave private practice. These include work life balance and lack of support and benefits The Report identifies the solution as being a "shift in the legal culture" The recommendations of the Working Group include a voluntary 3 year pilot project for firms of more than 25 lawyers involving the adoption of best practices for the advancement and retention of women which include the development of programs providing for maternity and parental benefits, encouraging network and business development and mentoring and appointing women to leadership roles. The economic model is not discussed in the Report however there is obviously a link between the best practices which will assist women to stay in the practice of law and the functioning of women within the economic model.

The Economic Model

By the economic model I am referring to the billable hour's model. This has been the economic model used by lawyers in the United States and Canada since the 1960's There were anti trust

³ The Consultation Paper released in late February 2008 for input from the profession includes a Selective Bibliography of the numerous papers and studies undertaken since August 1993

and Competition Act reasons for changing from the suggested tariff and flat fee approach used before the introduction of the billable hour as well as client related reasons. The billable hour model made lawyers more accountable to their clients as well as providing a far more precise tool for managing the business of a law practice. The billable hour expectations or targets set for lawyers in law firms vary depending on the experience of the lawyer. The model “has been criticized as, at best, conferring clarity at the expense of rewarding inefficiency, and at worst, contributing to padding of hours and ethical conflicts.”⁴ The studies in the United States by the ABA’s Commission on Billable Hours concluded that this model has prevailed over any modification in favour of value based because “it is profoundly difficult to calculate the value of lawyer’s services.”⁵ The model is profitable for law firms, easy to use and attractive to the client and flexible because it is easily applied to any type of legal services and takes into account experience and expertise. The model applies not only to the large firms who have the economic base to hire articling students and associates but also to smaller firms with limited resources. There is no doubt that this model affects all lawyers especially the young associates and is a very important factor in the professional lives of young women lawyers who experience the irreconcilable balancing of family responsibilities and law firm expectations.

My Practice Experience

Since my call to the Bar of Ontario I have been in private practice a little more than half of the time. The balance of my practice experience was spent in government which, according to the current Law Society statistics is the practice area for 2,675 women and 2,235 men. A statistic which more accurately reflects today’s societal gender breakdown and does so because it does not include some of the baggage which impedes gender equality in private practice.

If a young lawyer can find a work challenge in a gender neutral environment that provides respect for professionalism, regular hours, opportunity for advancement based on merit and not the bottom line, a salary comparable to private practice, maternity leave, a great pension plan and other paid benefits why would a female lawyer look elsewhere.

⁴ And⁵ Judith S Kaye The Progress of Woman Lawyers at Big Firms: Steadied or Simply Studied? 76Fordham Law Review 1941

At the time of my call it was difficult for women without connections through family or friends to obtain an articling position, particularly with a Toronto law firm. There was no support from the Law Society or any association on how to find a firm or what to say on an interview or what to expect as salary. There were often two salary ranges depending on gender. Finding a position as an articling student or junior lawyer was a matter of self help and tenacity. I cannot recall the number of times that I was told at an interview that the lawyer had never interviewed a woman lawyer before or that I had to answer the question or assumption that I would not be attractive to the firm because I would marry and have children and leave (the stereotype).

There was no legislation restricting the asking of such questions and I responded as best as I could knowing in many instances that the interview was over at that point and wondering why it had been conducted in the first place. Women were at the mercy of the male interviewer and you had to be on you toes not to give offence even when the man who conducted the interview alone would make sexist overtures or make a fool of himself as was the case of the lawyer who light the filter end of his cigarette while conducting the interview.

When I joined the provincial governments in 1970 women were very much in the minority. During my employment I married and my husband was in private practice. I had to swear a statutory declaration that my husband whose name I did not use was my husband so that he would have my OHIP benefits as a spouse. This was a first for government bureaucrats who could find not legal reason for my husband not to be my dependent or why I should change my name and use my husband's surname.

I did not join the government because I was seeking gender equality or work life balance or maternity benefits issues that have since been identified as indicia of gender inequality. I did not enter government because of the high salary and benefits. I entered government because I could not find a position in a Toronto law firm which would be an improvement in pay and work experience over my position in a three person general practice firm in a small Ontario town where I had articulated and was currently practicing. The only employer who did not see a women lawyer as an unusual species, considered lawyers to be gender neutral, conducted a proper non intrusive or offensive interview, was prepared to offer interesting work and was prepared to treat me in the same manner as a male lawyers including starting at the same level on the salary chart with the same size office and support was the provincial government. Equality and not preferential treatment was my goal. At this time there were no benefits or incentives to off set

time off for child rearing but this was not a priority because I was concerned about the impact of time off on my professional learning and development. For me, the opportunity for more challenging work without regard to my gender was incentive enough to remain in government for as long as I did.

Gender was not raised on the interview and did not matter when I moved to municipal government. I left the provincial government because I was looking for a more challenging work experience with comparable pay, benefits and working conditions. Like the provincial government there were no billable hours and you were evaluated and paid according to the quality of work and responsibilities. Gender was a factor in my advancement when I worked for municipal government. Women were not being hired to work as the City Solicitor even though the mayor was a woman. Although I could and did do the work and the retiring male city solicitor recommended me as his replacement my gender was an impediment.

My experience with a large law firm as a lateral transfer was my first introduction to billable hours. During articling and subsequent practice all billings were tariff based. As a lateral hire I had billing targets and for approximately 12 years practiced under the pressure of this economic model in a large firm environment. The economic model where money and not work quality determined success was new and in my opinion at that time created an eat what you kill existence and I functioned in a silo which did not permit much sharing or dialog. Because I was new to the model and wanted to be fair and reasonable with the clients I had difficulties adapting. I also was not motivated by more and more money but was motivated by client contact and satisfaction. Marketing was an expectation in conjunction with this model and I had no experience and was given very little guidance on how to achieve this beyond developing a profile through the delivery of papers at various CLE events. The firm had liberal maternity benefits for the firm's young associates but not many programs to mentor and encourage the development of female associates. I understand much has now changed for the better in terms of such best practices. The large firm and I parted company when I became president of the Ontario Bar Association a position not compatible with the economic model when you are not an equity partner. Had I had the opportunity earlier in my career to enter a large law firm perhaps my chances of advancement would have been greater and I may have become an equity partner. When I was with the firm gender equality was fast becoming a non issue although the billable hour model was often a problem for the young female associates who tended to work through the formative

years of their children's upbringing preferring half days or shorter hours to time off. In my opinion this has much to do with the model as the base for career development.

I am now my own boss and enjoying every minute of it. I am a specialist and practice solely within my area of expertise. Given the experience and expertise I can establish hourly rates that are readily paid by my clients. I am content with my position in the private practice of law and although P.C.Law helps me to keep to the economic model of billable hours I determine my goals and targets and all pressure is self imposed for the first time in my legal career

Conclusions

The Right Honourable Beverly McLachlin P.C in an address to the Women Lawyers Forum of the B.C. Branch of the CBA in January 27, 2006 responded to the speech by Neil French creative director of WPP Group PLC .who had stated that women did not make it to the top of the advertising profession because they cannot devote themselves fully to the job because of family commitments[Mr. French was removed from his position because of this remark].The Chief Justice agreed with Mr. French in that women enter the workplace ,a male dominated model and are expected to work long hours and devote all their time to their profession but cannot do this because of their responsibility for motherhood and family. The Chief Justice asked what society could do to ensure that women lawyers continue to make a contribution and not be held back from senior positions. Her conclusions firstly that society must be moved off the unrealistic outmoded and unfair assumption that women should bear the lion's share of child care responsibility and secondly, that the workplace must accept as a fact of life more flexible working arrangements for parents of both sexes during critical child raising years This is not dissimilar to the conclusions of Judith S Kaye who identified three reasons why women have not reached the top of large law firms namely; "the persistence of gender stereotypes, the resistance to flexible work arrangements and the use of the billable hours economic model"⁶By gender stereotypes she means the assumption that women are the caregivers with no sense of sharing between the sexes. The position of Neil French This

⁶ See foot note 1

stereotype has further negative aspects when the women lawyer is overly aggressive or “masculine”. Although part time and flextime have been part of the U.S. large firm experience since the late 1980s they have been resisted by some women lawyers as impeding career advancement billing for standardized service. On a positive note Judith S. Kaye found that in the past 20 years there were large U.S. law firms that had increased representation of women at the top through programs aimed at removing the barriers to increased female representation. These programs include business models which reward the attainment of diversity goals, initiatives to set benchmarks for hiring of women and minorities and, the practice of some clients of choosing law firms through flat fee. In addition, some of the women who have made it to the top attribute success to their taking control of their careers, being engaged in strategic planning of a course for advancement of their career.

There is no doubt that the billable hour model has a negative impact and affects women lawyers more than the male lawyers. Does it marginalize the woman lawyer? Are women lawyers put on a different career track because of the use of maternity leave and the inability to work until midnight on a client matter because of family commitments? All associates male and female must work towards billable hours and their success is measured in terms of meeting that target together with the quality of the work and other factors such as the ability to effectively communicate and work attitude. In my experiences at a large law firm I saw no evidence of the marginalization of any of the women associates because of the billable hour’s model. The firm exhibited flexibility and to the best of my knowledge continues to do so in the application of the model to its associates. An important factor in this is the age of the senior and managing partners and committees. Do they include senior women? Provided the law firm is flexible I am optimistic that there will be a change in the critical mass at the large firms. Many of the factors identified and applied as best practices for gender equity especially the expectations of the corporate clients will help women to advance to senior positions within the large law firms. I am sure that there are law firms that are still refusing to make these changes but they will occur over time if the profession is vigilant.

The existing situation in smaller firms is more variable. My experience with a boutique firm showed no impact of the economic model on advancement. The personality’s age and gender of the firm dictate the approach. Sometimes the culture cannot be changed and sometimes the bottom line does not permit the advancement. Some small firms cannot afford articling students

or associates of either sex. Law is a business and in bad economic times there are fewer positions available for young lawyers.

As my career has shown the public sector which does that operate on the same economic model is gender neutral and its employed lawyers have career advancement opportunities dictated by performance within confines such as regular hours of work. The percentage of women lawyers working for government confirms this conclusion. Whether all of the private practice profession will some day be more representative of the gender balance in society at all levels including the top positions are in my opinion a situation which will occur over time. The profession is much more gender neutral as a result of gender awareness and best practices and legislation today than it was in 1969 when many had never seen a female lawyer. Time and working together with the Law Society, Legal Associates like the WLAO will make the profession gender neutral in all respects and in the meantime do not forget how far the profession has come to date and be patient but do not fall asleep at the switch. Vigilance is required until the critical mass is attained and one should never forget that the practice of law is a business influenced by economic upturns and downturns.