

Address by
The Honourable Madam Justice Beverley McLachlin
Supreme Court of Canada
to

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Mr. Chief Justice, Honourable Guests, Chers amis. I thank you Mr. Potter for your kind introduction. I am honoured to be with you tonight - and with so many who are interested in what, of course, is one of my main interests - the law and the legal system.

I understand that half of you here tonight are lawyers, and the other half are high school students who are interested in law, possibly as a career. In view of this, I will direct my remarks to the place of law in our society and the role which you may play if you select law as your profession.

You may well have mixed feelings about the law. Television portrays lawyers as glamorous professionals -- like those sitting around you -- saving clients who have been wrongly accused. On the other hand, many people have another image of lawyers. If you were to tell a friend that you want to go into law, the response might well be to ask you if you know why lawyers are buried 12 feet under instead of 6? The answer is that deep down they're not so bad.

Of course I do not agree with this negative image of lawyers. After all, some of my best friends are lawyers. But neither can we brush off

criticism. While I believe that our system is a fair one, it cannot be denied that it is sometimes slow and expensive. Nor can it be denied that to be involved in a lawsuit can be a source of great stress. As one wit has said, there is nothing to be feared more than a lawsuit.

So where does the truth lie? Are lawyers parasites who make their money from the trouble of others? Or are they upright professionals, dedicated to the service of the community? Whatever your answers to these questions, one fact is clear. Lawyers and judges - in short the legal system - are absolutely fundamental to a just and civilized society.

Rather than speculating in abstractions, let us ask ourself what the world would be like without lawyers and our legal system? Let us consider, for a moment, what the world *was* like before our present legal system had developed.

The law is a venerable profession. But it did not always exist. There have been times, in our history as in the history of other peoples, when disputes were settled without lawyers or a legal system. Generally, the parties to a dispute -- and their family and allies -- would fight it out among themselves, or the weaker would put up with the loss. The method was quick, and it was efficient. But it wasn't very fair or just.

People got tired of the regime of might is right. They decided there must be a better way to resolve disputes - a legal way.

So in every society, at a certain level of advancement we see that a system of justice has developed. The Anglo-Saxons, from whom we derive our legal traditions, were no exception. In the days before the Norman conquest, the local courts in England convened on a regular basis. They used various techniques to determine who was right and who was wrong, who should win and who should lose. These courts, unlike ours, were not much concerned to determine the facts of the case. Rather, they determined the *manner* or *techniques* by which the case was to be decided. The most usual manner was by compurgation - the "buddy" system of justice. Each party would produce a certain number of people known as oath-helpers, who, along with the defendant, would swear an oath in a set form of words, denying the truth of the charge against the defendant. If any of the oath-helpers stumbled, the defendant would lose the case.¹

Trial by ordeal was another possibility. The defendant might be made to carry a red hot iron, or plunge their arm into a cauldron of boiling water. If the burns healed cleanly, the defendant was adjudged to be innocent -- if the wound festered, she was guilty. Another form of trial

¹ Holdsworth vol.i, p.305.

by ordeal was to throw the defendant into a pond. If he sank to the bottom, he was found innocent² -- although to be recognized as innocent would seem small consolation to someone lying at the bottom of a pond.

A third trial technique introduced by the Norman conquerors, was trial by battle. This method was no doubt quick, but I imagine that the champions who actually did the fighting would come no cheaper than a lawyer. And while the three systems were thought to be reliable because God would intervene on the side of the righteous party, I think that most of us today would agree that our present system is somewhat fairer.

This amalgam of oath - helping, ordeal and battle worked after its own fashion until some time after the Norman invasion. But if you think it was simple or crude, you are wrong. In fact it was rather complicated. It was complicated by questions of jurisdiction. Systems of law and courts, not always compatible, abounded. The result was confusion and injustice as the different systems and tribunals competed for power at the expense of the poor litigant caught in the middle. Not only did the Normans import trial by battle, they imported a separate system of laws for the French upper classes, while retaining the Anglo-Saxon customs for the conquered people. So there were really two legal systems, side by

² Ibid. 310.

side. To add to the confusion, the Normans introduced additional systems of law - a separate ecclesiastic court for matters concerning the clergy, as well as new feudal courts to deal with disputes in the relations between lord and vassal.³ For the poor person caught in the toils of the justice system, there were more questions than answers. Which law applied? Who got to apply it? Even those people who were willing to risk trial by ordeal quailed at the prospect of the jurisdictional disputes over which was the proper court.

No surprise, then, that dissatisfaction grew. This led to one of those great breakthroughs we find from time to time in history - seemingly insignificant at the time; in reality, revolutionary. And what was this breakthrough? Simply this. Those who were in a position to do so began to appeal directly to the King for justice.

The King's justice was very efficient. And it proceeded upon an entirely new premise - rational debate and argument. This was a new idea, and one of great power - such power that it continues to dominate our justice system to this day. The aggrieved person would present himself to the King, explain how he had been wronged, and if the King agreed

³ R.C. Van Caenegem, The Birth of the English Common Law (2nd ed.) (1988, Cambridge), p.12-13.

that a wrong had been done, he would order immediate redress. Swift, sure and above all rational justice -- an ideal system one might think. But there was still a problem.

Consider the story of the cleric, Abbot Ingulf, and Walter fitz Hingam. The Abbot was the lord over the land held by Walter, and he disseised Walter for defaulting on his feudal due. In other words, Walter was evicted for not paying the rent. While it was true that Walter had not paid his rent, his entire family was nonetheless upset, and in revenge his cousin, Turstin, went to the King and complained that the Abbott had unjustly occupied land which belonged to Turstin by hereditary right. The King was shocked that the Abbot would have done such a thing, and issued a writ -- that is, a written order of the King -- ordering the Abbot to restore the land immediately. Turstin triumphantly presented this writ to the Abbot, and demanded that he comply with the will of the King. The Abbot was shocked by the order -- understandably so, as so far as he could tell he had done no wrong. So, the Abbot in his turn sent a messenger to the King explaining his side of the story. The King saw the justice of the abbot's position, and....no, he didn't issue another writ ordering Turstin to vacate the land which he had occupied by the earlier writ. No doubt he was tempted to do so, but by this point the King was learning, and he ordered a trial at which both parties would appear, in

order to settle the matter. By the way, the Abbot won.⁴

This kind of story, with contradictory writs flying back and forth as first one party and then the other presented their story to the King, was by no means uncommon. The edict of the King, standing alone, might be fair and reasonable. But the context in which it was made - the *system* of justice if you wish - was confused and irrational. Justice still emanated from a variety of sources, and did so in a way that depended more on the mood of the moment than on principles. So more changes were made and we saw the emerging of a unified structured legal system.

The King began to routinely issue writs, which, rather than simply ordering a remedy, ordered that the defendant appear to show why a judgment should not go against him. A small measure, to be sure. But a measure of critical importance, introducing as it did one of the first elements of procedural formality to intrude on the efficiency of the King's justice. A party could no longer receive immediate redress, no matter how just his cause. But as we saw from the story of the Abbot, if the justice system was to do what it should to, a balance needed to be struck between efficiency and fairness.

⁴ Van Caenegem, p.37.

The new improved system of justice proved eminently successful. More and more people began applying for the King's justice. But the story was far from over. The very success of the system was to change it dramatically yet again. The volume of cases grew to the point that the King could no longer deal with them all personally -- and the fact that justice was dispensed by the King himself had always been a problem when the King was across the channel in Normandy or gallivanting elsewhere as Kings were wont to do. So the King appointed his own judges to tour the country and dispense royal justice. But the final authority which settled the dispute was not the word of that advisor, but the word of the King -- the King's writ. As the King could no longer deal personally with each case, he could not himself compose a writ making the appropriate order. Instead, a number of writs were drawn up in standard form, which covered all the most common cases. Thus, the royal writs, which were at first set out to avoid judicial proceedings, became documents which initiated judicial proceedings in the new royal courts.⁵

I am by no means an expert in legal history, and I claim no more than rough accuracy for the preceding sketch of the development of the common law. I wished only to illustrate first, that a structured legal system is essential, and second, that it is not a simple matter to design a

⁵ Van Caenegem, p.41.

justice system which is at the same time swift, inexpensive and just. Much of the frustration that non-lawyers feel for the complexity and expense of the law stems from the belief that justice is a right, not a commodity to be bought. To be wrongly sued and have to spend considerable sums of money and energy defending oneself, or to be wronged but unable to gain redress, whether for lack of time or money or simply lack of energy, is frustrating and even infuriating, and understandably so. But against the need for swift cheap justice, stands the need to make sure what we end up with *is* justice, and not simply an arbitrary decision.

Now, I do not want to be taken as saying that our system has struck the perfect balance between speed and justice, or even that our system could not be improved to give fairer results at less cost. Such an improvement is something which must be a constant goal of all the participants in the legal system. But I do suggest that blind rejection of the system is not an adequate response if you are one of those who feels frustrated. Rather, constructive criticism is required, which can lead to concrete suggestions for improvement.

And no doubt there is always room for improvement. An addendum to history of the common law illustrates this. While the writs proliferated, they remained tailored to specific types of cases which

commonly arose. The judges, who in theory were only carrying out the will of the King, felt bound to follow the writs closely, and plaintiffs who had been wronged in a novel fashion which did not fit in any standard writ would find themselves with no recourse. What was the solution when the shortcomings of the court impeded justice? The same as the solution which led to the development of the common law in the first place -- the aggrieved parties appealed directly to the King. And the King -- albeit a different King -- seeing the justice of their claims, came up with much the same answer as the earlier King: he set up a separate court system to dispense justice in these cases. And that was the birth of the Courts of Equity, as distinct from the Courts of Law. That is another story, and one which I won't go into. I will simply leave you think on the story I have just told on the origin of the Courts of Law, and let you wonder what happened when claimants grew frustrated in trying to decide which court should deal with their claim.

So we come to this point: the law plays an essential role. The next question is what role the lawyer plays in the law?

Our answer to this question depends on the answer to another question which must be tackled first. That question is this: what do we mean by the law? I have already said that the model of law which we

have developed on the foundation of the Anglo-Saxon tradition is premised on debate in search of a rational solution. But how, in practice do debate and rational decision-making produce the system of rules which we call the law?

We can get rules in different ways. One way is to set them out as *a priori* propositions, like Moses descending from the Mount with the Ten Commandments. The other way is to develop them, step by step, through trial and error and cautious deliberation as new cases arise.

The Canadian legal system has both types of rules. The Civil Code of Quebec and to some extent the Criminal Code which applies across the country are more like Moses' stone tablets of commandments: the rules are set out *a priori*. The common law, on the other hand, proceeds empirically, on a case by case basis, until a rule generally applicable in a defined class of cases arises. In both situations, however, what the lawyer does is essentially the same thing. The lawyer (a) ascertains the rule applicable to the case; and (b) applies the rule to the facts of the case to determine what the case to determine what the result is.

This is what lawyers do when, for example, they advise their clients how to structure a real estate transaction. They find the appropriate rules

and apply them to the circumstances and goals of the client. The result is advice as to what the client should do. This is also what counsel does when s/he argues a case before a court. The Counsel addresses the Court on what the applicable rules of law are and how they lead to the result s/he asserts. Finally, this is what the judge does; s/he sets out the rule and determines on the basis of that rule who wins or loses.

But, you ask, if it's this simple why do we need lawyers and judges at all? Why can't we just set the legal rules out in a series of books for any interested and reasonably literate person to consult? And in those rare cases where a dispute arises, why don't we just refer the matter to an appropriately programmed computer?

This reminds me of a story I heard recently about the Court room of 2010. Picture a room, just like any of the court rooms you might find here in Ottawa. With three critical differences. At each counsel table is a computer. And on the Bench, in the place of the judge, is a slightly larger computer, (complete with slightly flashier trim and a splash of red paint to mark its superior rank). There are no submissions, no words. When a red light above the "Judge" flashes counsel for the plaintiff takes a card from his computer and places it in the left-hand drive of the "Judge". Counsel for the defendant does the same. The "Judge" whirs and

clicks and after an interval sufficiently attenuated to indicate careful consideration of all information received, spits out a large, embossed card, complete with seal and red ribbon on the left-hand corner saying who won and who lost. Counsel take it, "access" it by their machines and depart. Justice has been done.

Or has it?

I predict with some confidence that we will never arrive at the day when computers render judgments and lawyers are otiose. That is because the rules of law which make up our legal system are not the technical, precise, deductive rules of mathematical equations. On the contrary, they are merely generalizations of how cases of a particular kind have been decided in the past. This, coupled with the axiom that like cases should be decided in like fashion, permits lawyers to predict how like cases will be decided in the future. But is here that we run into trouble. There is no guarantee that the next case will really be "like" the previous cases. It may have some features which are like some features of the previous case. But, given the infinite variety of human behaviour and circumstances, it may have other features which are quite different. The different features may resemble those in a different class of case, raising the question of which of the two different rules, or generalizations should we apply. Or

the different features may be really new, posing the choice between applying an old ill-fitting rule or developing a new rule tailored precisely to the new situation.

The impossibility of ever completely encapsulating and defining human experience in its infinite variety and circumstance leads inexorably to the impossibility of ever completely encapsulating and defining the law. The law must and does adapt to new situations. Viewed thus, the lawyers and judges who comprise our legal system are not mere functionaries applying rules in a mechanistic computerlike way, but players in creative and ongoing process - the process of determining the ambit of the rules by which guilt and innocence, rights and responsibilities, are ultimately judged.

Not that all is uncertainty and flux. I like to think of the law as consisting of rules which at their core are clear and solidly defined. At the new edges, however, the fixed solidity merges into a less distinct penumbra. Most cases fall into the solid core. Lawyers and judges have little difficulty saying what the result of taking such and such a course of conduct will be. People don't have trouble with the core concepts like murder, theft or failure to pay assessed taxes, for example. So for the most part the law is fixed, certain and predictable. It is only at the

penumbra that there is room for debate. It is here that conflicting rules clash. It is here that situations emerge to which it seems unjust to apply the rigid rule.

Lawyers and judges, viewed thus, play a dual role. For the most part, they spend their time applying settled rules to recurrent situations. The debate, if any, centers on how the facts should be defined; this accomplished, a clear legal rule dictates the result. But lawyers and judges also play a more creative role. Where the rule is not settled, or where the fact situation is one to which no one rule obviously applies, they are called upon to decide how the rule should be altered, how the law should develop.

How do judges and lawyers go about this? Sometimes, where no "common law" or "statutory" rule seems to apply, they may call upon Parliament or the Legislature to enact a new rule. More often however, they shape the existing rules, by subtle extension or contraction, to fit the new situation and produce a just result.

This is an important and essential task, and a difficult one. Generally, courts are concerned to go no further than required by the need to do justice in the case before them and others very like it. And in

considering how far to go and in what direction, they are guided by their understanding of the legal principle at issue, of its history and of the policy which the law seeks to achieve through that principle.

So lawyers and judges are neither mechanics, nor didactic computers. They are historians, economists and social scientists. Above all, they are legal scholars, with finely honed instincts for where the law has been, where it is, and where it is going. On television, it is the lawyer with the best suit and the glibbest tongue who wins the case. But in reality and in the long run, it is the lawyer who understands his case, his society and above all the law, who ultimately triumphs. In reality it is the well-founded argument which after criticism and in competition with the arguments, prevails. In the end, it is justice, not the facile application of dry propositions, which lies at the heart of the law.

In Canada today we live in a time when the penumbra of many legal rules seems vaguer than it once was, when there is more room for debate about the law than there once was. The *Charter of Rights and Freedoms*, adopted in 1982, introduced a new set of rules of fundamental importance to our entire society and legal system. It has been the task of lawyers and judges to define them, circumscribe them, give them meaning. And the *Charter* is not the only factor at work. More and more the tough

