

ADVOCACY POLICY FORUM

ADVOCACY AND PROFESSIONALISM

REMARKS BY

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CHIEF JUSTICE OF ONTARIO

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I AM VERY PLEASED TO HAVE BEEN INVITED TO PROVIDE THE OPENING REMARKS AT THIS IMPORTANT ADVOCACY POLICY FORUM. WHEN I WAS ASKED BY JEFFREY LEON TO SUGGEST A TITLE FOR MY REMARKS, I SAID “ADVOCACY AND PROFESSIONALISM” AND AS A TITLE IT WAS SUFFICIENTLY VAGUE SO AS TO GIVE ME ADDITIONAL TIME TO THINK ABOUT WHAT I REALLY WANTED TO SAY.

THIS MORNING, I WOULD LIKE TO REVISIT THE ISSUE OF CIVILITY IN ADVOCACY PARTICULARLY IN THE CONTEXT OF THE COURT OF APPEAL’S RECENT DECISION IN *REGINA V. FELDERHOF*.

A REPORT OF THE DECISION IN *THE LAW TIMES* SEVERAL WEEKS AGO CAUGHT MY ATTENTION AS IT SUGGESTED THAT MY COURT HAD UPHELD THE “RIGHT TO BE RUDE” AS THE COURT FOUND SIGNIFICANT IMPROPER CONDUCT ON THE PART OF DEFENCE COUNSEL BUT DID NOT AGREE THAT THE TRIAL JUDGE’S INABILITY TO CURB THE INCIVILITY OF COUNSEL HAD COMPROMISED THE FAIRNESS OF THE TRIAL TO THE EXTENT THAT THE TRIAL JUDGE HAD LOST JURISDICTION.

A SUB-HEADLINE STATED THAT THE COURT HAD FAILED TO ILLUMINATE A “BRIGHT LINE” BETWEEN UNCIVIL BEHAVIOUR AND AN UNFAIR TRIAL”. JUSTICE ROSENBERG WRITING FOR THE COURT STATED THAT DEFENCE COUNSEL “FREQUENTLY RESORTED TO SARCASM”, BELITTLED THE EFFORTS OF PROSECUTORS TO PREPARE THEIR CASE AND ACCUSED THEM OF LAZINESS. HE SUGGESTED THAT THE PROSECUTORS HAD BREACHED THEIR PROMISES AND MISLED THE JUDGE”.

JUSTICE ROSENBERG EMPHASIZED THAT “UNFAIR AND DEMEANING COMMENTS OF COUNSEL IN THE COURSE OF SUBMISSIONS TO A COURT DIMINISHES THE PUBLIC’S RESPECT FOR THE COURT AND FOR THE ADMINISTRATION OF CRIMINAL JUSTICE.

THE REPORT OF THE DECISION QUOTED ONE INTERVENING COUNSEL AS STATING THAT THE DECISION WAS SIGNIFICANT BECAUSE IT UPHELD THE IMPORTANCE OF LAWYERS' CIVILITY. HOWEVER, ANOTHER COUNSEL INVOLVED IN THE CASE WAS QUOTED BY *THE LAW TIMES* AS STATING THAT "THE RULING MAY HAVE BEEN SIGNIFICANT MORE FOR WHAT IT DIDN'T DO. THE COURT DID NOT DRAW ANY LINE IN THE SAND ABOUT WHAT KIND OF UNCIVIL BEHAVIOUR WILL LEAD TO AN UNFAIR TRIAL".

A VERY SENIOR AND RESPECTED COUNSEL FOR THE O.S.C. EXPRESSED CONCERN ABOUT THE DECISION STATING AS FOLLOWS:

WE WERE DISAPPOINTED THAT ON THIS RECORD, THE COURT DID NOT CONCLUDE THAT THE LEVEL OF INCIVILITY AFFECTED THE FAIRNESS OF THE TRIAL, THE ARTICULATION OF THE TEST [OF ABUSE OF PROCESS] IS ONE THING BUT, ON THE APPLICATION OF IT TO THIS RECORD, TO CONCLUDE THAT IT DOES NOT AFFECT THE FAIRNESS OF THE TRIAL, ONE MUST ASK

ONESELF RHETORICALLY: WHAT WOULD BE REQUIRED IN ORDER TO AFFECT THE FAIRNESS OF THE TRIAL?

I THINK ON THE CIVILITY SIDE, THE RESULT IS NOT ENTIRELY COMFORTING, IF I CAN PUT IT THAT WAY. THE IMPLICATION IS THAT CIVILITY IS IMPORTANT, BUT IT'S NOT THAT IMPORTANT. I DON'T KNOW IF THAT'S A FAIR WAY OF PUTTING IT, BUT THE FACT THAT YOU CAN HAVE A HIGH LEVEL OF INCIVILITY AND ACCUSATORY BEHAVIOUR WHICH STILL DOES NOT AFFECT THE FAIRNESS OF THE TRIAL IS REALLY THE BOTTOM LINE. THAT'S A BIT TROUBLING, I WOULD THINK.

IT IS MY VIEW THAT IT WOULD BE VERY DIFFICULT FOR ANY COURT TO DRAW A "BRIGHT LINE" WITH GENERAL APPLICABILITY TO DEMONSTRATE AT WHAT POINT UNCIVIL BEHAVIOUR LEADS TO AN UNFAIR TRIAL OR WHEN A TRIAL JUDGE HAS LOST JURISDICTION FOR FAILING TO CURTAIL THE HIGH LEVEL OF UNCIVILITY. THE

RESULT IN ANY CASE WILL, OF COURSE, DEPEND ON THE PARTICULAR CIRCUMSTANCES OF THAT CASE.

THE COURT IN *FELDERHOF* REFERRED TO THE EARLIER COURT OF APPEAL DECISION IN *MARCHAND VERSUS THE CHATHAM HOSPITAL*, AS THE LEADING AUTHORITY IN THE PROVINCE. IN *MARCHAND*, MY COURT FOUND THAT THERE WAS “A LEVEL OF RANCOUR AND HOSTILITY RARELY, IF EVER SEEN IN AN ONTARIO COURTROOM. ONE COUNSEL CONTINUALLY QUESTIONED HIS OPPONENT’S INTEGRITY AND COMPETENCE WHICH THE COURT DESCRIBED AS “COMMENTS THAT HAVE NO PLACE IN ANY COURTROOM AND WHICH INFECTED THE TRIAL FROM START TO FINISH”. ALTHOUGH THE COURT “DEPLORED THE CONDUCT OF DEFENCE COUNSEL” IT FOUND THAT THE TRIAL JUDGE’S INABILITY TO CURTAIL THAT CONDUCT DID NOT GIVE RISE TO AN APPREHENSION OF BIAS”. HOWEVER, AT THE SAME TIME, THE COURT STATED THAT THE TRIAL JUDGE’S INABILITY TO DISCHARGE HIS RESPONSIBILITY “TARNISHED THE REPUTATION OF THE ADMINISTRATION OF JUSTICE” AND ALSO STATED THAT “THIS CASE UNDERLINES THE IMPORTANCE GIVEN BY LEADERS OF THE BENCH AND BAR TO IMPROVING CIVILITY IN THE COURT ROOM”.

IT MAY WELL BE THAT APPELLATE COURTS WILL CONTINUE TO BE RELUCTANT TO ORDER A NEW TRIAL AS A RESULT OF UNCIVIL CONDUCT PARTICULARLY AFTER VERY LENGTHY TRIALS. WHILE THE THRESHOLD FOR A COURT ORDERING A NEW TRIAL MAY BE HIGH, I DO HOPE THAT THE TWO DECISIONS TO WHICH I HAVE REFERRED WILL ENCOURAGE TRIAL JUDGES TO BE MORE AGGRESSIVE IN CURBING UNCIVILITY.

AT THE SAME TIME, THE LAW SOCIETY HAS A CRITICAL ROLE TO PLAY IN RELATION TO CIVILITY IN THE COURT ROOM AS THE ISSUE IS CRUCIAL TO MAINTAINING A LEVEL OF PROFESSIONALISM AND IN PROTECTING THE INTEGRITY OF THE ADMINISTRATION OF JUSTICE.

INDEED, AS ONE COUNSEL STATED TO *THE LAW TIMES* IN *FELDERHOF* THAT THERE WAS “OBVIOUSLY A LINE BEYOND WHICH YOU CANNOT GO” AND THAT IT MIGHT BE AN ISSUE OF CONTEMPT OR A COMPLAINT TO THE LAW SOCIETY.

THE RULES OF PROFESSIONAL CONDUCT STATE THAT “MAINTAINING DIGNITY, DECORUM AND COURTESY IN THE COURT ROOM IS NOT AN EMPTY FORMALITY BECAUSE UNLESS ORDER IS MAINTAINED RIGHTS CANNOT BE PROTECTED”. WHEN ACTING AS

AN ADVOCATE, THE RULES STATE AS YOU KNOW THAT “A LAWYER SHALL NOT NEEDLESSLY ABUSE, HECTOR OR HARASS A WITNESS”. THE RULES OF PROFESSIONAL CONDUCT CONTAIN AN IMPORTANT COMMENTARY AS FOLLOWS:

LEGAL CONTEMPT OF COURT AND THE PROFESSIONAL OBLIGATION OUTLINED HERE ARE NOT IDENTICAL AND A CONSISTENT PATTERN OF RUDE, PROVOCATE OR DISRUPTIVE CONDUCT OF THE LAWYER, EVEN THOUGH UNPUNISHED AS CONTEMPT MIGHT WELL MERIT DISCIPLINE.

IN THE CONTEXT OF CIVILITY IN THE COURT ROOM, AN ONGOING DIALOGUE WITHIN PROFESSIONAL ORGANIZATIONS PARTICULARLY THE ADVOCATES’ SOCIETY IS VERY IMPORTANT. THE ADVOCATES’ SOCIETY HAS PLAYED A MAJOR ROLE IN ENHANCING THE LEVEL OF PROFESSIONALISM IN ADVOCACY IN ONTARIO AS WAS ILLUSTRATED BY ITS PUBLICATION OF THE IMPORTANT *PRINCIPLES OF CIVILITY FOR ADVOCATES*.

IN RELATION TO A CONTINUING DIALOGUE, I WOULD LIKE TO MAKE A BRIEF COMMENT, PARTICULARLY IN THE CONTEXT OF THE MARCHAND CASE AND THE MAINTENANCE OF PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE. I WILL HAVE NOTHING FURTHER TO SAY ABOUT THE *FELDERHOF* CASE AS IT IS STILL BEFORE THE COURTS.

IN *MARCHAND*, THE COURT OF APPEAL STATED AND I REPEAT THAT THERE WAS “A LEVEL OF RANCOUR AND HOSTILITY RARELY IF EVER SEEN IN AN ONTARIO COURT ROOM WHICH TARNISHED THE ADMINISTRATION OF JUSTICE”. NEVERTHELESS, THE APPEAL WAS DISMISSED AND THAT WAS THE END OF THE MATTER INsofar AS THE PUBLIC RECORD IS CONCERNED.

THE PUBLIC DOES NOT KNOW WHETHER THE GOVERNING BODY OF THE LEGAL PROFESSION EVER CONSIDERED THE CONDUCT OF COUNSEL IN *MARCHAND*. IF THERE WAS AN INVITATION FOR ANY COUNSEL TO APPEAR BEFORE A PANEL OF THE DISCIPLINE COMMITTEE OF THE LAW SOCIETY, SUCH AN OCCASION WOULD BE CONSIDERED CONFIDENTIAL UNDER THE PRESENT *RULES OF PROCEDURE* AND WOULD NOT BE KNOWN BY THE MEMBERS OF THE LEGAL PROFESSION LET ALONE THE PUBLIC. IT IS MY

UNDERSTANDING THAT IT IS ONLY WHEN A LAWYER IS CHARGED WITH PROFESSIONAL MISCONDUCT THAT THE MATTER BECOMES PUBLIC.

FROM TIME TO TIME, IT HAS BEEN SUGGESTED TO ME BY ADVOCATES THAT INCIDENTS OF SERIOUS LACK OF CIVILITY DURING A TRIAL SHOULD BE REFERRED BY THE TRIAL JUDGE TO THE LAW SOCIETY. I HAVE HAD DIFFICULTY WITH THAT SUGGESTION AS IT MIGHT WELL BE PERCEIVED BY THE LEGAL PROFESSION AS JUDICIAL INTERFERENCE WITH THE INDEPENDENCE OF THE PROFESSION.

WHILE I ASSUME THAT THE LAW SOCIETY PREFERS TO DEAL WITH SPECIFIC COMPLAINTS, I UNDERSTAND THAT THE SOCIETY DOES OPEN UP A MONITORING FILE BASED ON THE PUBLICITY THAT MAY BE GENERATED BY A CONTROVERSIAL TRIAL. WHILE IT MIGHT NOT BE POSSIBLE FOR THE LAW SOCIETY TO TAKE ANY ACTION WHILE THE COURT PROCEEDINGS ARE ONGOING, I BELIEVE THAT IT WOULD ASSIST IN THE MAINTENANCE OF CONFIDENCE IN THE JUSTICE SYSTEM IF THE PUBLIC WERE MADE MORE AWARE OF THE ROLE OF THE GOVERNING BODY.

I DO NOT KNOW WHETHER THE *MARCHAND* AND *FELDERHOF* CASES WERE ISOLATED EXAMPLES OF EXCESSIVE LACK OF CIVILITY OR THE TIP OF THE ICEBERG. HOWEVER, BOTH CASES CLEARLY HAVE THE POTENTIAL TO UNDERMINE PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE. IT IS THEREFORE IMPORTANT THAT THE PUBLIC BE MADE MORE AWARE OF BOTH THE CONCERN OF THE LEGAL PROFESSION IN GENERAL AND ITS GOVERNING BODY IN PARTICULAR. THERE IS ALSO THE EQUALLY IMPORTANT ISSUE OF MORE AGGRESSIVELY DETERRING SIGNIFICANT UNCIVIL CONDUCT WITHIN THE PROFESSION.

AT THE SAME TIME, I BELIEVE THAT THE ISSUE OF CIVILITY MUST BE ADDRESSED ON A NUMBER OF FRONTS INCLUDING GREATER EMPHASIS ON THE TEACHING OF ETHICS AT LAW SCHOOLS AND IN CONTINUING EDUCATION IN THE LEGAL PROFESSION.

WHILE I DO NOT THINK THAT THE JUDICIARY SHOULD ATTEMPT TO DICTATE THE GOVERNING PROCEDURES OF THE LAW SOCIETY, IT IS CERTAINLY A DIALOGUE WHICH SHOULD BE A PRIORITY WITHIN THE LEGAL PROFESSION ITSELF.

AS ONE EXAMPLE, AT A CONFERENCE ORGANIZED BY THE ADVOCATES' SOCIETY SEVERAL YEARS AGO, IT WAS SUGGESTED BY A SENIOR COUNSEL THAT THERE SHOULD BE A CIVILITY PANEL MADE UP OF RETIRED JUDGES OR SENIOR ADVOCATES TO WHICH THE LAW SOCIETY COULD REFER MATTERS OF SERIOUSLY INAPPROPRIATE BEHAVIOUR. IN SIGNIFICANT CASES OF UNCIVILITY, LAWYERS COULD, AT THE VERY LEAST, BE REQUIRED TO DISCUSS THEIR ACTIONS WITH MEMBERS OF THE PANEL.

IN ANY EVENT, I WOULD LIKE TO CONCLUDE BY QUOTING THE ELOQUENT PLEA FOR CIVILITY BY THE HONOURABLE JOHN MORDEN, IN HIS CALL TO THE BAR ADDRESS IN 2001:

THIS LEADS INTO THE SECOND LAST ASPECT OF BEING A LAWYER WHICH I SHALL MENTION – THE DUTY OF CIVILITY. IT IS A TOPIC MUCH DISCUSSED THESE DAYS BY MEMBERS OF THE LEGAL PROFESSION IN NORTH AMERICA. THERE IS A GENERAL CONCERN THAT STANDARDS OF CIVILITY IN THE PROFESSION ARE DECLINING. CIVILITY IS NOT JUST A NICE, DESIRABLE,

ADORNMENT, TO ACCOMPANY THE WAY LAWYERS CONDUCT THEMSELVES, BUT, IS A DUTY WHICH IS INTEGRAL TO THE WAY LAWYERS ARE TO DO THEIR WORK. IN THE FIELD OF LITIGATION, CIVILITY IS THE GLUE THAT HOLDS THE ADVERSARY SYSTEM TOGETHER, THAT KEEPS IT FROM IMPLODING. UNCIVIL, ABRASIVE, HOSTILE OR OBSTRUCTIVE CONDUCT IMPEDES THE GOAL OF RESOLVING CONFLICTS RATIONALLY, PEACEFULLY AND EFFICIENTLY, IN TURN DELAYING OR EVEN DENYING JUSTICE.