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Dianne Pothier

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> Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.
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> *Henrietta Muir Edwards et al. v. Attorney General of Canada (Persons case)*[1]

The Canadian Bar Association's Gender Equality Task Force Report[2] sets out to challenge the traditions of a male model of the legal profession. The title of the Report, *Touchstones for Change: Equality, Diversity, and Accountability*, announces the challenge. Although in a formal sense the legal profession has been open to women since well before the Judicial Committee of the Privy Council acknowledged women's eligibility to be Senators, the sad truth is that, in many respects, the legal profession is still not a welcoming environment to women. While women are entering the profession in greater numbers than ever before, they are also leaving the profession at a disproportionate rate.[3] That is probably the most compelling single piece of evidence that the profession has a problem.

The Task Force Report is a comprehensive one that deserves to be read by all members of the profession. It documents widespread problems and suggests wide-ranging solutions. Reading a review is not an adequate substitute. A review can only touch on highlights, whereas it is in the detail of the Report that its real impact lies. This review will briefly comment on each of the themes announced in the title of the Report: equality, diversity, and accountability. Although in my assessment the report is in some respects too timid, that should not take away from the fact the Report goes a long distance in calling on the legal profession to remake its own image and reality.

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1. [1930] A.C. 124 (P.C.), at 134. This is the case in which women were held to be persons capable of being called to the Canadian Senate.
2. Canadian Bar Association Task Force on Gender Equality in the Legal Profession; The Honourable Bertha Wilson, Chair, *Touchstones for Change: Equality, Diversity, and Accountability* (Ottawa: 1993).
3. *Ibid.*, at 51.

Equality

The Report takes great care to ground its analysis in equality jurisprudence. For the uninitiated, it walks the reader through the basics of human rights and *Charter* guarantees of equality (especially Chapter 1). In general, it is a very good overview.[4] The Task Force's arguments in furtherance of gender equality are based on a combination of legal obligation, moral obligation, and enlightened self-interest. The emphasis on legal obligation and enlightened self-interest makes the Report hard to ignore, even for those predisposed to be unreceptive.

The Report makes a concerted effort to examine all aspects of the legal profession, with separate Chapters on the entry stages (law schools, articling, bar admission – Chapter 2), private practice (Chapter 5), government legal departments (Chapter 6), corporate counsel (Chapter 7), law faculties (Chapter 8), administrative tribunals (Chapter 9), the judiciary (Chapter 10), law societies (Chapter 12), and the Canadian Bar Association (Chapter 13).

The general overview picture is presented in Chapters 3 and 4, with the remaining Chapters providing the detailed analysis. The research relied upon for the Report is a combination of consultation and surveys undertaken specifically for the Gender Task Force Report as well as earlier studies, especially by bar societies, conducted independently of the Gender Task Force. Chapter 3 of the Gender Task Force Report offers a profile of the profession, and Chapter 4 categorizes and explains the types of gender discrimination.

In an overview sense in Chapter 4, and then in greater detail throughout the rest of the Report, four aspects of gender discrimination are the focus of the analysis: employment opportunities, career development and advancement, lack of accommodation for family responsibilities, and sexual harassment. In all aspects, the Task Force finds pervasive gender discrimination, often magnified when combined with other grounds of discrimination.

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4. I would, however, quibble over some of the detail. For example, the Report suggests, *supra*, note 2 at 59, that the test for discrimination in hiring/firing is whether the person would have been hired/fired even without the discriminatory element. My reading of the authorities is that the test is whether the discriminatory element is one of the factors relevant to the decision. In other words, there is discrimination if the decision was tainted by discriminatory factors even if it could be shown that the decision would have been the same without the discriminatory factors. See *Pitawanakwat v. Canada (Department of the Secretary of State)*, Canadian Human Rights Tribunal, December 23, 1992. The taint theory has long been applied in the interpretation of unfair labour practice provisions of labour relations legislation; see *The Barrie Examiner*, [1976] 1 Can. L.R.B.R. 291 (O.L.R.B.).

The analysis is a mixture of statistical information and personal accounts, taken from both the Task Force's own and others' research. The inclusion of both statistical and personal account information strengthens the impact of the Report. If there were only personal accounts, the reader might be tempted to treat them as anomalous. If there were only statistical accounts, the real significance of what is being discussed would be lost; the personal accounts bring the issues into stark relief.

The picture of the legal profession painted by the Task Force Report is one that features a traditional male face despite the changed demography of the profession. The model for success in the legal profession is still predominantly a traditional male one. This is reflected in many different ways.

The most traditional form of lawyering, private practice, is disproportionately male.[5] However, particular areas of law in which women tend to be concentrated, such as family law, are generally seen as having less status.[6] Similarly the influx of women into administrative tribunal positions seems to have been coincident with a decreased value attributed to such work.[7] The Task Force documents patterns of work allocation, promotion to partnership, and remuneration that are negatively affected by gender.[8] The cumulative effect is a legal profession that has admitted women to its ranks, but often as second class citizens.

The lack of accommodation for family responsibilities is perhaps the most obvious signal that the legal profession is based on a traditional model of a male breadwinner available to work almost unlimited hours by relying on a wife to take care of home and family. Although that model does not reflect accurately even the realities of many men, it is particularly difficult for women with children given the continuing predominance of women's role in child rearing. The Task Force Report emphasizes the point that dedication to one's family should not be taken to signify lack of dedication to one's work. This is a point that has to date largely been lost on the legal profession, with many instances of discrimination based on pregnancy and the child care responsibilities of women. The use of billable hours as the only measure of devotion to work has indeed carried the implication for many women that they are not committed to their jobs.[9] It is quite telling that male heart attack victims do not suffer comparable repercussions from absence from work.[10]

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5. *Supra*, note 2 at 48.
6. *Ibid.*, Chapter 11.
7. *Ibid.*, at 182.
8. *Ibid.*, at 60-64.
9. *Ibid.*, at 64-70.
10. *Ibid.*, at 99.

The Task Force argues for a broad range of accommodation in work arrangements to take account of child care responsibilities, taking for granted that such accommodation has no negative implications for women's commitment to their work. The Report places this discussion in the general context of society's responsibilities toward children. In that context, it is particularly inappropriate to penalize women who bear a disproportionate share in actually carrying out that responsibility.[11]

One of the Report's most publicized and controversial recommendations is that women with child care responsibilities should be able to work up to 20% less than the standard billable hours target and still be considered as working full time.[12] The recommendation has implications in two respects: performance evaluation (including promotion) and compensation. In considering the recommendation, it needs to be emphasized that even 20% less than the standard 1600 billable hours is still more than full time hours for most full time employees in Canada. What is the basis for the Task Force's recommendation of a 20% grace factor? While I think there are different rationales for the performance evaluation and compensation points, the Report collapses the discussion, focussing only on the former.

The Report is reasonably clear in explaining why, when someone has child rearing responsibilities, falling somewhat short of the standard billable hours targets should not be relevant to performance evaluation and promotion. It is the quality of the work that is more important than the quantity, remembering that even a 20% reduction is by most standards full time work. The time required for child care responsibilities takes away from the time available for paid work, but does not detract from the commitment to, or quality of, work, the factors relevant to performance evaluation and promotion. Part time status should only affect the promotions clock if it is genuinely part time.

But this analysis does not address the compensation question, whether a woman with child care responsibilities who works up to 20% less than the standard billable hours should be paid the same as someone who does work the standard billable hours. The Task Force Report basically ignores this point, which is not a strategy calculated to convince the sceptical. The argument that a 20% reduction in hours worked should not be reflected in reduced pay must be related to the general societal responsibility towards children. Maternity leave (in respect of which the legal profession has far to go)[13] is one reflection of this. Beyond maternity

11. *Supra*, note 2 at 95-96.
12. *Ibid.*, at 98-99.
13. *Ibid.*, at 99-102.

leave, it can be argued that, since society as a whole benefits from those taking care of children, the rest of society, including those who work alongside those with child rearing responsibilities, must share in the financial costs. While, aside from maternity leave, one's co-workers do not normally pick up such costs directly,[14] the rationale for doing so in a profession with typically long work hours is that there must be some constraints on the expectation that people have unlimited time to devote to paid work. If the normal limits on hours of work do not apply to lawyers generally, there at least has to be some recognition of the realities of child care responsibilities. The Task Force's recommendation really amounts to an argument that a woman with child care responsibilities should not suffer for working normal full time rather than extended full time. Full time work at a law office still deserves full time pay.

Thus I think both the performance evaluation and compensation aspects of the 20% grace factor argument are valid. However, it is possible to accept the logic of the former without accepting the logic of the latter. By not separating out the two, the Report seems to be trying to have the compensation point slide in on the coattails of the performance evaluation point. But what appears to be happening instead is that the performance evaluation point is being lost in the shuffle for those most concerned to reject the compensation point. That is particularly unfortunate because, at least at this stage of trying to dismantle the unidimentional male model, the performance evaluation point seems to be the more important one. The most pressing point in deconstructing this aspect of the male model is to destroy the myth that everyone has unlimited hours available for paid work. That point has implications beyond child care responsibilities, that generally there is more to life than paid work.

There are other aspects of the male model that need deconstructing. The disturbingly high[15] incidence of sexual harassment of women lawyers also reflects a male model of lawyering. Sexual harassment, in all of its forms, is a way of telling women that they do not really belong. Whether sexual harassment takes the form of demands or expectations of sexual favours, or a poisoned work environment, the result is to undermine women's work as lawyers.

In its description of the incidence and nature of sexual harassment, the Report recounts one incident in which a woman lawyer in court asked her male counterpart for his position on a legal issue, only to be given the

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14. The provision of subsidized child care facilities at work, which is starting to happen on a limited basis in some contexts, is another example of the costs of child care being carried to some extent by co-workers.

15. *Supra*, note 2 at 72-73.

answer that the male lawyer preferred the missionary position.[16] Such conduct can only reflect a refusal to take women seriously as lawyers.

Framing the issue in terms of the accepted legal categories of sexual harassment, as the Task Force does, is not, it seems to me, fully adequate to capture the problem. Even where the behaviour does not fall into what may be described as sexual harassment, there may still be an issue of refusing to take women seriously as lawyers. In the discussion of law faculties, the Task Force Report touches on this, in referring to the sometimes diminished weight given to the opinions of women faculty and students.[17] Similar comments are made in relation to the judiciary.[18] This was not, however, a point pursued as a consistent theme throughout the Task Force Report. This misses an important element of the gendered nature of interaction among lawyers. Sexual harassment of women lawyers is part of the larger problem of not taking women seriously as lawyers.[19]

In the context of its discussion of sexual harassment, the Task Force Report refers to the problems created by the hierarchical nature of the legal profession. Sexual harassment is difficult to counteract where the harasser is in a position to retaliate, or is even on the investigation committee.[20] This is obviously a serious problem, but what of other implications of hierarchy? Although there are other passing references in the Task Force's Report about hierarchy in the legal profession, it is not a theme that is systematically discussed. I think that misses an important aspect of the gender dynamics of the legal profession.

The legal profession is notorious for not giving credit where credit is due. Frequently juniors do the work, while seniors take the credit. Juniors write, seniors sign; juniors research, seniors argue. While this may be rationalized as everyone contributing to the firm effort, the net result is

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16. *Supra*, note 2 at 107.
17. *Ibid.*, at 166-168.
18. *Ibid.*, at 193.
19. The Task Force Report makes passing reference to the sexual harassment of non-lawyer employees of lawyers, but does not pursue the point because it is considered beyond the scope of the Report; *ibid.*, at 74-75. I am not sure that lawyers' inappropriate treatment of others in matters related to gender should have been considered beyond the scope of the Report. Also, there are other types of gendered interaction of lawyers with staff that might merit consideration, though they would not meet the usual notion of sexual harassment. I am thinking of instances of extensive use of support staff to deal with lawyers' personal matters. My impression is that it happens quite frequently. I consider it problematic that someone hired as an employee to do legal work should be expected to be the personal servant of the lawyer. It reflects a gendered assessment of roles (legal work is for the men, personal matters are to be taken care of by the woman, either the wife or the secretary) that is part of the general phenomenon the Task Force Report is examining.
20. *Ibid.*, at 108-109.

that the public face of lawyering is different from the realities of who is actually doing the work. Given that women have entered the legal profession in large numbers only in the last two decades, this presumably means that the public face of the profession is more male than the profession really is.

The importance of seniority in the legal profession impacts upon junior men as well as junior women, but the dynamics are different. For men, the only relevant hierarchy is the seniority one; junior men can look forward to being senior men. But while junior woman (perhaps) can look forward to being senior women, that is not the only relevant hierarchy for women. Getting to the top of the seniority hierarchy does not mean that women will not still be disadvantaged by the gender hierarchy. I think that tends to make women more resistant to hierarchies of any sort. And when that resistance leads to the label of "troublemaker", life can become more difficult.[21]

The Chapter on the judiciary suggests that the problem of gender bias may be cured by time, when those who are currently the most senior men are no longer in the profession.[22] Unfortunately, there is little in the rest of the Task Force Report that would support the inference that it is only the "old guard" that is the source of the problem. The Report documents gender bias at all levels of the profession.

Diversity

An important aspect of the Gender Task Force Report is its frequent acknowledgement of other forms of discrimination. In numerous contexts the Report documents how issues of race, sexual orientation, and disability can compound gender discrimination. The Task Force concluded that it could not properly fulfil its mandate without paying attention to the diversity of women's experience, especially diversity reflected in multiple grounds of discrimination. To that end, two additional members of the Task Force were included part way through its term, and their influence shows. The Report's indictment of racism in the legal profession is, in places, quite powerful. The Report's attention to sexual orientation and to disability is more sporadic, but still a significant element of the Report. The Task Force is to be commended for the breadth of its approach to equality, even though it sometimes comes across as an afterthought.

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21. *Supra*, note 2 at 193.
22. *Ibid.*

The attention to diversity shows that the Task Force was open to having its own perspectives challenged; the Chair, the Honourable Bertha Wilson, admits to having started the Task Force's work from the perspective of [straight, able-bodied] white women.[23] Yet in some respects the Task Force's crash course into aspects of discrimination beyond gender seems to have been inadequate. I will use the treatment of disability to illustrate this point.

In the "Introduction from the Chair", the following comment is made:

> There is no such thing as a neutral perspective. This is the message that came through to us loud and clear:
>
> a white view of the world is not neutral.
> a masculine view of the world is not neutrål.
> a heterosexual view of the world is not neutral.
>
> Women of Colour, Aboriginal women, disabled women, lesbian women all have experiences of life that differ profoundly from those of the dominant Canadian culture and each group brings a unique and different perspective to our understanding of life and the law.[24]

Is there any significance to the absence of a recitation of "an able bodied view of the world is not a neutral one"? I think there is. I will refer to several things about the Report that cause me to doubt that the Task Force has any real conception of a not so able bodied view of the world.

Admittedly, the Task Force shows some appreciation of physical barriers that inhibit access to persons with disabilities, and recommends efforts to remove such barriers.[25] That recognition is critical, and an important first step. But what I find disturbing is that there is nothing to indicate the Task Force perceives anything beyond that first step as being necessary. Specifically, the Task Force shows no real appreciation of the attitudinal barriers to persons with disabilities, and indeed exhibits problematic attitudes itself.

In the opening Chapter, the following comment is made:

> Women with disabilities are faced with a great deal of ignorance concerning their ability to function as lawyers. The advent of modern technology has solved many of their problems and what is really required now is a will on the part of the profession to acknowledge its responsibility to disabled lawyers to make the necessary facilities available so that they too may enjoy a full and satisfying career in the law.[26]

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23. Susan Lightstone, (interview with the Honourable Bertha Wilson), "Bertha Wilson: A Personal View on Women and the Law" *National*, Sept./Oct. 1993, 12, at 13.
24. *Supra*, note 2 at 4.
25. *Ibid.*, at 15, 30-31, 236-7. However, it is noteworthy that some of these recommendations, (esp. pp. 30-31) though included in the body of the Report, do not make their way into the shaded boxes of recommendations that are reproduced at the end of the Report in Chapter 16, *Summary of Recommendations*.
26. *Ibid.*, at 15-16.

The problem is seen solely in terms of availability of facilities, without any suggestion of the need to rethink able bodied perspectives or attitudes. Moreover, the problem is seen as one belonging to the disabled, rather than the problem being identified as lack of acceptance by the able bodied.

In its Chapter on *Private Firms*, the Task Force comments as follows:

> A billing target of 1600 hours a year is not neutral. ... [M]ost individuals with disabilities find such targets virtually unachievable.[27]

Where does the Task Force get the notion that "most" persons with disabilities have greater difficulty than able bodied persons in meeting billable hours targets? It offers no authority for that proposition, nor does it suggest it was told this during its consultation process. This seems to have been the product of its own intuition. I would add, its own able bodied intuition. To me this represents the typical able bodied stereotype that, however well-meaning, underestimates the capabilities of persons with disabilities. Although some disabilities will obviously have an impact on the quantity of work possible, there is no reason to assume that is generally true. The fact that a person with a disability may need some accommodations in how the workplace is organized does not automatically translate into a reduced workload. The Task Force makes the important point that a reduced workload need not be viewed in a negative light, that workload expectations need to be tailored to individual circumstances. But its assumption that a heavy workload is not even an option or possibility for most persons with disabilities is precisely the kind of attitude that creates entry barriers for persons with disabilities.

In its Chapter on the judiciary the Task Force refers to a 1985 report of a CBA Special Committee on *The Appointment of Judges in Canada* which recommended a set of criteria for the appointment of judges. The Task Force offers some suggestions for improvement in respect of gender sensitivity and relevant work experience.[28] However, there is one aspect of the 1985 list that significantly escapes comment, that a judge should be of "good health". By its lack of comment, the Task Force seems to endorse that criterion. That standard has profound implications for persons with disabilities, who may not fit someone's "objective" standards of "good health". If someone is capable of doing the work of a judge, why does it matter whether they are in good health? That criterion seems to reflect an able bodied pre-occupation with ablebodiedness.

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27. *Supra*, note 2 at 98.
28. *Ibid.*, at 188.

In the context of a report of almost 300 pages, these few comments may seem insignificant. However, I treat them as important because they represent a mind-set that I find pervasive. That mind-set was also evident to me when the Chair of the Gender Equality Task Force addressed the 1992 Annual Meeting of the Canadian Bar Association.[29] During the course of her remarks, the Honourable Bertha Wilson was, as usual, eloquent and powerful in her quest for gender equality. Yet I was struck by the part of her comments making an impassioned argument as to why pregnancy is not a disability. While at a semantic level I probably agree, the more interesting question is why it matters. It seems clear that it mattered to Bertha Wilson because of an assumption that negative consequences flow from the association with disability. There is enough of such a negative spin in the Task Force's comments on disability to cause me disquiet.

The sincerity of the Task Force's commitment to diversity and inclusiveness is not open to question. My point is rather that, at least in some respects, the Task Force does not recognize the limitations of its own perspective.

Accountability

The Task Force Report makes a point of broadly attributing the responsibility for dealing with the equality issues it has identified. Its long list of recommendations is directed at all facets of the profession, individually and collectively. As with all systemic problems, there are no simple solutions. It will take a lot of concerted effort on everyone's part to challenge the traditions of the male model of the profession, traditions that have persisted despite the changing face of the profession.

Is the legal profession as a whole ready for the challenge, or will the Gender Equality Task Force Report have an impact comparable to that of the next issue of the DLR's, i.e. occasionally consulted, occasionally important, but not a basis for fundamental change? Is there even widespread will to change? Are there effective strategies to ensure that equality issues do not get lost in the shuffle of preparing for tomorrow's court appearance or client meeting? It can only be hoped that the Gender Task Force Report was speaking not just to the profession, but also for the profession, and that the profession will take up the challenge.

29. Honourable Bertha Wilson, remarks to the Canadian Bar Association, September, 9, 1992, Halifax, Nova Scotia.