

There is a tradition about saying something about G. Arthur but the problem is I am a bit young to have moved in those circles. I can say I'm the beneficiary of his greatness, in that he was such a fine lawyer that when he chose criminal law as his field it added luster to the identity of being a criminal lawyer. He was one of those people whose professionalism and intelligence transcended everything so the fact that he said "it is legitimate to be a criminal lawyer" paved the way for my generation, which I emphasize is much much younger, to slip into the field.

I've always conceived of this award as one that our organization shares with people who have committed themselves fully and without reservation to the criminal law.

To that count I plead guilty and on that basis I'm happy to accept it.

It is also a pleasure to have an opportunity for a change to speak to a room full of people with whom I agree on almost everything. But that isn't the only thing I like about criminal lawyers. I appreciate working with people with a single-minded dedication to fairness; I like having colleagues happy to work without regard to the odds of winning or I might add getting paid. Good criminal lawyers enjoy the fact that the harder and smarter you work, the fairer the fight becomes.

I'd like to continue for a moment about the pure joy and pleasure of being a criminal lawyer because it is a topic on which we dwell infrequently.

In fact if you like uphill battles and not just "going along", the criminal defence bar is the place to be.

If your family finds you *oppositional*, then criminal practice is for you. If you are the obvious captain of every passing ship, you are a criminal lawyer.

After 30 years as a criminal lawyer I still enjoy that first interview and meeting with someone who has a problem that needs solving. I am still charged up by the responsibility involved in taking on a case to help a person and their family in what is often the biggest crisis ever to land on them and where the stakes couldn't be higher. I know I'm not alone in thinking it is an awesome job in the real meaning of that word, not the millennial sense. Like awesome tacos. Or, "dude, you are awesome". Just awesome.

On the other hand there is occasional and understandable weariness with our job. A criminal lawyer's practice is often at the apex of a series of social problems others *have* not or *will* not fix. We as criminal lawyers are often a proxy for those problems. I want to speak of 3 examples which I hope are of interest to everyone in this room.

The first is the challenge of poverty and the legal system. Criminal lawyers associate ourselves with the liberal ideal that in the courtroom poverty should take a back seat

insofar as legal representation goes. When I say criminal lawyers I mean of course Cr and defence counsel. Judges, at least those I've met, think the same way. How we achieve that that ideal in our country has varied. Before the 1960's it was through ad hoc lawyer charity.

In the last 50 years the ideal has been achieved through an enlightened social program popular in both Canada and the US that provides legal services without regard to ability to pay. In Ontario we named it legal aid.

A generation of lawyers, including those before my generation, leapt at the chance to represent poor people with legal problems.

One reality about this kind of program is that the quality of the service is directly related to how well the program is run and funded. For example, the lawyers sleeping through death penalty trials in the US were publicly paid lawyers working in degraded, standard-less judicare programs. The lawyers given 2 serious felony cases to try in a week without having met the client are lawyers working in underfunded public defender programs.

In contrast, in Canada there was a YUGE difference, as the blond businessman might say. We are a kinder place for people without wealth. In Ontario, for e.g., our program was decently funded.

It was run by the law society and it was considered a public interest social program. It attracted senior lawyers

mentoring more junior lawyers. And that was the story for its first 20 years.

Then at the end of the 1980's the government discovered other priorities. The Cabinet Minister responsible, the AG, could not seem to keep it going.

It became a neglected social program supported principally by the donated legal services of colleagues in this room and others who passed on the chicken or beef choice today.

The bar objected because we could see what was happening and we were told your program is not equivalent to other priorities, but the AG is working on it.

If you will indulge a bit of history here, for a really long time, we were fooled by successive AGs in Ontario. It wasn't one specific person.

There were 6 different AGs, pan-ideological, starting with the NDP through the Mike Harris government and into the second term of McGuinty Liberals.

Criminal lawyers told each of them that the legal aid program was underfunded and we were supplying free parts and labour in order to make the program work. They all said the same thing, that you got a point and we ought to study that. Which they did. They studied it forever by themselves. They even let *us* study it with them. Until the thing had been studied beyond recognition.

But nothing got done.

They invented new terms that made them sound cutting edge, like “access to justice” which they said was their new priority. This ignored the fact that the program which *already* had a stellar record of producing access to justice was being run on the donated services of a few hundred lawyers. The AGs told us it was hard to get money out of cabinet. We told the AGs to try harder.

Experienced lawyers saw themselves as graduating from the program to never come back. Legal aid lawyers had no money to hire experts in homicide cases or employ legal assistants in their office. Eight or nine years ago I was the president of the organization and I met with the AG and the Premier and told him them we were getting fed up but neither of them looked particularly worried, and why should they be? They knew that most criminal lawyers didn't go into criminal law because of the money. And anyway, organizing criminal lawyers is like hypnotizing chickens. The prevailing view in government was that defence counsel's dedication to clients doomed any job action or protest to failure within 2-3 weeks.

To make a long story short, the defence bar told the Board of this group to stop talking and do something and so the board told me to announce a boycott of serious cases. Which I did.

The reaction of the government was as expected —denial, anger, grief and threats. All of that is well known to you and I won't repeat it. But I want to share a few things about

that episode that tell you something about criminal lawyers and how we are viewed.

I was called in first by the AG, then by senior members of the Bar and chastised for announcing a boycott instead of going to more meetings to study the issue. When that didn't work, the AG and senior members of the profession reached out to the other members of the Board to ask if I was the problem. They had no idea that I was the least crazy person of the bunch. Someone asked a member of my Board if I was affiliated with a left wing group. That was a puzzler.

Many establishment legal groups, accustomed to a smooth working relationship with government, were unwilling to join our fight for something as *abstract* as a poor person armed with a legal aid certificate and facing an indictment in superior court. The LSUC, which should have been our ally, declined to come to our defence.

The days turned into weeks and then months, and some additional funny things happened. The Globe and Mail wrote an editorial extolling the virtue of the criminal defence lawyer, particularly for the indigent defendant. Indispensable, it called us. The editorial also explained that the government could not pay us a fair wage to cover overhead because there were hospitals and schools to run ...then told us to get back to work donating our legal services on grounds *we* were too valuable to be boycotting.

Our partnership with legal aid Ontario crumbled and *that*

relationship changed forever.

Throughout this fight, we were basically alone. No one who was in a position to support us came to our aid.

No one made the argument that it is a well-trained, properly funded bar that gives inequality a back seat in the criminal courtroom. It was criminal lawyers and criminal lawyers alone who held the boycott together and rescued, temporarily, a crumbling social service program.

We eventually got some money, a giant increase by comparison to what had been going on for the 19 previous years. But the progress did not continue. The program continues to lose its luster with one of its most valuable constituencies, the service providers in this room.

If I could speak to the current AG, who I know to be a good person, I would say: if you *don't* want to fund the program say so. If you want to fund it, treat it like the valuable access to justice vehicle it is and about which you regularly give speeches. It is just like Kindergartens and emergency rooms, without the popularity. Argue your brief in Cabinet as if your liberty depended on it. Be a criminal lawyer and we will be your allies.

The second issue concerns the federal jurisdiction and if I can speak frankly, I'd like to say I'm pleased as a criminal lawyer we have graduated from the last government.

Among the many things they did which were irksome to the criminal bar, by which I mean Crown and defence counsel,

was to pass laws without any appreciation of their impact. I could pick a dozen examples from the 9 or so years that felt like a century, but the worst was their habit of putting cute names on vicious laws like truth in Sentencing. Everyone is for truth in sentencing but you can't manage people's lives with a bumper stickers.

Criminal lawyers dislike those cute names because they obscure what's really going on. Tough on crime as a motto is not tough on crime at all. It's tough on criminals and maybe the people who work inside the system. Being tough on criminals fills jails, strains resources and frustrates rehabilitation but there is no evidence it reduces crime or increases public safety. Bankrupt American states know that now after a 30 year failed experiment along the same lines.

The same thinking that gave us branded criminal laws, also gave us an intolerable number of mandatory minimum crimes—which take a knife to judicial discretion where it is most important.

Mandatory minimums popularize the idea that judges are soft and out of touch... whereas the last government was *so* modern, *so* levelheaded and *so* in touch. Their choice to denigrate judges and judicial discretion for narrow political purposes was another example of their instincts.

On the subject of MMIW, the Prime Minister famously said he doesn't do sociology. He brought his lack of curiosity to the public policy discussion when he was an Opposition leader and it propelled itself into mainstream thinking. His

government ratcheted up and exploited fear about violent crime, demonized defendants and just kept repeating that longer sentences were an acceptable way to manage social problems.

For me the answer to the question, “how can you represent *those* people” has always been easy, because I think I’m representing “one of us”.

But the last government tried to create a magic circle, separating us and them. They re-described the dangerous criminal and the mentally disordered offender from one of *us* to one of *them*, a monster who has to be separated from us as long as possible.

Criminal lawyers know that you cannot imprison or demonize your way out of long-standing social problems.

If the Minister had returned today for a second delicious lunch at the Marriott, I would remind her that if anything should be arrested forthwith in this country it’s the criminal justice slide under the last government. It’s time to get going.

We are of course pleased that the overdue MMIW inquiry is underway but there is a lot more to be done. We were pleased to hear what she said she was thinking about doing, but I would just say, as the police often remind us, “deeds speak”.

Consultation is not a replacement for action. It’s time to get going. Canadians like fairness and civil liberties in their criminal justice system.... and Minister we want it back.

Yesterday, the Minister mentioned she is going to do something about mandatory minimums. Fine, we're waiting for the legislation. A good place to start, though, would be to direct your federal prosecutors to stop defending the remaining mandatory minimums in the Code. It's expensive and distracting to bring those challenges and it skews resolution discussions.

While you are at it, how about if we get going on solitary confinement? It's a form of torture. Let's see some governmental impatience there.

Since we are speaking candidly between each other Minister... could I mention that Innocence Canada is about to die, which means the freedom of the wrongly convicted will be dependent once again on the charity of defence counsel and clergymen. How about arms length financial aid for Innocence Canada before it sinks out of sight?

Some of you know there are few topics more frustrating than the way we treat our aboriginal defendants and offenders. Nearly every political constituency agrees that we over-criminalize and over-incarcerate our first nations fellow citizens. The Minister mentioned it again yesterday.

We incarcerate a higher number of first nations people now than we did before the Gladue case was decided, a case in which the Supreme Court *told* Crown attorneys, defence counsel, law enforcement, trial judges and even appeal court judges to smarten up. But we didn't. My question is how does a country like Canada end up targeting one

minority so successfully— a minority that has been judicially noted to be a victim of colonization—but ineptly extracting itself from the problem?

Well, one reason and this applies not only to the failed promise of Gladue but to other disadvantaged groups and the wrongly convicted—is this. There has been no voice at the policy table for the accused, the incarcerated and mentally disordered.

If I could put it more another way: we have an attorney general of Canada and one for each of the provinces and territories. We have a Minister of Public Safety federally and each for each of the provinces. And each of those ministers has a small army of smart lawyers to help them achieve their mandates. But First Nations and the wrongly convicted, to take 2 obvious examples, have no Minister, no *Defender-General*. The only lawyer enshrined in the Canadian Constitution is named in s. 10 of the Charter.

McLachlin CJ recently said extra-judicially, “[without the assistance of a lawyer] the citizen’s voice remains an inarticulate and unheard cry. If citizens are to find justice, they must have lawyers”

So, everyone agrees that the legal rights in Charter depend on us and the promise of equality is unattainable without us.

Yet, the defence *is* not, and *has* not been a part of policy decisions about criminal justice matters.

There is right now no office to represent criminal justice

interests at the executive level from the perspective of those caught up in the system. It is obvious that the tried and true thinking of smart government lawyers is not solving the problem.

If the Justice Minister who was here yesterday was still here, I would invite her to put a defence counsel voice in a senior public policy position. Do it now if you want to stop jailing First Nations people at an unacceptable rate. Do it now if you want to reverse the unacceptable incidence of wrongful convictions.

The answer is not missing. The will to change the status quo is what's missing.

I have one last thing I want to get off my chest. This is probably the touchiest but needs to be said.

Not a week passes without some law professor or another being quoted as noting that the justice system and in particular criminal defence counsel is letting down victims in sex assault cases. The whole movement assumes the pervasive problem of sexual violence can be solved by preventing defence counsel, often the one and only unconditional ally the defendant has after his name has been widely published and associated with this nasty crime, from doing his or her job.

If the movement means nothing more than that gendered or rude treatment of sex assault survivors is intolerable I'll support that and so will my colleagues. If it means more education of justice system participants, including defence counsel, is needed about sexual violence and how victims behave, I'm for that too. If it means that we are no longer

entitled to promote or rely on rape myths, I'm in.

But if you are asking me to get behind a weakening of the rules of evidence or of the presumption of innocence or of the defence lawyer's role because you and others can't solve a pervasive social problem, *forget* it. I am *not* interested. And neither I expect are my colleagues.

If there is a credibility challenge, I intend to pursue it. If defence counsel show *professional* skepticism of an allegation against our client that does not make us the villain, it means we are doing our job.

So to the commentators but especially the *law* professors who have been regularly attacking defence counsel in sex assault cases, we are *not* the problem. We are carrying out a constitutional responsibility by testing the evidence when someone makes an allegation *even if* the allegation touches the third rail of Canadian social problems-- sexual violence against women and children. I grant you they are miserable cases but we are often the last ally the defendant has.

The question in those cases is not "who do you believe" as has been suggested or even "who do you feel sorry for" but what's been proved. It's not complicated. We work with this legal standard in murder cases. You should not be attacking defence counsel for litigating to that standard or judges for acquitting according to that standard.

Two weeks ago I was watching the US news, like everyone else, and the unhinged land developer was attacking

Clinton and Kaine for being former defence counsel and having represented people in death penalty and sexual assault cases. He said they “consistently protected the *wrong* kind of people”. Hillary responded with what I would call weak sauce, she said when you’re a lawyer you often don’t have the choice as to who you will represent. There will be those you represent who you don’t approve of.” I went to watch it online and you can see her lips kind of curling when she is explaining that she was once a criminal lawyer in a sexual assault case. And she said it the way you might say the word carbuncle. Let me say it again. Good defence counsel have no ambivalence about what we do. I never shy away from telling people what my job is or who I represent. We are a small but indispensable part of the civil liberties program and our work is not distasteful, it is the patriotic work of happy warriors.

I’m pleased I was able to get that off my chest.

I want to say one more thing before I let you go to Canadian tire or wherever criminal lawyers go on Saturday after they leave the Marriott Eaton Centre, and that is about our future as a defence bar. The new generation of the criminal bar, those who have been practicing 10 years or less, from where I sit, is the best generation of young criminal lawyers in the history of our bar. I see it with the associates in my office and in court every day. You are ingenious, fast and efficient. You have capitalized on every advance in research synthesis and information sharing that’s available. If it goes in cycles we are now in a cycle where the young lawyers, are going to reinvent criminal

law. Your choice to be specialists in a non-lucrative part of the profession makes me happy to be part of the criminal bar. If the government should ever have the good sense to re-fund the legal aid program it will see that there is a generation of lawyers with a thorough and unalloyed commitment to justice in its purest form, the defence of the person accused of crime. We are very lucky for that. Thank you.