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*From the office of the President*

February 7, 2021

As of Thursday January 14<sup>th</sup>, our province has been under a stay-at-home order, requiring every person to remain in their residence with exceptions for permitted purposes or activities. Provincially-run elementary and high schools have been closed since before the Christmas holidays. At the same time, courts have made significant strides in transitioning to online operations. This “lockdown” differs notably from the lockdowns in the spring and summer of 2020 as courts are operational, albeit primarily in a “remote” format. This is a laudable accomplishment.

However, as a result of the combination of school / programming / facility closures and the transition to remote court operations, lawyers who are the responsible caregiver for minor children or dependent adults and seniors are experiencing significant hardship. This pressure affects our Membership in particular, as proceedings in criminal cases have been given priority by the court system. While this priority is appropriate, accommodation must be made for practitioners who are under unprecedented pressure to care for dependents in the home, and simultaneously engage in litigation on behalf of their clients.

This issue disproportionately affects women, parents, single parents, lawyers who are recently called to the bar, lawyers who experience mental health challenges, racialized lawyers, and less affluent counsel.

We are facing a crisis of retention of female lawyers in the legal profession generally and in criminal law, in particular.<sup>1</sup> This problem is exacerbated by the pandemic. The data confirms that women are disproportionately engaged in child-care and other caregiving responsibilities; the pandemic has revealed that this disparity continues to affect women in the workplace in almost every field. Worldwide, the pandemic has resulted in an unprecedented departure of women from the workforce, in order to cope with increased childcare responsibilities.<sup>2</sup> Canada has been directly impacted by this problem; one study indicating that “[i]n a matter of weeks during the spring, COVID-19 rolled back the clock on three decades of advances in women’s labour-force participation.”<sup>3</sup> Mothers or children under the age of six make up over half of women aged 35-39 who have left the labour force during the pandemic.<sup>4</sup> These factors call out for significant step to be taken by the judiciary to ameliorate the impact of the pandemic on the retention of women in litigation-based practice.

In addition, caregiving responsibilities disproportionately affect counsel who are first generation lawyers, who live in single-income household or who are single-parents, and who come from less affluent backgrounds. These factors often intersect with gender and racial identity to compound disadvantage. Lawyers from lower socio-economic backgrounds and circumstances may have less resources to call upon to assist with care. In addition, lawyers who are New Canadians or First Generation Canadians, may therefore have a smaller family network to call upon, leading to greater individualized care responsibilities.

Without accommodation, affected lawyers may have no choice other than to decrease the scale of their practice or leave the profession entirely. This is unacceptable. Diversity makes our profession stronger. We must work together to ensure that lawyers who are impacted by increased care responsibilities – many of whom already come from groups that are underrepresented in our profession – are adequately supported during the pandemic.

We also note that this problem affects access to justice. Lawyers who work on Legal Aid or who are primarily aiding clients of modest means often operate on very small profit margins. Their practices are more vulnerable to increases in care

<sup>1</sup> See , e.g., Brosnahan, Maureen, “Women leaving criminal law practice in alarming numbers” CBC News (March 7, 2016) online < <https://www.cbc.ca/news/canada/women-criminal-law-1.3476637>>

<sup>2</sup> World Economic Forum, “Why COVID-19 could force millions of women to quit work – and how to support them” (October 20, 2020). Online < <https://www.weforum.org/agenda/2020/10/women-work-gender-equality-covid19/>>;

McKinsey & Co., “Women in the Workplace 2020” (September 30, 2020). Online: < <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace#>>.

<sup>3</sup> Royal Bank of Canada, Economics, “Canadian Women Continue to Exit the Labour Force” (November 19, 2020) online < [https://thoughtleadership.rbc.com/canadian-women-continue-to-exit-the-labour-force/?utm\\_medium=referral&utm\\_source=economics&utm\\_campaign=special+report](https://thoughtleadership.rbc.com/canadian-women-continue-to-exit-the-labour-force/?utm_medium=referral&utm_source=economics&utm_campaign=special+report)>.

<sup>4</sup> *Ibid.*



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responsibilities. The widescale increase in care responsibilities as a result of the pandemic may force many lawyers who work in these areas to change practice areas, reduce *pro bono* hours, or to shrink or close their practices. As a result, a systemic failure to accommodate practitioners who are caregivers is likely to produce cascading, adverse consequences for society's most vulnerable who are served by our justice system.

To ameliorate this crisis, we must remember that – for criminal lawyers especially – the courtroom is counsel's primary "workplace". While Judges are not employers, Judges function akin to employers in many practical ways. For our Membership, it is Judges, by and large, who set deadlines, determine workflow, and mandate day-to-day schedules. Just as workplaces have had to adapt to accommodate the pressures caregivers face as a result of the pandemic, the judiciary must make appropriate accommodation to ensure that caregivers are able to meet the demands of practice and the responsibilities involved in providing care to children and dependents.

This issue also has a significant impact on the mental health, physical health, and general wellness of practitioners who are caregivers, as well as on the mental health, physical health, and wellness of the individuals under their care. In a November 25, 2020 Letter to Tony Lorpaco, Justice Morawetz and Justice Maisonneuve indicated that the health and safety of justice system participants are the court's primary concerns during the COVID-19 pandemic. This concern for health and safety must be extended to the mental health of counsel, and the mental health and well-being of children and dependent adults in the care of counsel.

An approach to the court's administration which recognizes the impact that judicial scheduling decisions have on the mental health and wellness of practitioners can be found in the recent decision of *713949 Ontario Limited v Hudson's Bay Company ULC*, 2021 ONSC 621. In granting an adjournment application, Justice Frederick Myers of the Ontario Superior Court of Justice stated:

[16] The court takes very seriously issues of health and wellness of practitioners, members of the judiciary, and court staff during the pandemic in particular. While lawyers and the courts are in a service business, there has to be a brake applied to service providers' willingness to compete themselves (or their juniors) into unhealthy states in the ordinary course of business. Recognizing that young counsel and staff may have other responsibilities or just need down time does not impair access to justice provided that everyone understands the need to make personal sacrifices when truly urgent circumstances arise.

In the November 25, 2020 Letter, on behalf of both the Ontario Court of Justice and Ontario Superior Court of Justice, the Chief Justices committed to communicating a clear message to the judiciary that virtual proceedings should be conducted wherever possible, with "a strong message of accommodation and flexibility." We ask that this strong message of accommodation and flexibility be explicitly extended to parents and caregivers who are disproportionately impacted by the pandemic.

There are a number of options to open to the judiciary to assist in alleviating the burden faced by practitioners who are also caregivers. These include, but are not limited to:

- Granting adjournment requests aimed at accommodating counsel who have increased care responsibilities, whenever practicable;
- Modifying filing deadline requirements to allow caregivers extra time needed to draft materials or to allow caregivers extra time to respond to application filed by opposing counsel;
- Considering alternate forms of scheduling for remote trials and hearings, wherever feasible, such as: scheduling matters on alternate days, scheduling matters for shorter time intervals during the day, scheduling matters with start and end times that accommodate care responsibilities; and scheduling trials with non-traditional break times or breaks of longer durations to accommodate care responsibilities during the day;
- Allowing counsel to email instructions for set procedural appearances, such as adjournments to the court where appropriate; and,



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- Adopting a non-adversarial, collaborative approach to scheduling which recognizes the increased burden and strain currently experienced by counsel who are also caregivers.

This is not a short-term problem. Ontario is now projecting a vaccination schedule which contemplates that vaccines will be widely available throughout the province no earlier than September of 2021. It is likely that the pressures faced by caregivers as a result of the pandemic will continue for the duration of 2021, and perhaps into 2022. There is a real danger that many practitioners will be unable to withstand the burden which COVID19 will continue to place upon their practices into the future. Practitioners who are also caregivers require the formal support of the judiciary to weather this crisis.

We strongly encourage the judiciary to adopt formal procedures, in the form of a practice direction, which provides clear guidance to judges and to practitioners on how to achieve adequate accommodation for caregivers for the duration of the pandemic.

Adopting a formal policy for accommodation would reduce barriers to practice for female lawyers, lawyers who are single parents and caregivers, racialized lawyers, lawyers from low socio-economic backgrounds, and lawyers working with vulnerable populations. This would be a notable step forward in creating structural changes to court administration aimed at promoting equity, diversity and inclusion in the legal profession and in the administration of justice.

Yours truly,

John Struthers  
President, Criminal Lawyers' Association

&  
Stephanie DiGiuseppe  
RUBY, SHILLER, ENENAJOR, DIGIUSEPPE