

LSUC2 – “The International Lawyer in the Media Spotlight”  
The Law Society of Upper Canada

Thursday, November 5, 2015

1:30pm – 3:00pm

**PANEL REPORT**

**Chair**

Lawrence Herman, Herman & Associates

**Speakers**

Richard Ouellet, Université Laval

Pascal Paradis, Avocats sans frontières

Cristin Schmitz, The Lawyers’ Weekly

Reported by Anthony Rosborough – Halifax, NS

**Introduction**

Lawrence Herman began the panel discussion with an introduction to the topic. He said that lawyers face a number of challenges today posed by instantaneous communications. Mr. Herman said that the aim of the panel is to address how these challenges might inform those of us who are in the legal profession – whether in public practice or private practice – as we handle our relationships with the media.

Mr. Herman said that international lawyers need to be very prudent. They are asked to express the best position for their client, but equally so, sometimes the best position is to simply not respond when the circumstances warrant it. It is in this sense that Mr. Herman reckoned that it is not always in your client’s best interests to advance a position or provide a response at all.

**Cristin Schmitz – *Lawyers’ Weekly*, Ottawa Bureau Chief**

Cristin Schmitz framed her discussion into three sections, and as propositions for international lawyers who find themselves in the media spotlight:

- (1) the need to understand the short deadlines under which journalists operate;
- (2) the importance of reporter-source confidentiality; and
- (3) the dos and don’ts in dealing with the media.

### (1) Timelines

Schmitz said that international lawyers must acknowledge and respect the short timelines which journalists are given to produce a story. Today's reporters are required to file stories within minutes of an event. For news wires, reports are completed on even shorter notice; often within seconds. For certain statistics, it is less than a second. From a journalist's perspective, it is usually the case that for a story that broke at 9:45a.m., the story is complete and over. While lawyers have a difficult task as well, Schmitz said that international lawyers need to be as diligent as possible in getting back to journalists and should respect their urgency to produce a story quickly. If lawyers wait an hour or two to get back to a journalist, she said, it will often be too late to meet with the reporter and comment on the story.

As a matter of good etiquette, Schmitz said that when lawyers are unable to meet or discuss a matter with a journalist because they are occupied, they should inform the journalist of this. Even if you are unavailable for comment, she said, journalists will keep an international lawyer on their call list if they are given the impression that the lawyer is cooperative.

Where lawyers have been instructed by their clients to not comment on a case or legal matter, Schmitz said that the lawyer should refer the media to their client. If the client is not cooperative with the journalist, Schmitz said that at least the journalist can try to find another commentator before the submission deadline.

### (2) Confidentiality

Ms. Schmitz's second topic was the constraints and limitations of confidentiality. Lawyers and journalists can sometimes have converging roles, Schmitz said, as journalists are primarily in the business of distributing information while lawyers often are tasked with safeguarding it. For this reason, Schmitz proposed that lawyers and journalists establish relationships of familiarity and trust. This, she said, will allow lawyers to feel comfortable sharing information that will not be prejudicial to their client or professional contacts and produce better journalism.

The relationship of trust, Schmitz said, can be reinforced by agreeing on the use of some basic terms of the arrangement. For example, when a journalist asks a lawyer to comment on something "for background only, and not for attribution" this means that the source can be used, but the person sharing the information cannot be identified. Conversely, "off

the record” means that the information cannot be used unless the information is obtained by someone else. Some journalists, however, use the phrase “off the record” more loosely than others. If the information the lawyer gives to the journalist can identify the lawyer as a whistle blower, the lawyer should be very clear to ensure that it cannot be used at all. Understanding the terms of the relationship in this respect is vital, Schmitz said.

### (3) Dos and Don'ts

Finally, Ms. Schmitz provided a series of “dos and don'ts” for international lawyers who are contacted by the media for comment. Among them were suggestions that lawyers be open to working with the reporter through a variety of means, whether by telephone or email. She also suggested that journalists are very appreciative of lawyers who forward them relevant documentation – this, she said, can save journalists a lot of work. In summary form, Schmitz provided the following list of best practices for lawyers dealing with the media:

- (i) speak as plainly as possible, and without legalese;
- (ii) understand the difference between media (e.g., TV versus print);
- (iii) get to know journalists that report in your area of specialization – find the ones you trust and work with them when possible; and
- (iv) talk to journalists even in defeat – there may be a sympathetic angle for your client that the journalist can take.

Regarding the don'ts, Schmitz said that lawyer should be weary of patronizing reporters and being so caught up in their answers that they cannot help but bend them in a way that is beneficial to their client. Beyond lawyers' duties to their client, court and firm, Schmitz reckoned that lawyers are a learned profession and are uniquely situated to explain the rule of law to the public. She said that lawyers have a sacred obligation to help demystify the law for the media so that important information can be conveyed to the public.

### **Pascal Paradis – *Lawyers without Borders*, Executive Director**

Mr. Paradis began by highlighting the importance of public engagement in the world of Lawyers without Borders (“LWB”). Over the last two years, he said, LWB has invested significantly in social media and communications. The reason for this is generational, he said. Young people are now joined via social media and it is an important conversation to be a participant in. Modern social movements such as the Arab Spring, the Guatemalan

spring all have seen heavy use of social media as an organizing tool. For LWB, Mr. Paradis said, it is important that they are able to communicate within this framework.

### “Strategic Litigation” and the Importance of the Media

Mr. Paradis went onto discuss the concept of “strategic litigation”, which in the human rights context is to highlight emblematic examples of violations before national and international courts to create or influence the outcome of jurisprudence in a way that effectively rationalizes human rights. In this sense, he said, strategic litigation aims to produce a social impact by testing the law and the legal structures that support it.

In order for strategic litigation to have its desired effect, however, Paradis said that the media must be there to support it. The media has a crucial role to play in ensuring that the new legal vision of human rights can percolate throughout society and be disseminated by the media. In this regard, the media contribute to the recovery and conservation of collective memory and help open the eyes of younger generations on issues that are otherwise hidden or taboo. On the other hand, however, Paradis cautioned that it is necessary for LWB to adopt a low profile due to the sensitivity of certain cases – this can upset partners and media outlets who wish us to take a stronger position.

### Risks and Challenges in Dealing with the Media

Mr. Paradis then went on to identify several challenges and risks for dealing with the media in a climate of strategic litigation. The first challenge is that of finding the right balance between a number of variables: taking a position, respecting the judicial process, and considering the rights of each party and the right to a fair trial. Another challenge Paradis identified is that of understanding the media culture of the country you are operating in, and the dynamics of stakeholders, trends and practices. In this respect, Paradis said, the trend toward the concentration of the press and media monopolies in many countries and the desire to have a uniform message often opposes the sort of changes that LWB seeks to implement.

Mr. Paradis noted the unique nature of LWB and the nature of its lawyer-client relationships. He said that LWB is unconventional in that it acts as a human rights NGO that works with local actors. That being said, Mr. Paradis said that LWB adheres to the obligations of lawyers under the CBA’s *Code of Professional Conduct*.

Like all other citizens, Mr. Paradis said, lawyers are entitled to freedom of expression, belief, association and assembly. They have a right, he said, to take part in public discussions of matters concerning the promotion and protection of human rights. The

exercise of these rights is always a balance when they are directed towards the initiatives of LWB and legal or political situations as they are unfolding. Mr. Paradis said that LWB lawyers should always ask themselves how their contribution to the media will help them achieve LWB's mission and its programmatic goals. They should prepare thoroughly for public interventions by anticipating questions, envisioning opposing views, assessing risks and planning mitigation strategies.

Mr. Paradis cautioned international lawyers who may find themselves led astray by journalists. In order to minimize this, Mr. Paradis suggested, lawyers should focus on the interests of the stakeholders, and that can include parties well beyond their clients. Mr. Paradis commented further on the danger in speaking to the media about matters about which international lawyers possess little knowledge. It can be tempting, he said, to appear on television or in the media, but lawyers should exercise discipline and summon the courage to refuse to comment. For LWB, he said, there have been many instances in which the organization has been asked to comment on matters that are either very recent or inconclusive. Ms. Paradis said that in these instances it is LWB's approach to wait until a proper assessment of risk and harm is done before comments are made – even if the opportunity to comment is lost by waiting.

To provide an example of the type of scenarios that can arise when being asked to comment by journalists, Mr. Paradis provided an anecdote from his experience working in Guatemala. He said that LWB was asked to comment on a massacre in that country as 'international observers'. With only five minutes before the interview, Mr. Paradis said that he learned that the journalists in Guatemala had arranged for him to debate the issue with defence lawyers. "They wanted us to comment on the position with only 5 minutes [to go] before we went on air. I decided I would not do it", he said.

Mr. Paradis closed by stating that it is no exaggeration to say that LWB's work is only effective if it is communicated, and the media are absolutely essential for this. However, at the same time, he said that the accuracy and efficacy of LWB's message is equally essential. The surgical choice of words and the need to contextualize is a constant concern for LWB, and this is not always conducive to the way that the media and its stakeholders wish to conduct themselves.

### **Richard Ouellet – Professeur titulaire - Université Laval**

Mr. Ouellet began by providing an overview of his work and involvement with the media. Mr. Ouellet's work as a commentator has always been in the context of economic

international law, and specifically within the context of trade agreements. Over the past 14 years, he has provided nearly 100 interviews primarily to television media outlets.

### Questions Outside the Lawyer's Expertise

Mr. Ouellet cautioned lawyers about commenting on international legal matters for which insufficient time has passed for the lawyer to properly prepare to comment. He said that WTO decisions will often come out at 10:00am eastern time in Canada, and at 10:15am, trade lawyers may receive a call from the media asking them to be on television by 11:30am. Mr. Ouellet said often trade agreements can reach 800 pages or more, and there is simply not enough time to review it and to make an informed comment. He recommended that lawyers refuse these types of interviews, and ask to do them later instead. Overall, Mr. Ouellet opined that commenting on decisions for which lawyers have had little time to review is unethical and can lead to negative consequences for themselves and their clients.

Mr. Ouellet shared a situation where he was contacted by the CBC to comment on a government investment into the cement industry in Quebec. He said that he was asked whether this investment went against the countervailing measures at the WTO. Providing meaningful comment on a question like this, he said is nearly impossible. The lawyer would have to know what the funding would be, the method of the funding and so on. If any conditions or nuances were left out of the question or the answer, the lawyer may have lost all credibility and no longer receive any calls for comment. Lawyers' management of their responses in this respect is both a practical and reputational requirement.

Mr. Ouellet suggested that lawyers ask themselves what *type* of media outlet they are dealing with. In this regard, telephone interviews offer a chance to clarify, but there is no certainty that this will be included in the final edit of what goes on the air. Electronic media, on the other hand, completely denies you the opportunity to re-do the response, he said. One way to eliminate this uncertainty, Mr. Ouellet said, is to prepare and suggest questions to the media outlet. Often the journalist will be happy to do this, because in the end it will make them appear as if they are more informed about the issue than they really are.

Controlling the question may be one aspect, Mr. Ouellet said, but ethical issues still remain. Lawyers must ask themselves what sources they can use to answer the questions being put to them. Though lawyers often have access to privileged information, Ouellet said that they should be sure to never, under any circumstances, use that information for

media reporting. Lawyers will lose the trust of the people who work in their area, from the government and in the private domain. Journalists will often try and pry this information out of lawyers by telling them that they are well connected, Ouellet said. In response to this, he cautioned against playing along with the game and to categorically refuse to provide any of that information. Aside from privileged information, Mr. Ouellet cautioned against using information that is not reliable or well-researched.

In concluding, Mr. Ouellet provided three main pieces of advice for lawyers who are dealing with the media. He said that lawyers should:

- (1) always provide exact information, and even if this sidesteps the question;
- (2) have in mind the rights and interests of the parties; and
- (3) never use privileged or baseless information.