SPEECH GIVEN BY
MR. JUSTICE JOHN D. ARNUP

Convocation
April 10, 1984

Madam Treasurer, members of the Bench, my lords, your honours, my new colleagues of the bar, distinguished guests, ladies and gentlemen.

Fifty-two years ago I came up those steps and was admitted by the Chancellor of the University of Toronto to the degree of Bachelor of Arts. He was the Right Honourable Sir William Mulock, the Chief Justice of Ontario, then in the prime of life. He was 88. He continued as Chief Justice for four more years and lived to be one hundred. He was the living denial of any assertion that a man's life would be shortened by old rye whisky and fresh Cuban cigars.

Twenty-five years later I was a member of the small group which negotiated the agreement with the universities that made university law schools possible. Since the Osgoode Hall Law School was going to be continued by the Law Society, it was an obvious necessity that the Society should be granted power to grant degrees in law. The universities readily agreed, and Premier Leslie Frost personally made sure that the necessary legislation was promptly passed.

We quickly realized that our new statutory power gave us the right not only to grant the usual three earned degrees, but also Honorary degrees and we chose LL.D.

During my term of office as Treasurer I conferred that degree, on behalf of Convocation, on five distinguished Canadian legal figures, beginning with Mr. Justice John R. Cartwright, then Chief Justice James C. McRuer (who has just turned 94), Park Jamieson of Sarnia, who had been on the 1957 negotiating team, Professor Austin W. Scott, the noted American legal scholar and author, and finally upon McGill's Professor Frank Scott, poet, author, teacher and on occasion, a winning counsel in civil rights cases. I do not recite this as an exercise in self-promotion. These men were part of our history - a subject to which I will return.

It never once occurred to me that some day I might be the recipient. I thank you for this great honour, conferred on behalf of the profession in which I have spent most of my life. But I have to admit that pleased and grateful as I am to receive this degree, my appreciation of the occasion is enhanced by the fact that I was there when the Society's power to confer it came into being.

There is a danger that when someone who was called to the bar 49 years ago is invited to address convocation, he might attempt to survey the life and times of the bar for the preceding half century. No doubt the thought has crossed your mind - and yours, too, Madam Treasurer. I have a certain distaste for being tarred and feathered, and even being pelted with tomatoes is a punishment I have always sought to avoid.

Accordingly, I propose to leave with you just a few reflections on the present, and a few hopes for our joint future. If it had to have a title it would be "Some Things I Worry About". Because my whole life in the law has been spent in the courts, most of my worries concern that branch of the law.

As a judge for the past 14 years, I have some worries about the courts of Ontario, and particularly my court. We are in real danger of being choked to death - a fate that sometimes overtakes people who try to devour too much, too fast, without time to digest it. Every chief justice in the country is sounding the same foreboding note, and Ontario is in the greatest danger of all. It starts in the Provincial Courts, especially in the criminal division. You hear terms like "sausage mill", "assembly line", and worse. It spreads to the County and District Courts, especially in the three or four largest cities, and again it is worst on the criminal side.

It infects the Supreme Court of Ontario. We put on a trial court "blitz" in Toronto, or Windsor, or London, or Ottawa, and by skilled

and energetic work of a team of trial judges, the list gets caught up for a while. The Divisional Court has a very heavy load, which is about to get heavier. And in the Court of Appeal, where I am now on a half-time basis, the individual load of sitting time has increased by 60% since I first joined them, despite the fact that the number of judges has gone up from 10 to 18, including two supernumeraries.

What is being lost is not necessarily the quality of justice, but two crucial necessities - thinking time, and the appearance of justice. Thinking time is essential, if we are to have judicial creativity. The appearance of justice is essential, if the institution is to maintain the respect necessary for its survival.

Turning to the bar, I worry about several things. I worry about the increasing tendency towards advocacy by press conference. It bothers me when lawyers come steaming out the back door of the courtroom, and say to the press: "How could he possibly reach that result? We'll certainly appeal that decision." He is followed, at a more leisurely pace, by his opponent, who says expansively: "This is the first case of its kind in Canada - certainly it's a landmark decision." I am even more upset by lawyers who tell the press what their case is going to be, before the case has even started. What makes it worse is that the press encourages these practices, by the way they write the story. I know that when they say, "in an interview, Mr. Blowoff stated", it means "I phoned him and asked if that case he just won was a landmark decision" and he said: "I guess so"; or, "I grabbed his arm as he came out of the washroom, and he said: 'You haven't heard the last of this case.'"

I wrote these words four months ago. Three weeks ago the benchers spoke out on the subject and a week ago some well known lawyers reacted. Somebody else is worried.

I worry because after 25 years of diligent investigation by some very bright benchers, we still have no satisfactory answer to the layman's

question: "How do I find a lawyer who is knowledgeable about my kind of problem?" The only answer you hear is: "Ask a lawyer and probably he can tell you." If you don't know any lawyers, and you finally go to the one whose name you got from a fellow at work, and you ask your question: "How do I find a lawyer for my kind of case?", you run the risk that he'll say: "You just found one!"

I worry about the adequacy of legal education in this complicated world. In the law school of today, there are scores of options in the second and third years. It doesn't take a calculator to show that if the student chose four options out of the 84 available, there are 80 subjects he knows practically nothing about. Yet he, and you, dear friends, are entitled to take that practising certificate and practise any kind of law you like, or what is more serious, to practise every kind of law. I don't have any answers to this problem - just worries. I was chairman of the legal education committee for five years, and I know that the benchers have always tried to turn out lawyers well equipped to serve the public - and in a world where every facet of life steadily becomes more complicated, it isn't easy.

I worry about one aspect of legal ethics, and again it is more visible in the criminal field than in the civil. It is a widely held belief that your duty to your client is paramount to all others, and that you are justified in doing anything in his interest that isn't actually criminal. Included in the tactics followed in pursuit of this belief are merciless cross-examination of a witness by suggestions you know are untrue, or mere rumour, in order to discredit him or her; remaining silent while the Court proceeds on an assumption of fact that you know isn't so, but which, if true, would be very helpful to your client; going back on your word to the other lawyer, because your client insists that you do; remaining silent, with your back turned, while your client bribes a Crown witness to get lost, or to change his or her testimony (the illustration is hypothetical!).

The view that I seek to challenge has ancient and respectable roots. The most frequently quoted is from a speech of Sergeant Brougham, later Lord Brougham, commenting on his role as counsel for Queen Caroline at the trial in 1821 of her right to be crowned. He said:

> ... an advocate, by the sacred duty of his connexion with his client, knows, in the discharge of that office, but one person in the world - that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others, to himself, is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any others ...

This passage of oratorical fervour was frequently quoted, and even found its way, in somewhat modified form, into the Code of Conduct for the Bar of England and Wales, but has been substantially modified by modern authority, which has emphasized that even the adversarial process must be governed by rules of fair play.

The late Lord Reid, that giant of judges, in the already famous case of Rondel v. Worsley, reported in 1969, asserted vigorously that a barrister, although not an officer of the court but deeply concerned in the administration of justice, has an overriding duty to the court, to the standards of his profession and to the public. Three other members of the House of Lords expressed similar views. The line is often a narrow one. On one side is merely silently knowing that facts could be proven that are not being proved; on the other is permitting the judge to proceed on a basis of fact or law which is obviously mistaken. Counsel has a duty to his client which is paramount save to the cause of justice itself, and therefore his duty to the court overrides all others.

Finally, I worry about what I perceive to be an erosion of good manners in litigation. This seems especially to infect the conduct

of court matters that are not before a judge. I make no reference to a notorious cross-examination that Ontario Lawyers Weekly published in November. I don't know why; copies of it had already achieved a wider circulation than Ontario Lawyers Weekly. I had observed long before that incident that some counsel on examinations appear to equate vigilance with rudeness, and to regard the traditional "courtesy of the bar" as an outmoded aberration. God knows we have had some rude judges in this country, and they're not all dead, but good manners, and good humour, are about the only things that have not gone up in price, and they should be treasured for what they are - the hallmark of a true professional.

Even some of the traditional courtesies seem to be failing. For 150 years judges have bowed to counsel, and counsel to judges, at the opening and closing of court, and at each end of the noon recess. I frequently find myself bowing to men who are gathering up their papers, or have their back to me. And usually this unthinking discourtesy is by people who know better.

I speak of men in the context of discourtesy, and deliberately so. I cannot recall a single instance of a female barrister being rude in court, despite some severe provocation.

I close with a couple of things I don't worry about. I don't worry about splinter groups of lawyers who proclaim that the benchers do nothing, think nothing, and should all be turfed out of office.

The reason I don't worry is not because I am no longer a bencher. It's because I have seen similar groups, and heard similar gripes, about every five years for the last half century. They all have two things in common - they have no real conception of the work the benchers do, every day of the month, and twelve months a year, and none of them

has ever said: "We're a group of eager, energetic, concerned lawyers. What can we do to help?"

Finally, I don't worry about you, the new lawyers. You are the best educated lawyers we have ever had. You are facing the enormous challenges of the '80's with courage and imagination and a genuine desire to serve your fellow men and women.

On one subject my views have never changed. Ours is a noble profession, with high ideals and a passionate devotion to justice. All of the great wisdom of the ages, all of the highest traditions of the bar, have come down to us, and now to you. You are the inheritors of the ages, the trustees of the past, and the hope of the future.

I know that you will be worthy of this great trust.