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Convocation Address
by
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on the occasion of
the call to the bar
of the
LAW SOCIETY OF UPPER CANADA

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My first words must of course be words of congratulation:

* to those for whom today marks the culmination of one of the most protracted of all educational experiences known to western man,

* to their families and friends, for the patience with which they have born the vicarious stresses and second-hand strains of legal education, and

* to the Law Society of Upper Canada which has today admitted to membership a group of women and men who are probably as intellectually able and well educated as any new lawyers in the history of the Ontario bar.

In this list of people who are to be congratulated, I did not include myself. This is not because I am particularly modest, or because others have already done the job, if anything to excess.

Rather, it is because I am not sure that I want to be congratulated on receiving an honorary degree from the Law Society of Upper Canada.

Look at it from my point of view. I have spent my entire professional life as an enfant terrible. It seems like only yesterday that I ceased being an enfant, but today I have to face up to the fact that I may no longer be as terrible as I like to think. One of the most unforgiveable aspects of my own career has been that I have devoted so much of it to teasing the law, lawyers, and the Law Society. Even when I was a Bencher of the Law Society, even when I was a member of this magic circle of serious and distinguished governors of a serious and distinguished profession, I managed to find something naughty to say.

And now they have their revenge. They have got me up here as a consenting adult, and in full public view, and I must graciously accept what they have so graciously offered: an honorary degree which is official recognition and at least implied approval of everything that I have said and done over the years. Sic transit gloria.

Or is it, perhaps, not yet too late for just one more minor outrage, one tiny gesture of irreverent and critical comment, before I am relegated to respectability? Let me chance it.

I want to talk about some things that may well get me in trouble. I want to talk about openness, openness in the sense of participation and democracy, and openness as it affects the intellectual style of lawyers and their ability to adapt to change.

People have been admitted to the bar of Ontario, on occasions like this one, for almost 200 years now. For all of that time, the Law Society of Upper Canada has exercised a dominant role in the professional formation of lawyers, in expressing and promoting their ideology, in articulating and enforcing their standards of professional behaviour, and in speaking for them on matters of professional and public concern. After 200 years of such arduous efforts, it would be surprising if every one of the Law Society's actions and achievements, every one of its cherished traditions and beliefs, stood up under scrutiny.

It used to be said that no man is a hero to his valet. By analogy, it might be said that no organization is a hero to those who know its history or critically examine its contemporary behaviour from an intimate, internal perspective. It is in this spirit that I propose to you that the Law Society is not likely to be above criticism. There must surely have been some event, some decision, some policy which deserves criticism.

However, while that hypothesis is easy to advance, it is very difficult to prove. Very little is known or understood about how

the Law Society makes policy, about the arguments and assumptions underlying its policies, occasionally even about their precise content and usually about their effects. The Law Society is not a very open organization, and it never has been. Policy decisions are made in private deliberations, sometimes with limited information or debate, usually unchecked by subsequent accountability to those affected, and typically unchronicled and inaccessible to the judgments of posterity.

We are just now beginning to see the first fruits of historical research on the Law Society, research indirectly supported by the profession through the activities of the Osgoode Society for Legal History. We will soon be able to document in some detail important moments in the Society's history. My profound gratitude goes to those who have sponsored and facilitated this important opening up of historical sources.

However, there is an irony in this: much more will soon be known about important controversies of the early nineteenth century than about those of the late twentieth; the din of ancient debates will be heard more loudly than those of today.

This, I suggest, is not a healthy state of affairs. It undermines the quality of decision-making, and the confidence which is felt in the decisions and policies of the Law Society both by its members and by the public at large.

Perhaps my desire for openness seems a touch naive, especially coming from someone who deals daily with a university deliberative process the likes of which has not been seen since the municipal architects of Babel staked out the foundations of its most important civic structure. And I would have to concede that one pays a very high price for openness. Decision-making becomes infinitely protracted. It produces results which sometimes cater to the lowest common denominator of interest, rather than the highest principles. It invites rhetorical excess and engenders hostilities which may last well beyond any given issue. And finally, openness makes it difficult to run things on the basis of noblesse oblige, by subjecting to general scrutiny the sometimes unpopular decisions of elites who can afford to do the right thing because they have nothing to lose.

All of this is true. Yet I plead nonetheless for openness, for participation, for democracy, in the Law Society. I do so because I believe that this is the only way the Society can survive in the long run.

In a country which is becoming increasingly intolerant of power and privilege and secrecy in public government, the prospects are not bright for powerful and privileged and secret private governments. In a country where we increasingly expect to hold accountable those who rule us, sell us things or perform vital services for us, a Law Society which is accountable neither to its members nor to the public faces a future of recurring and

escalating conflict. In a country where we expect decisions to be made in a business-like way, with careful planning and the prudent expenditure of resources, there will be decreasing tolerance for unplanned, impulsive, inexpert decisions - however generous and sincere the motives giving rise to them.

I am greatly heartened by several recent developments in the administration of the Society: the reestablishment of a committee on research and development, the invitation to rank-and-file lawyers to offer their reactions to several proposed policy initiatives, the involvement of a number of nonbenchers in various committees. All of these are very positive measures indeed. But they are so far uncoordinated and ad hoc, and do not go to the heart of the deliberative process.

What the Law Society needs, for its own good, for the good of its members, for the good of the public, is new constitutional arrangements which permit debates to be conducted vigorously, decisions to be reached openly, policies to be declared in detail and change to be always a genuine option.

Let me now point to a coincidence: that same characteristic - openness - which is so much needed to invigorate the governance of the Society, is also the key to the ability of lawyers as a group to adapt to the new realities of professional practise.

Now, however, I am talking about a different form of openness, not openness in governance, but openness in intellectual style, openness about new forms of knowledge.

For a learned profession, the bar has always had rather an arm's length relationship with knowledge. For a long time, through the nineteenth century and well into the twentieth, while most professions were beginning to emphasize book knowledge in the preparation of their new members, lawyers continued to emphasize practical knowledge. While medicine and engineering and even divinity developed a learned literature, the legal profession continued to venerate the oral tradition.

And when finally the need for a legal literature became obvious, lawyers remained curiously ambivalent about how that need would be met. Some practising lawyers read books, it is true, and some classic legal texts are found in most law offices. But only a very few practising lawyers actually see themselves as producers of legal knowledge, and most become consumers reluctantly and only when confronted with the practical necessity to do so. And only the tiniest number of practitioners - almost none in fact - see themselves as sponsors of fundamental scholarship or patrons of serious works of legal theory.

Yet at the same time, it is becoming increasingly understood - even by lawyers - that law cannot exist as a system dominated by its own inner logic, indifferent to the society in which it

operates, unaffected by new ideas in other disciplines. No lawyer contemplating the politics of legal aid or automobile insurance, the social technology of Charter litigation or the macroeconomic context of tax policy can labour under any such illusion.

Nor is this simply an issue for the big firms on Bay St. Intellectual challenge is on everyone's agenda. The inner life of every law office will be transformed: real estate and commercial practises will have to deal with computerization; family law practises are doomed forever to grapple with law reforms which never seem able to overtake the changing assumptions of family relations; and new forms of professional competition will force even the most slumberous of general practises to sit up and take notice.

In the context of all this change - past, present and future - to what extent has the knowledge base of the profession changed? Not very much, I fear.

The law schools have tried to do their bit: a few joint degrees, a little interdisciplinary research, ritual nods at the beginning and end of courses to law's relation to social forces and to other forms of knowledge. However, all of this does not add up to an intellectual revolution.

And as modest as has been the restructuring of research and education in the law schools, the profession itself has yet to come to terms even with the need for new knowledge, let alone its expression. Lawyers still seem to feel that when they need to know engineering or economics, they can read up on it; when they need to prove social consequences, they can hold their noses and hire sociologists and statisticians; when they need a plausible theory to support their side of a public policy debate they can shift gears from what they do best - close analytical work - to more far-reaching, theoretically-grounded and integrative arguments.

These typical lawyerly conceits have to some extent disabled the profession, and interfered with its service to society and to individual clients. Worse yet, they have impoverished the lives of many highly intelligent and naturally curious lawyers, encouraging them to continue to work in a traditional legal style, and destroying incentives to seek the stimulus and challenge of the unfamiliar.

My plea for openness in the intellectual work of the profession can now be restated. I hope that the profession - and its new members especially - will not hesitate to accept a large and open view of what there is to know about law. I hope that gradually lawyers will come to inform themselves more fully about the entire range of intellectual insights which bear upon their individual and collective activity. I hope that they will accept

that they cannot resolve all problems within the narrow perspective of their traditional methods. I hope that they will be open to the assistance and participation of other knowledgeable people, with their own professional insights and skills, who can contribute so much to the solution of large and small scale issues confronting individual clients and the legal system as a whole.

And, most of all, I hope that all of these marvellously stimulating opportunities will occur within the professional careers of those who are graduating here today. As I said at the outset, there has never been a body of women and men better qualified for admission: they are ready for intellectual challenge. And they are ready as well to participate constructively in open and democratic processes of governance within the Law Society.

What they need, Mr. Treasurer, is the support, the understanding, the legitimacy which lies within the gift of the Law Society, and its leading members gathered here today in Convocation. I ask that you give them that support.

I thank you all for the indulgence - the openness - you have shown in allowing me to express once again my own peculiar views about law, lawyers, the Law Society and their collective relevance to our social, economic and intellectual development.