

DREAMS, VISIONS, SHERPAS AND THE LAW

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## DREAMS, VISIONS, SHERPAS AND THE LAW

### DREAMS ...

You had a dream. Those who cared for you, loved you and encouraged you, had a dream. If you and they had not had that dream, you would not be here today. It is not possible to survive Law School, Bar School and articles, without such a dream. The dream was that you would be a lawyer; that you would join an ancient and honourable profession, a profession that, traditionally, was one of the three celibate professions (which might surprise you) - law, medicine and the clergy.

### ... VISIONS ...

You are a person of vision. You not only dreamt of being a lawyer, you became one. Visions are dreams acted out.

The big question for you now is, what should be the content of your dreams and vision in relation to the professional life on which you are just embarking? What does it mean to be a lawyer on the verge of the 21st century? What are your responsibilities, privileges and tasks? What is the nature of a profession - in particular, the profession of law - and how do and should our responses to this question inform the dreams and visions that will guide our individual professional lives and our profession?

... SHERPAS ...

Knut Hammarskjöld, an international diplomat, in addressing an international assembly of aviation and aerospace lawyers some years ago, told them that:

"Lawyers are the sherpas of the new ideas for the next generation; they must not limit themselves to mending fences, broken in the past."

This is an interesting metaphor: sherpas are trusted, tenacious, skilled guides on the most difficult to climb mountains in the world; they are highly competent; they open up new terrain; they rescue people through use of their expertise; they carry the loads (burdens) needed for the survival of others; they work in a rarefied atmosphere; yet, their victories are comprehensible to everyone; they belong to a tradition and honour that; they have a reputation of integrity and being loyal to each other and to their "clients"; we imagine them as having, and indeed they do often have, great vistas (visions) from the peaks they conquer; the "hero" is often the person with whom they climb; they take others with them to enable those others to achieve what has not previously been achieved.

There are indeed many insights to be gained by comparing sherpas and lawyers. On what intellectual, political, moral and legal mountains will you be the guides?

... AND THE LAW

A. STRUCTURING DECISION-MAKING

(i) Role of Lawyers

Lawyers are trained to help in decision-making. Increasingly, our skills need to be used not only in an adversarial setting, but in structuring models for decision-making, which is not the same as developing a consensus model. Consensus may no longer be possible concerning many important issues with which we, as a society, will need to deal. We could consider the current controversy surrounding abortion as one example of such issues.

Structuring decision-making means that we need to help people to develop frameworks of concepts within which they can analyze their own approaches, values, attitudes and beliefs and those of others from whom they differ and, sometimes, with whom they strongly disagree. Structuring decision-making will help people to recognize the necessity for both substantive and procedural principles, and the difference between these, for example, the requirements of human rights and of natural justice, respectively; or the necessity to identify basic presumptions and to justify exceptions to these. It is, quite frankly, amazing how many persons in important decision-making positions are unaware of such

analysis and of how crucial it can be to acceptable decision-making and, consequently, to acceptable conduct. For example, the pioneers of leading-edge technology, whether it is in medicine, physics, genetics or molecular biology, need lawyers to assist them in structuring decision-making in these areas that cannot be avoided and which will address issues of critical importance to society. To quote Hammarskjöld, again, they need "... sherpa-lawyers to guide them towards summits of human achievement never reached before, avoiding the glaciers of inhumanity and the precipices of political short-sightedness ..."

(ii) Transdisciplinarity

I would suggest to you that part of our sherpa-lawyer role, if we are properly to carry forward new ideas to the next generation, will be to develop the ability to think and to act in a transdisciplinary manner. This means that we must learn to be able to deliver our expertise in law to other specialists and to receive their expertise and to be able to work with them to create an "integrated knowledge product" - something that goes beyond any one discipline or person and exhibits synergism: the whole is greater than its individual parts. This phenomenon can be called "transdisciplinary synergism".

In order to do this, you must understand well the basis of your own professional expertise and learn about that of others and

be able to identify important and relevant differences and similarities. In short, one has to work at working in a transdisciplinary mode, it does not just happen.

(iii) Conflict and Paradox

One could consider how medicine and law can work together in order to investigate features of transdisciplinary activity. First, attitudes are important. One physician, at the time, the President of the Association of American Medical Colleges, told a group of graduating medical students that: "We're swimming in shark-infested waters where the sharks are lawyers." Such attitudes and beliefs are not a good basis for transdisciplinary activity. Mutual respect and presumptions and projections of mutual integrity on the part of all participants are essential. The negative image projected in the remark quoted here is harmful to our perceptions of ourselves as lawyers and our profession, and to others' perceptions of us. But, it is equally harmful to our being able to work fruitfully with other professions and "vice versa". In short, both the source and the targets of such remarks are harmed by them.

It can provide insights and lessons to ask: Why has there been conflict between physicians and lawyers and what should be our contribution to resolving this? In doing so, we will contribute, not only in any immediate situation with which we are

dealing, but also, much more broadly, because we will develop the methodology that will become an essential tool for resolving conflicts of cultures, which are inevitable in a pluralistic society.

It has been suggested that the antagonism many physicians feel toward lawyers is the result of fundamental disagreement about five issues:

"the nature of authority, how conflict should be resolved, the relative importance of procedure and substance, the nature and significance of risk, and the legitimacy of politics as a method of solving problems".

D.M. Fox, "Physicians versus Lawyers: A Conflict of Cultures", in Dalton et al., (eds.), "AIDS and the Law", Yale University Press, 1987.

Each of these issues, all of which are related, deserves full analysis which cannot be undertaken here, but of which you will almost certainly need to make yourselves aware in the course of your professional lives.

Fox examines how the differences between law and medicine, that he has identified, operate in the AIDS situation. He describes AIDS as "a new opportunity for cooperation and a new occasion for conflict between physicians and lawyers". Which of these it becomes will depend, I suggest, on how well we, lawyers, can structure the very important decision-making involved, because

a large part of the task of such structuring will necessarily fall to lawyers and only this will enable participants in that decision-making to have the widest and deepest view of the issues raised. It has become almost a truism that how AIDS issues are resolved will have a major impact on our society as a whole.

(iv) "Truth"

The "bottom line" is that often with controversial, societal issues, of which AIDS issues are one group, there is no "truth" as such. There are different lenses or different perspectives that we can have on the "truth" and sometimes our different lenses will throw up what appear to be conflicting and hence paradoxical results. This can be best understood by thinking of an analogy with the quantum and wave theories of light. Light can be "seen" either as particles or waves depending on which theory is applied. The theories are inconsistent, but neither is "wrong". We, as lawyers, have a major role to play in evolving structures to accommodate paradoxes raised by varying responses to societal issues. It is likely that the delicate fabric of which our society is composed, especially its ethical and legal "tones", may well depend upon us being able to do this.

Lawyers, more than any other profession, are trained to work with knowledge and material with respect to which they are certainly not experts (in fact, about which they may know little

or nothing, at least when they commence an "involvement"), but they can structure the relevant knowledge and information in such a way that others, including experts from various disciplines, can work with it. Court cases, which involve a range of expert witnesses, display this phenomenon. We need to make our talents in this respect more widely available to enable them to be used to pre-empt problems, which is the primary function of law, rather than seeing our role primarily as to litigate problems. The latter is law's secondary function, which operates only when it has failed in its primary function of conflict and problem avoidance.

B. NEW IDEAS

I can speak most easily from my own background in medicine, ethics and law, in identifying some of the new ideas, and the analyses, arguments and approaches that must surround them, that we, as lawyer-sherpas, might be carrying into the 21st century. Issue-raising areas will include: provision, allocation of and access to health care; rights and claims of an aging population; human embryo research; fetal tissue transplantation; the fetal tissue industry; designer fetuses; access to novel therapies; euthanasia; patenting of new life forms, including human ones; genetic research, including manipulation of the human "germ cell" line; ownership of body parts used to produce valuable drugs

(e.g. of cancerous cells removed as therapy, Moore case, pending, United States Supreme Court); shortage of human organs for transplantation and their allocation and increasing their supply; AIDS; etc. There are many aspects of these and like matters, that need to be explored, but we also need to recognize that many of these issues - query problems - are the result of our successes. Failure, like dying, is often less complicated to deal with and less expensive.

One of the most telling indicators of our success is that, in less than the last 100 years, the average life span in Western countries has increased from 47 to 75 years. This has given rise to problems raised by an aging and aged population and to new ideas of "squaring the morbidity curve" (persons should be reasonably well or dead) and to "setting limits" (life-prolonging health care would not be provided after a certain cut-off age). Should we be sherpas of such ideas?

Although some would query whether they were successes, we can now also accomplish non-natural events - events that are not possible in nature. The first of these, although we do not often, at least any longer, think of it as such (we so quickly lose our sense of wonder) is organ transplantation. Others, only some of which we still wonder at, include: cryopreservation (freezing) of human gametes or embryos so that persons' reproductive life spans, or a couple's combined reproductive life span, respectively, can

exceed their chronological ones; a grandmother gives birth to her grandchildren; identical twins are born at widely different times; a woman gives birth to her own identical twin; a woman gives birth to a child to which she is not genetically related; a man gives birth to a baby; neither a woman nor a man is necessary for gestation - we will have developed an artificial placenta (ectogenesis).

How will you handle such events as the lawyers of the 21st century? Or do you think that they are irrelevant to you, because, after all, you are going to be dealing with nice, old, friendly, familiar corporate law or tax law? But, even these fields could become involved in such issues. For example, the fetal tissue industry involves corporate law, or it has already been suggested that a frozen embryo is a child for the purpose of child dependent tax deductions. There is, however, a deeper reason why issues such as those raised above are important to all lawyers. They have caused a profound change in the law, which will have wide effects far beyond these issues or these or other avant-garde areas of law. I suggest that, very recently, the need that has arisen to deal with such issues has changed and, to a much greater extent, in the future, will alter, how we, as lawyers, analyze situations. At first glance, this change may seem very minor or even no change at all. In fact, it is very major, and has widespread and deep ramifications. The change is from analyzing from law to ethics, to analyzing from ethics to

law. We will now be more inclined to ask what are the ethics of this situation and does the law comply with these and, if not, what should the law be. In the past, we have worked primarily from the law and simply hoped that it conformed to the required ethics.

In the last month, Carswell of Toronto published the first issue of a new loose leaf publication, "The Corporate Ethics Monitor". Companies are intensely interested in how they compare with other companies, in terms of the ethics of their operations. Large financial institutions are interested in how ethical a given company is, because more and more persons and institutions will not invest in companies unless they are "certified" as ethical. Such an articulated, express interest in ethics is new and reflects, I suggest, the shift from law being primary to ethics being primary, that I identify above. There is a danger in this "public" shift to ethics that merits noting: ethics must not become a rubber stamp of acceptability.

Could it even be that we might be able to analyze the Canadian Charter of Rights and Freedoms as a statement of the fundamental ethics on which our society is based and which we regard as so important that we enacted those ethical principles as law? It is interesting to contemplate how such an approach might affect our interpretation of the Charter.

There are many areas which should be proposing marriage to ethics and law, but one major area, where the partners should no longer "live in sin" (although that is better than not living together at all), is ethics, law and the environment. We may have no world in which to be ethical, and to practice law, unless we each take personal responsibility for the many issues, both micro and macro, that need to be addressed to save our micro and macro environments.

### Conclusion

In conclusion, to return to my original metaphor, I would make a wish for you:

May you be wise, courageous, compassionate and imaginative lawyer sherpas of the new ideas as you help to lead our Canadian society into the 21st century.