February 22, 2001

THE VIRTUE OF DISAGREEMENT

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REMARKS TO THE CALL TO THE BAR CEREMONY OF THE LAW SOCIETY OF UPPER CANADA

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FEBRUARY 22. 2001

Treasurer, Benchers, Colleagues in the Law, and Guests:

I am more grateful than I can say for the great honour that you bestow on me today. I thank you for the kind sentiments expressed in the citation.

It gives me great pleasure to think back to those days ten years ago in the Law Society. Above all, I remember the dedication that the benchers and staff always showed to the public duties of the Law Society. That commitment to the public interest was exemplary then and I am well aware that it continues to flourish in the Law Society in these days as well.

I recall happily the debates in the regular convocation meetings of benchers. Since it relates to the topic I wish to address in a moment, let me say that I especially cherish the many occasions of vigorous disagreement and dispute. I was often engaged in those disputes. Like others in debates, I was often assured that I was wrong. Indeed, once I had to concede to an opponent that at least one of us did not know what I was talking about. Those lively exchanges, those arguments, always helped to make things better.

I am particularly grateful to be invited to address the call to the Bar this morning. Everyone knows that the call to the Bar is a notably happy and auspicious occasion. I am pleased to take part in this ceremony and I extend my congratulations to all who are now to be admitted to the responsibilities of lawyers in this province.

En ce jour heureux, il me fait grand plaisir d'accuellir et de feliciter tous les nouveaux avocats et nouvelles avocates qui sont appelés au jourdhui au barreau. Et felicitations aussi a toutes vos familles.

And now I come to reflect on what I want to call, provisionally anyway, the virtue of disagreement. We all know that, at least on this side of paradise, disagreement is endemic. Not everyone, however, is professionally occupied with the business of disagreement. Not everyone is, but lawyers certainly are. Whether they are arguing in court, negotiating contracts, or advising clients, lawyers work in the midst of disagreement; they mediate disagreement. Indeed, lawyers and judges, all of us, get very accustomed to disagreement. It becomes a natural habitat, our milieu.

But the mediation of disagreement is not an easy business, as is well known. In our legal tradition, we rely largely upon the adversarial system, which requires each of the parties to make its case to the court. That system comes under attack from time to time, from the outside, and also receives criticism from the inside. It is certainly tough on the parties themselves, who can suffer litigation fatigue, or worse.

Lawyers know very well how demanding the effort is, day after day. They have to contend with the clients and the witnesses, and with each other and with the judge. Moments of exasperation are not unknown. We know the story of the English judge who said, after counsel's careful explanation of a subtle point, "Thank you for that submission Mr. Smith but I must say I am none the wiser", to which Mr. Smith of course replied "That is as it may be, my lord, but I trust you are better informed".

Even judges wonder why it can be so tiring sometimes listening to people arguing all day long. A colleague once told me there is a passage in Homer that goes something like: "It was the hour of the day when the sun is low in the sky and all those who make their complaints in the court have gone on their way and silence reigns throughout the halls of the palace". My fellow judge thought things hadn't changed much in the almost three millennia since Homer's time.

Of course, we are right to be troubled and suspicious about all the disagreement around us, inevitable as it is. We know what the wages of disagreement are: they are rancour, hostility, hatred and, on a larger scale, war and devastation. Instinctively, we can accept the principle: no more disagreement than is reasonably necessary. If a dispute can be settled, let it be settled, and the sooner the better. Lawyers today are engaged in ever more sophisticated approaches to dispute resolution, to avoid resort to court proceedings, and so are the courts themselves with the assistance of the Bar. The vast majority of lawsuits are settled without court hearings. These alternate dispute resolution procedures are a most welcome development.

But that still leaves lots of cases in which parties who disagree are going to insist on having their rights adjudicated by the court, for one reason or another, and if there is a genuine issue between them, it is fair enough they should be able to do so.

The inevitability of disagreement assures us we will have lawsuits. Disagreement is the fodder of the law. We cannot avoid disagreement, so we must instead ensure that we make a virtue of its necessity. A lawyer tells me that the Latin root of the word "argue" is probably related to that of the word "silver" and it means "to polish". I can see that derivation. For it is not inevitable that we shall realize the virtue of disagreement. To do so, disagreement must be given shape and made intelligible, molded by reasoning so that it calls for a response and is fitted to respond; that is: so that it is made responsible. And that fashioning of disagreement into coherent, responsible form is accomplished in one major way: through the polishing of argument; the effective presentation of fact and law. Polishing, as in the case of a fine tool, perhaps, or a treasure, so that its strength, its utility, its integrity of form, its real worth is made to glisten, to shine. So that, in that fine legal word, its cogency, its compelling soundness, becomes apparent - so apparent that the judge can see it.

In that idea of disciplined argument lies, I think, the key to the virtue of disagreement. In one case before me a few years ago, the disputing parties were all financially interested in an entertainment establishment whose name included — fittingly enough as it turned out from the parade of interesting witnesses — the word "saloon". As I left the courtroom after one of the many days of argument, I had a brief recollection of an old movie about the Wild West. The characters left the dusty street behind them and strode through the swinging doors of the saloon to find, behind the bar, waiting for them, the judge. He was the legendary Judge Roy Bean, who styled himself the "only law west of the Pecos River". The judge was there in his courtroom. The parties would be heard and there would be law, well, at least Judge Roy Bean's law, and there wouldn't be any shoot-out in those dusty streets. And so it is here, I thought: we're in the court of law and we will have argument from all parties. And that argument will give the dispute its proper shape, so that it can be decided according to law.

Thus argument, which gives proper shape to disagreement, is the genius of the judicial system. Argument has frequently been given a bad name. In ancient Greece there were those verbal combatants, the Sophists, whose reputation never recovered, at least in the lectures I took at university, from the philosophers' criticism of their practices, which were disdainfully described as making the worse argument seem the better. And argument can be destabilizing. Many institutions in the course of history have enforced uniformity of opinion and stifled dissent. But the law looks to the process of argument: the adversarial advancing of evidence and law to get to a solid understanding of the case. And without wanting to involve myself in the dispute between Plato and the Sophists, let me say that the counsel I want to hear are the ones who can present the case as well as it can properly be presented, who will polish it so that I can discern its merit. Few things are more disturbing for a judge than those moments when you fear counsel is not putting the case forward at its best. Few moments are more gratifying than the exchange with counsel who knows the strength of the case and presents it at its full potential; not more, but not less.

The judge who hears the argument may or may not interject during the submissions but he or she is a party to the argument too. As the judge, I am bound to be

engaged in a mental argument with counsel, and also with myself. As I work through the process of making the decision, I have to keep asking myself of each tentative determination I make: could I more properly decide the matter the opposite way?

The invigorating force that I am attributing to argument in the law is not restricted to the exchange between the lawyers and the judge who hears them. It is stimulating to think of the process of judicial appeal and review as an extension of the activity of argument all the way up through the course of the legal system, to its highest reaches. There must be very few judges who do not know how it feels to have a decision overturned on appeal. It is a proper hazard of our office.

Judges must be prepared to reverse the decisions of other courts on appeal when they find that is what the law requires. Perhaps this practice encourages a somewhat critical attitude on the part of judges about their colleagues. The story is told that, at the time of Queen Victoria's jubilee, the English judges could not agree to begin their salutation to her Majesty with the expression of collective humility: "Conscious as we are of our shortcomings". One of the judges suggested instead that they say "Conscious as we are of one another's shortcomings". No doubt that alternative made more sense to many of them.

Of course, it is disconcerting to be reversed on appeal. One judge told me that his motto is "overturned but unrepentant", perhaps recalling the truculence of Churchill, who said (in a quite different context) that he had spent the day eating his own words and had found them a most nourishing diet. It has been said that judges go through three stages of reaction to being reversed on appeal. The first is chagrin, the second is annoyance, and the third is indifference. The judge who was kind enough to tell me this had just finished overturning a decision of mine. He didn't tell me what stage I should have reached by then. My point here is that the appellate process can be viewed as another level of argument in which the decision from the court below forms an additional voice in the argument, and the process continues. We are all in the argument together, and we can only do our best.

With a system that has argument at its heart, how can things ever be made final? Yet the finality of the law is recognized by all. It is the source of the law's powerful discipline upon all of us, including all who are engaged in its work. The philosopher Jacques Derrida, whose ability to discover ambiguity and indeterminacy is widely acknowledged and acclaimed, has written about what he calls "the force of the law" and what I think of as the special implacability of the law. The law will take its course. It will come to a final conclusion. There will be an order from the court, and it will change things. That is a daunting thought, and so it should be.

Historians, and perhaps other expert professionals, remark on the finality of the law, sometimes with bemusement. The historian knows that his or her conclusions are provisional. In the light of future experience, opinions may change. But the courts have to go on what is known now and cases have to be decided and those decisions must, subject to the rules for reopening decisions, finally become final.

That does not mean that the larger argument of the law comes to an end. Issues that arise in one case arise again in other cases, affording different perspectives on a principle previously stated, showing ways that the principle may properly be extended or restricted in other circumstances. And today's dissenting opinion may become tomorrow's majority decision. Over time, the process can yield significant changes in the fabric of the common law. I may have been inattentive in law school in the 1960's, but I don't recall much mention, if any, being made then of fiduciary duties in business dealings. Now, almost forty years later, it often seems as if some lawyers think of little else.

We would be mistaken if we thought of this multi-voiced argument over time as principally a game. It has some similarities to a game, certainly. And also to a conversation, a highly disciplined and mutually respectful conversation.. But because this activity of argument regularly concludes in final decisions, it carries a burden, the burden of doing justice. The philosopher of law Ronald Dworkin is said to hold, in respect of U.S. Constitutional law, that to each legal problem there is only one right answer. For most of us engaged in the work of the law, I think we suppose there probably is one answer that does the greatest justice and we hope we are on route to it with the assistance provided by the arguments of counsel. Ronald Dworkin has said that the law works itself pure, but we do not believe that result is automatic or inevitable. So we may regard that prospect as a continuing hope, the hope for justice. What constitutes justice is itself a matter of enduring dispute. But we are surely right to believe it can only be achieved through law. So we properly do our work in the law in the furtherance of that great hope.

This difficult business of argumentation is as important as it can be, but there are excellent resources at hand. Some of these resources are as basic as human nature, or the best aspects of human nature. Colleagues of mine commiserated with me when they heard that a long trial I was hearing was growing even longer than expected - indeed it eventually lasted 92 days in the courtroom - stretching over a period of eight months. I realized that what lightened the task for me was that all counsel in the case acted throughout with a buoyant and generous sense of their role as counsel. They worked hard but they had a good time. They never let their guard down, and they were assiduous in their service to their clients' interests. But they managed to conduct the trial, and themselves, with proper respect for their opponents and the court and with reliable good humor. They knew their task, they knew their law, and they knew how to help the trial process and how to help the court. What a benefit that was for me. I was grateful to them, and I said so.

Every day, all day long, there is more than enough disagreement to go around. No one should expect to bring it to an end. It is not for us to do that. The work we are given is to deal with disagreement through the resources of the law, in order to reach just results.

So I welcome you as you now join in this work. Lawyers are called to the mediating of disagreement, a service that is desperately needed at all times. It is an

undertaking for those who will seek to realize the virtue of disagreement, through the discipline of good responsible legal argument.

A few weeks ago, dealing with a heated dispute among a group of lawyers, I had what I thought was a bright idea about the way to resolve their differences fairly, to the reasonable satisfaction of all concerned, and I suggested it to them. "Oh no, your honour", one of the lawyers responded immediately. "That would just make a bigger mess".

I think that response offers a good admonition to all of us. Let us take care not to make a bigger mess. Each time we have the chance, let us try instead to make it better.

Thank you.