

BRENDAN O'BRIEN TRANSCRIPT

BRENDAN O'BRIEN INTERVIEW #1

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INTERVIEWER: ALISON FORREST

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This is Alison Forrest, June 21st, 2004. First interview with Brendan O'Brien.

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AF Today I'd like to ask you about your interest in history. You studied history at St. Michaels' College at the University of Toronto when you left school, is that right?

BOB That's right.

AF And what year was this?

BOB Well, I started in the University course in 1926 or '7, I guess it was. And I took some of my lectures at St. Michael's College and some at University College, including one of the options that was history, which I could take there, that's modern history at University College, and opted to take that course and found it quite interesting. It included, I must say, that I was never much taken by Ancient History because mainly it was badly taught in school, and didn't catch my fancy. But modern history was well taught, and I'd always taken an interest in it, and looked up aspects of it in my research, and life goes on, and I still have an interest in history.

AF So what exactly was modern history?

BOB Well, modern history, for example, at U of T was, for example, one year was almost totally devoted to the French Revolution, and all sorts of detail about it that I didn't know before.

AF So it wasn't ancient, it was modern?

BOB It was modern. I didn't take ancient history at U of T, I took modern history. I had taken ancient history previously, you see, at the St. Michael's College and found it pretty dull, not very exciting. But when I got into the field of modern history it leads in all directions, of course, and take my interest in writing *Speedy Justice*, for example. My first interest in this subject simply came from the fact that I was aware that in the year 1804 this ship had disappeared and on board were a number of the highest people in the legal profession, including the judge, prosecutor, defense counsel, including a prisoner that they were taking for trial when this was lost. And I thought, well, as I say in the introduction, I would do a, make a list of those that were on board, and how it happened, and disappeared and so on. But as I got into the story, I found much more of interest than the mere loss of the ship and the legal people and, to give you an example, I didn't know until I'd researched the subject, that the governor, Lieutenant Governor Hunter, was the central figure of the loss of the ship. And if you look at the back of the book you'll see a petition, appendix following page 135. It's an appendix, and Thomas Paxton junior, or at least the petitioner, Thomas Paxton junior, whose father was the captain of the *Speedy* and was lost on the ship, disappeared, and he says that [reading from page 137 of the text]:

[I]n the fall of the year 1804, your petitioners father was directed by the then Governor of this Province, Lieut General Hunter, to embark the judges and officers of the Court going on the circuit to open the assises in the district of

Newcastle, against which he remonstrated alledging the utter unworthiness of the vessel to go to sea:

That being peremptorily ordered by General Hunter to proceed he embarked the Court and proceeded on his voyage as directed: but from the time of his leaving the port of York no tidings were ever heard of the vessel...[sic]

and so on. So that it became apparent there that the Lieutenant Governor was the central figure. Now, when the ship disappeared, there was a suggestion made in the local press, in York, that there should be an investigation, but none was conducted, obviously because had an investigation been conducted, Lieutenant Governor's interest in the loss of the ship would have been revealed. Now, he died a year after the ship disappeared, and when he died, as usual, he was remembered by people of Upper Canada: John McGill, for example, on the Executive Council, "my much lamented Patron." But others remembered him differently. Hannah Jarvis wrote to her father [reading from page 111 of the text]:

I think the Ministry must have scraped all the Fishing Towns in Scotland to have met with so great a devil ... the wretch I am told half an hour before his Death, Damned every one around him in his usual manner ... a Tyrant in all his Departments -- hated by all -- except a few Lying ... mischief making sycophants and dependants.

That's how she described him.

[laughing]

BOB And Lieutenant General Hunter was the central figure in the loss of the *Speedy*, but that had never been revealed until we put it together in this book. And the pieces of the picture, let me give just one example to show you. [pause] Oh yes, the ship sailed from York for Newcastle which is near what's today called Brighton, on the north shore of Lake Ontario, and it came within sight of the port, in fact was about to enter the harbour when a strong north-east wind blew up and swept it out towards the lake. And this was

towards evening that this happened, and it disappeared into the darkness, and although they lit a bonfire on the shore hoping the captain would be able to get it under control, and get it back in again, but it was never seen again. But, in a letter, which is in the book, the, when the evidence comes out, the ship on leaving for Newcastle ran aground and it was delayed departing two hours until they could get it freed from the bottom again, and, as it turns out, if it had not been for that, it would not have been lost, because it would have got there before the storm broke. Just an example how little, we found that in a letter written some fifty years later from a clergyman to Sir John Beverley Robinson who had sought information about one of the victims of the *Speedy*, Mr. Justice Cochrane, who had been a school mate of the clergyman in the Maritimes and he, in that letter, he reveals the fact that the *Speedy* lost two hours in the harbour aground before it sailed, and, as it turns out, that's crucial to the story. If it had not been for that, it would not have happened. And these are the sort of things you come upon quite by accident when you're reviewing material for the book.

AF So, where did you look for material for the book?

BOB Oddly enough, that letter was found by an archivist of the Law Society who I told I was going to do the book, and said she'd find out what she could and she found that letter; where she found it I don't know. But she gave it to me.

AF Right. What about the other records? Where did you look for those?

BOB Well, I looked everywhere.

AF And where was that?

BOB In the archives in Ontario you find all sorts of letters and things like that, you've got to go through them all, hope you find something, and you usually don't, but

research for history is fascinating. It goes on and you dredge through a great deal of stuff you find useless, but then you find some pieces you can use. That's the way it goes.

AF Exactly. Exactly. Were all the records in Toronto, or did you have to go elsewhere?

BOB I think I went to Ottawa.

AF To the National Archives?

BOB Some records in Ottawa.

AF At the National Archives?

BOB Yes. But I'll tell you, in this book [indicating *The Prettiest Spot in Muskoka*], the second one I wrote, the reason I wrote this book was somewhat the same as this one [indicating *Speedy Justice*]. This a story of the town in Muskoka, which until 1915 was one of the main principal towns in Muskoka. It had two steamships a day, it had a post office, it had a stagecoach which connected with the railway, and one of the largest hotels in the lakes. And in 1915 the hotel burned, the post office was closed, steamships stopped running there, stage coaches were stopped, and gradually it became a ghost town. But I knew about it, because these pictures, these are my parents here, and that's my eldest sister.

AF On the cover, yes.

BOB That's on the cover [of the book]. That's two years before I was born [i.e. taken in 1907], when the town was there, that's one of the largest ships on the lake on its maiden voyage coming into the Port Cockburn.

AF And what is the name of the ship?

BOB The *Saggamo*.

AF The *Saggamo*.

BOB And then the *Dora* [?], which is the second largest, was already there and this the-- [pause] Now it's nothing but a ghost town, and I thought, because I knew about it, my parents told me much about it, that if I didn't record it, it would be totally lost. So that was why I say in the introduction, that was what prompted me to put the book together, and I gathered together enough to make a rather short story about it. But it's all history.

AF And when was this book published, *The Prettiest Spot in Muskoka*?

BOB It was published in--

AF It was published after *Speedy Justice*?

BOB Yes, after. Published 1999.

AF And *Speedy* was 1991, I think.

BOB *Speedy Justice* [looks at publication date]?

AF [Looking at publication details] 1992.

BOB 1992. Well, *Speedy Justice*, as you know, was the Osgoode Society, so that I got assistance, editorial and otherwise. In fact, there's a funny anecdote about *Speedy Justice*, which I'll tell you. I was told about six months ago that they were collecting historical background for the workings of the Osgoode Society and wondered if I might have anything I might have of interest, by way of anecdote or otherwise, they would like to have it. So I told them, I wrote back and said that when we were doing this book, the editor that had been appointed by the Osgoode Society was Curtis Fahey. And Curtis Fahey and I had some very spirited arguments about the story, because he wanted to include much more about the early history of York than I did. I wanted to stick with the

loss of the *Speedy*. And we got into some really stiff arguments. Finally, we went to Peter Oliver, who was the editor-in-chief, and between the three of us we sorted it all out. But, about six months later Curtis Fahey telephones, and says, “What’s this I hear about you wanting me to be editor for another book you’re writing?” I says, “Well, there must be some mistake.” He says “My son tells me he got the message from you this morning.” And then he says, “Wait a minute, I just remembered today is April the first!”

[laughing]

BOB His son had picked up on this, knowing that, knowing that would be a most unwelcome assignment for his father.

AF So, how long did it take to write the book, in the end?

BOB Oh, that took me about a year. [Pointing to *The Prettiest Spot in Muskoka*] This one [indicating *Speedy Justice*], maybe a year or two.

AF Research and writing, both, took a year?

BOB Yes.

AF That’s remarkably quick. Could you tell me something about the title of the book, *Speedy Justice*?

BOB The title?

AF Yes.

BOB Well, I’ll tell you, the ship when it was lost, was carrying to his trial a native who was accused of murdering a white man, Ogetonicut was his name, and I say that what happened, not only did he get his fate on this trip, but the judge, and the prosecutor, and the defense, they were all lost. This was, and somebody picked up on

this, that I put this in the book, and let's see if I can find it here... some American writer.

[Looking through the book] Oh yes, just read this bit here [points].

AF [Reading from the text at page 110]

The last words belong to the Reverend Peter Roots, an American Baptist missionary active in Upper Canada. He informed the Massachusetts Baptist Missionary Society in April 1805:

“On Lords-day, the sixth of October last, a number of persons, among whom were some of the principal characters in this country, went on board a vessel at York, bound to New-Castle, in another county, to attend a court there; but the vessel, with all whom it contained (I think twenty-seven persons) was undoubtedly buried in the bottom of the lake; but nobody knows the spot where. O how sudden the change! Instead of attending an earthly court, they were summoned before the bar of God! How important that we should remember the words of Christ, ‘Take ye heed, watch and pray: for ye know not when the time is.’”

BOB See [laughing] that's the speedy justice. They got justice of a different kind!

AF Yes.

BOB That's where I got the name.

AF That's page 110. Thank you.

BOB That's at page 110, do you want to note that?

AF Yes, thank you. Now, I also wanted to ask you about different themes that emerged in the book, that we haven't talked about so far. One of them is the different understanding of the justice system that First Nations' people and Europeans had, and I was wondering what it was about this theme that interested you?

BOB Well, in order to write the book, I had to research the history of law of native people to know about the trial and in order to, perhaps if you have perhaps not read the book-- The accused a man named Ogetonicut was charged with murder and killed a white man, and there wasn't any doubt that he killed him, well it might have been

manslaughter, they were in a fight when he killed him, but he claimed that his brother had been killed by a white man, and that the governor, that's Hunter, had done nothing about prosecuting the man who killed his brother. So finally, and he waited for almost a year, he took it out on another white man. And that's how this death charge arose. But you see the background to this, is that the white people had advised the native people long before this happened, that they would make good any, in other words if the native people made good any breaches of the law by their own people, they would make good breaches of the law by white people involving natives. In other words, the failure of the governor to do anything that led to this killing and to this charge, and to the loss of the accused and the court that was going to try him on board the ship, so they all went-- But I had to, I didn't know much about native justice, but I did have to research it to find out, and I've written about it in the book as to, for example, how the jury would be charged by the judge in the trial, if that had taken place, and whether it would have been a defense to say that he was trying to make good the failure to punish the man who killed his brother, if that would have been a defense. And I speculated that in the book, and this involved a fairly in-depth study of the native justice. But I only put a small bit of it in the book, because, only enough to make it intelligible.

AF There was another example in *Speedy Justice* of another well-known native man, I can't think of his name, his son was also charged but charges weren't pursued. So there seemed to be some...

BOB Yes, you're quite right. His picture may be [looking]—

AF You seemed to be suggesting [in the book] that different people had different justice meted out to them, depending where they stood socially. So that the chief's son—

BOB Yes, here [indicating in the book]. Yes, I think I mentioned that. Joseph Brant, the great Mohawk chief, and I describe, tell about them. Somebody killed his son, or his brother, or something, I don't remember the details now. But he was mixed up in a fatal charge which I don't think there was any prosecution for, at least I don't think it went to trial, but there was a good deal of [pause] sort of back and forwards as to prosecution of that kind of case.

AF Right. So, you said that prior to this, you didn't really have a great deal of knowledge about this area?

BOB I had practically none.

AF So you didn't practice in the area?

BOB There's something about Chief Justice Osgoode, too. I think that may be in the book. I think I saw it here... [pause] Chief Snake case, the Perrish Montour case: remember that? Those are both mentioned here. [reads from text at page 44]

On the 25 June, 1792 Chief Snake met his death at Kingston in an altercation with soldiers of the 26th Foot [regiment]. An inquest by Coroner John Howard certified that the Chief had been willfully murdered and that later evidence 'strongly induces a suspicion that five persons ... are guilty of the said Murder. On the 12 July acting governor-in-chief Alured Clarke reported the matter to Simcoe, 'I trust that summary steps taken by the Government to bring the offenders to condign punishment, will calm the wrath of the friends of the deceased, and that as they seem already satisfied with the honors paid to the memory of the Chief, no evil consequences will arise.' On the 25 July Joseph Chew wrote from Montreal to Alexander McKee, the deputy superintendent-general of Indian affairs, stating that 'I have heard the Missisagues intend Coming here with their Complaint on Account of the Chief who was killed at Kingston, I have wrote to Lines to stop them of he Can, as their coming here will be attended with much trouble...' On 29 July Simcoe wrote to Clarke to advise his that two soldiers had been committed for trial, 'and I am sorry to say there is little doubt of their guilt and conviction.'

When Chief Justice Osgoode found out about the case and realized that he might soon have to sentence two soldiers to be hanged, he communicated with Simcoe in a letter marked 'Private.' Expressing his concern about the upcoming trial, he stated that 'from what I have heard of the Evidence ... it is probable that

one or both may be convicted.’ He then reminded Simcoe that he had the power to grant respite in case of conviction and also that ‘latitude is given to the Governor’s Discretion in Cases of Conviction for a Murder.’ Osgoode wanted Simcoe to be ready to act because ‘by Law in Crimes of this sort Execution must take place the day next but one to the Conviction.’ This communication between the chief justice and the lieutenant-governor before the trial had taken place can be understood if not condoned because of the speed with which execution would follow conviction. But as it turned out, the precautions were unnecessary. As the historian W.R. Riddell recounts: ‘The Court of Oyer and Terminer and General Gaol Delivery came on, Thursday, August 23rd, Chief Justice Osgoode presiding. William Robertson and one Fraser, accused of the murder of the Indian, were prosecuted by [Attorney-General John] White, as was William White accused of stealing a sheep from the commodore. All were acquitted.’ In a footnote Riddell adds that the accused pleaded self-defence and that ‘it was probably a drunken brawl.’ [sic]

AF And what page is that?

BOB But there’s quite a little bit of Indian—

AF Sorry, what page is this?

BOB That’s at page 44.

AF Thank you.

BOB It’s rather unusual to find that the judge communicating with the prosecutor before the trial to be ready to grant respite.

AF Yes, exactly. Another theme in the book, which we touched on earlier, is the relationship between the justice system, administration, political structure and individual personalities. You were looking at the interplay between these in the book.

BOB Which question are you up to? [pause] Well, the reason it was relevant to the book, was because the *Speedy* was lost carrying this native person to his trial, which never took place because he was drowned, but you had to see why he was being tried, although he claimed he was led to kill this white man because his brother had been killed, and the governor had done nothing about it. So I had to get the background, understand?

AF Yes.

BOB Well, this next item here [asking him to comment on the importance of keeping historical records] about keeping records. Well, that's, perhaps, self-evident. If you can't have records to research at archives, you lose the items, it's lost to posterity, that's all if you don't have it, a record of some sort.

AF I was wondering about the value of keeping records: if you could put your hands on some missing records when you were writing the *Speedy*, I was wondering what they would have been? In many ways—

BOB Well, I did speculate in the book, if the wreck of the *Speedy* was ever found, since it was on the way to the trial when it was lost, that no doubt the records of the charge would have been on the ship, in a sealed box which would survive the water damage, and maybe if we found the wreck, even if we find it today, we might find something in the records that was interesting, because it's now two hundred years since it disappeared. But I think it unlikely that any legible records would be found, but who knows?

AF Yes, you never know. Well, if we could turn now to your other book, *The Prettiest Spot in Muskoka: Port Cockburn*.

BOB Oh, yes.

AF You were talking about the photo on the cover of the book earlier.

BOB Yes.

AF You went there as a child, or—

BOB Yes. My parents, father and mother, they built a summer cottage in Port Cockburn in 1905, and I was not born until four years later. But from when I was born

until we left there in 1921, I went there every summer to Port Cockburn. And then there was a period when we rented places down the lake, but then in 1938 I bought this island here in the corner there [pointing to the top left hand corner of the books' cover photo] which I still own, and we still go there, so that we've been going to this area ever since. But Port Cockburn simply doesn't exist. This big boat house is gone, as is the wharf and it's, ever since 1915 it's gradually disintegrated and disappeared.

AF Does the island [you own] have a name?

BOB My island? Burnt Island.

AF Burnt Island?

BOB Burnt Island. Yes.

AF And does anyone else in your family go there: your brothers and sisters, do they go there?

BOB Oh, yes. We all go there. And we have a house and a boat house on the island, and we have telephone and hydro, and so on.

AF Do they have their own houses there?

BOB No, it's just the one house. And the funny thing, the story of the island: I bought this island for \$800, it's thirty acres, and today it's now doubt worth several million.

AF I would think so. And this was in 1938?

BOB 1938 I bought it. The man that I bought it from told me he was sick and tired of paying taxes on it. I says, "What are you paying?" He said, "\$25 a year." So I offered him \$800, and he took it!

AF Is there anything else you'd like to add about the book?

BOB No. Except that in the introduction to the book, I say why it was written. I say [reading] “Since Port Cockburn as a port has now ceased to exist, the Summer House Hotel is just a memory, and the time has come to preserve for posterity what I know about this era in this part of Muskoka.” And I say my mother had a very good camera, and so on, so that a lot of her pictures are in this book, and [pointing] that’s a picture of me on the family cottage in 1911. But the historical prompting is what is interesting, I suppose, from your standpoint, but I felt it, if I didn’t write this, nobody would. Because my father and mother have gone, and my older brothers and sisters have not shown the same interest in it. That’s lead to this book being written.

AF Yes. Just to go back to your formative years: your father was an Irish immigrant, so did you ever take an interest in Irish history?

BOB Oh, yes.

AF Did you publish anything other than these two books?

BOB No, I never did. But my father was a very enthusiastic Irish historian, and his father before him. They were, as you perhaps know, the Irish were at odds with the British over the history of Ireland. But, in this book there’s one of the letters from Alec Fraser to my father, he has an Irish joke in it. And the joke I incorporate into one of the chapter headings. It’s called [reads] “An Irishman drowned in the Clyde, and all is well.” That’s [pointing] the town crier of New Glasgow. But I haven’t written anything about Ireland. I know a lot about it. Perhaps some day I should, but I...

AF Your next project? Did your father or your grandfather ever publish anything about Irish history?

BOB No.

AF They were just interested in it?

BOB That's all.

AF Right. Did you ever do a family history?

BOB No. I didn't, I should say I didn't, but my wife has done a great deal of sort of biographical research, in the sense that she's made family trees of them, see she got a complete history that way. But I've not done it, no.

AF Before you belonged to the Osgoode Society, had you belonged to any history societies or groups before that?

BOB No. That was the first. And as you perhaps know, Roy McMurtry, who is now the Chief Justice of Ontario, he was really the founder of the Osgoode Society, but it was with me, we discussed it before it was incorporated. And I was the first president of it, under his direction, and with it for the first ten years.

AF I had thought in an earlier interview that you had said that the Attorney General had suggested it [the Osgoode Society]: is that –

BOB That's Roy McMurtry. He was the Attorney General, then.

AF Right. And when did he suggest that: what year was that?

BOB Well, let me try and-- The Osgoode Society this year had its twentieth anniversary. So, it's twenty years back that this happened.

AF So, 1984.

BOB Yes. Twenty years ago.

AF And how did you know him: did you know him [McMurtry] personally, or professionally, or both?

BOB Roy McMurtry? Oh, we knew each other from away back. He was the Attorney General then but I was the, a bencher of the Law Society and we knew each other very well. In fact, I knew his father before him. I'm a bit older than he is.

AF And why do you think he would have suggested—

BOB Well, because Roy had an interest in history, as I did, and we decided that the history of the legal profession ought to be preserved in some fashion, and the only way to accomplish this was to get an organization together that would concentrate on publishing legal history.

AF So that's its main function?

BOB That's the main function, yes.

AF And you had said that you were the president?

BOB Yes. For ten years.

AF And what did that involve?

BOB Well, it involved, mainly, Peter Oliver was the editor, and mainly involved arranging with him for meetings and so on, subjects to be discussed, and books to be published and so on.

AF Right. And did you hold any other offices, other than president?

BOB Well, I was the Treasurer of the Law Society twice.

AF No, sorry. I meant other offices in the Osgoode Society.

BOB The Law Society is the whole legal...

AF Yes, I understand.

BOB But the Osgoode Society-- I don't think I had anything to do with any, sort of, any collateral societies, I did, I taught at law school, both in the Bar Admission

Course and the Osgoode Law School, I taught in both of them. And took an active interest in legal teaching and legal history.

AF You were teaching those subjects as well?

BOB Well, teaching. I was teaching mainly Practice, legal practice, that sort of...

AF Right. Could you tell me how the books produced by the Osgoode Society were commissioned? Did somebody approach the Osgoode Society and say, "I want to do this book", or—

BOB That has happened. We have an editorial board which, Peter Oliver, as I say, is the editor, and he has taken an extremely keen and active part in the... He's been, I should tell you, I was president, but he's with the, still the editor-in-chief, and he sort of supervises all the manuscripts and that sort of thing. And then, when they get a book that someone wants published, they have a meeting of the directors, and they discuss that, and decide whether they will, if this book is a product of that method.

AF Right. So there's a board of directors?

BOB Yes.

AF So it goes to a committee to decide—

BOB To decide what will be published, and what won't.

AF They publish about a book a year, would that be right?

BOB They've done, I think, as many as three a year.

AF Oh, really.

BOB But it's certainly more than one a year, it averages one and a half.

AF Right. And could you tell me something about some of the other books?

BOB [Indicating a copy of *Speedy Justice*] Well, that's the same book as this one [indicating his own copy].

AF Yes, I was just looking inside the cover at the—

BOB This is the Osgoode Society edition [indicating], and this is the U of T edition. They do one of their own, you see.

AF Oh yes, I see.

BOB So they put a different cover on it.

AF Yes, right, right. So the list of titles here [indicating other titles listed inside the cover]: are you able to speak about any of those other books? Anything, the background to any of these books?

BOB Well, I am familiar with all these, of course. And some of them are totally different from others. For example, the essays on the history of Canadian law bear no resemblance, say, to the biography of Chief Justice Duff by David Williams, that's an extremely interesting biography of a man who was Chief Justice of Canada. And Patrick Brode, Sir John Beverley Robinson, that's another biography that is most interesting. And I think all these books are interesting, and well worth reading, if anybody has an interest in the history of law and Canada. By the way, there's a book coming out, have you heard a book, called *Where Angels Fear To Tread*, by a woman lawyer? She wrote this book, she took her own case to the privy council, and won, and the Osgoode Society is going to publish that this year. They're working on it now.

AF Great. So it's quite a broad ranging—

BOB How many, wait while I see how many [counting]-- Seventeen we did in the, in the first eleven years.

AF Yes, that's quite a lot. And where does the funding for the books come from?

BOB [pause] The members of the Osgoode Society pay an annual membership fee and we have a number of patrons, I mean big law firms that are, that are patrons of the Osgoode Society, and they contribute lump sums.

AF And would that be for a specific book?

BOB No, just for general work. And they have a dinner every year for the patrons, and they are often invited to meetings for books that are discussed, which they might be interested in.

AF Right.

BOB And I think the funding, we get also some funding from the Law Foundation, if you know what that is.

AF Yes.

BOB It's interest on trust funds. So we get some funding from that.

AF Right. The last area I would like to discuss today is the area of making and creating history, and the Law Society's role in that. Now, you've been a bencher at the Law Society for many years, and I would like to ask about new prizes, or titles, or annual dinners, anything along these lines, that the Law Society has perhaps created in this period?

BOB Well, I'll tell you what they're doing now, we didn't mention this: oral history. They've had an oral history programme from the beginning. And the oral history programme, as you perhaps are aware, has done hundreds of interviews of lawyers, and I think you've seen mine. I was done twice. And these records will be of, I think, immense value to historians who teach, who want to cover this period. They might

not find everything they want in this oral history, but they go from one to the other, and link them together. And if we don't have these records a lot of the history of this period is going to be lost.

AF Exactly. I'd like to ask you about the creation of prizes, or dinners, or anything along those lines by the Law Society?

BOB Well, in the sense that the Osgoode Society does invite people to—

AF I'm sorry, I'm not thinking not of the Osgoode Society now, but the Law Society.

BOB Well, the Law Society, of course, backs the Osgoode Society.

AF Yes.

BOB But the Law Society has not, yes they have, they've sponsored and paid for a single volume history of the Law Society. Have you seen that?

AF Yes, I have.

BOB That was a Law Society project. I must say, I wasn't too enamoured with the book, but it's been written—

AF This is the book written by Christopher Moore on the two hundred years [*The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997*]—?

BOB Yes. I tried to persuade him to add an historical background, but he left it out: the fact that Chief Justice Osgoode was said to be the illegitimate son of King George the Second, but he wouldn't put that in! I thought it should have gone in, but it didn't.

AF Is there anything else? I am thinking here of making history: have there been particular things that have come into being at the Law Society while you've been

involved with it, over the last fifty years. Was there a particular prize given out for recognition of service, something like that?

BOB No. We, these are, more or less hit or miss as far as-- We have [pause] I don't think the Law Society, as such, has sponsored anything in writing except for the history of the Law Society which, as we say, was published, and I think that's the only one I can remember, anyway, at the moment.

AF Is there anything we haven't talked about today that you'd like to—

BOB Well, let's look at your list here. [looks]

AF I think we have covered everything.

BOB This concern [points]: we haven't touched on that. I think it would be interesting if we could find more about it [the *Speedy*], if we could find the wreck but there could be some records on board, that would show something about the charges that were prosecuted. Now this 200th Anniversary [of the *Speedy's* sinking], they're going to have some ceremonies, they've asked me to serve as the honorary chairman of the group that are investigating the loss of the *Speedy*, and just what they propose to do, I-- I said, "Find the wreck, would be a good project"! [laughs]

[long pause]

BOB You ask where the meetings of the Osgoode Society take place [looking at list of interview questions in front of him]: nearly always at Osgoode Hall.

AF Right.

BOB They have different rooms there that are made available for them.

[long pause]

BOB [Still looking at list of interview questions] I think we've covered all that. [long pause] Well, it's funny you say here did I do a family history? I say, "No, I didn't", but I've often thought of doing it. It's a project that I should pursue. But I never did belong to any historical group before the Osgoode Society, that was the first.

AF Were you working at that time? Were you retired at that point?

BOB No. Not when I started the Osgoode Society, I had not. I retired in 1998.

AF Yes. I was thinking perhaps that you were doing less work at that time?

BOB Well, yes, I minimized my-- I should tell you, I'm 95 years of age!

AF Yes.

BOB I took my last case in the Supreme Court of Canada in 1998, in June of that year, and haven't been back in court since because, among other things, if you want to practice law actively, you must carry liability insurance in case you make any mistakes, and since I'm not carrying-- I don't want to carry the insurance. It costs about several thousand a year, so I simply have retired. I don't intend to resume!

AF You could write your family history, then, that sounds like the thing to do at this point. Well, Mr. O'Brien, thank you very much.

INTERVIEW ENDS

BRENDAN O'BRIEN INTERVIEW #2

DATE: JUNE 28, 2004

PLACE: O'BRIEN HOME, TORONTO

INTERVIEWER: ALISON FORREST

**MEDIA: 1 MINI-DISK APPROX. 55:48 MINUTES IN LENGTH AS WELL AS A
A MINI-TAPE AND VIDEO RECORDING OF SAME**

[This interview looks at many of the prominent lawyers Mr. O'Brien has known over his long career. We started by looking at the Treasurers of the Law Society from the time Mr. O'Brien was made bencher of the Law Society. Mr. O'Brien also looked at some of the benchers he remembers, as well as the Secretaries of the Law Society].

AF Ok, so I thought we'd start with Mr. Robinette.

BOB Well, do you want me to go over the same story that I've told you?

AF Yes, please.

BOB Well, this happened while he was Treasurer of the Law Society. And there had been an episode in court the previous week where the judge, Mr. Justice Wilson, had reprimanded a lawyer named Elliot Pepper who occupied the position of Queen's Proctor for, as the judge thought, not properly discharging his duties properly in a divorce case that was before him. And when this came public, it was in the headlines, and at Convocation the following Friday, there was a good deal of discussion and there was a motion to reprimand the judge for the way he had treated the Queen's Proctor. And there was a discussion about whether we had the power to do this. And, anyway, the debate ranged for a bit and then they took the vote and it came out a tie vote so that the Treasurer had to cast the deciding vote, and after thinking about it a bit, he voted in favour of the motion of reprimand. And when he got home there was a telephone message from the

Chief Justice McClure to come at once to his house, which he did, and John told me afterwards that he never got such a reprimand as he did then from Chief Justice for interfering in the judiciary in a matter that was none of our concern. [laughs] Just an example of the life of a Treasurer.

AF Yes, so Mr. Robinette was the Treasurer when you first became a bencher?

BOB Yes. Well--

AF Did you know him before--?

BOB Oh, yes. I have know him from away back. In fact, there's an episode in his life, which is not very well known, and that is that he was appointed a judge and he was to be sworn in on a certain date. But he came in amongst other people to talk to, my senior partner, Thomas Phelan, and others who were senior to him, but for whom he had respect, and after talking to them, he decided he was not going to be a judge so he declined to be sworn in, and he never did become a judge. But, there was then a motion, made before Chief Justice McClure again, to determine whether he was still a bencher, having been appointed a judge, but having declined the appointment. And McClure said he was no longer a bencher, so, they had to reappoint him a bencher, and reappointed him to standing.

AF Right, right.

BOB Just one of the episodes of his life. But he was an outstanding lawyer, and as you, perhaps, have heard he defended the, in the Evelyn Dick murder case.

AF Yes.

BOB He defended her. He was the son of course of T.C. Robinette who had been a partner, my partner, the firm of Robinette Godfrey Phelan, and that's about it.

AF So, did you know him socially as well?

BOB Not socially, no.

AF Not socially.

BOB I knew his family, but I didn't, we didn't have social contact.

AF And how old would he have been when you became a bencher, when he was Treasurer?

BOB He would have been about late 50s, early 60s.

AF Right, and how much longer did he remain Treasurer?

BOB He stayed on as Treasurer while I was first a bencher for about, I think his total term was six years, and I think I came along in his first year, so he was about five years Treasurer while I was a bencher.

AF And after he was Treasurer—?

BOB I should add something else.

AF Yes.

BOB Every Convocation day the benchers have lunch at Osgoode Hall. And when John Robinette was Treasurer, he used to be rather entertaining in his address to the benchers. But at this time Joe Sedgwick and Peter, Peter Wright had gone to England and we still belonged to the Commonwealth [?], and part of their project was to purchase wine for the Law Society [laughs], and they used to send regular reports back to John Robinette, as Treasurer, which he used to read out at each benchers' lunch, which was very entertaining.

[laughter]

AF Ok. So, that's about as much as you recall—?

BOB Well, these are things that-- Joe Sedgwick was a most eloquent man, and one of the stories he told about himself was that in World War One he was at the lowest rank that you could serve when in the spring of 1915, the British battleship the *Hampshire* was sunk off Scapa Flow and amongst those that were lost was Lord Kitchener, who was head of the Allied troops. So, when this happened, Joe Sedgwick wrote a letter home to his mother, he said, "Since Lord Kitchener has been lost at Scapa Flow, we've all moved up one rank, and I'm now a lance corporal."

[laughter]

AF So, he followed John Robinette, Joe Sedgwick? Do you remember any change in Convocation with the change—?

BOB The only thing, I'll tell you, the only interesting episode, that when John Robinette retired John Arnup was going to run for Treasurer, and Sedgwick also. So they finally entered into an agreement, whereby Arnup would stand aside, Sedgwick would be elected Treasurer but, only for one, one term.

AF Right.

BOB But when the one term was expiring Sedgwick had forgotten this arrangement and Arnup had some problem. He had to get others to back up his memory of the events. So that he did, Sedgwick did back down. [laughs] John Arnup did succeed him.

AF Right, right. But he never, Joe Sedgwick never became Treasurer again?

BOB No.

AF So how did they reach that arrangement that he would agree to do it for just a short period of time?

BOB Well, he just-- He said to Arnup, this was when they were succeeding Robinette, instead of them both running he said that he would not run and Arnup would, or at least the other way round: Arnup would not run and he would, and he'd be elected as the only candidate, and then, the following year, when the vacancy occurred, he could run again, or he could drop out. And he had agreed to drop out, but he didn't! So they had to persuade him to drop out, and he did! And Arnup was elected.

AF Right. So, with Mr. Arnup, do you remember when he became Treasurer?

BOB Yes. Yes, he became Treasurer about, it was in 1962 and he served for two years, or three years, I'm not sure which. But I succeeded him for two years and then I think Howland, or else Arthur Martin, one or the other...

AF Mr. Howland after that, yes.

BOB And then you have Goldwyn Martin. It was G. Arthur Martin, not Goldwyn Martin, and he succeeded Howland.

AF Right.

BOB A very capable criminal defense lawyer.

AF When you succeeded John Arnup did you have to work fairly closely with him, initially, when you took over?

BOB What happened was that, John Arnup said come over to my office, and I'll give you a box of documents that you'll find useful. [laughs] And I went to his office and he had kept good notes for his work, and he says you'll find all you'll need in this box, and you take it with you. So I did, and that was all that happened.

AF And that was it? Was that the usual practice, do you think?

BOB Well, I don't know. [laughing] When I turned over to Howland there was no such box!

[laughing]

AF Right. And then you were Treasurer a second time, in 1983.

BOB Well, that was because John Bowlby had been Treasurer, and in March of that year he was appointed judge, which created a vacancy. And they elected me again to fill the vacancy, until the next regular election, which was in June, when Laura Legge was elected, so I only served for three months. So that was the second term.

AF Was that disruptive at all to Convocation, to have—?

BOB Well, no. I should say that John Bowlby's term of office tended to be a bit disruptive because he and Ken Jarvis did not get on at all. [laughs]

AF Yes, the [Law Society] Secretary. Yes.

BOB Bowlby was inclined to do things his own way, and one of the things he did was take a trip to Hong Kong in which he said there was some Law Society business involved but nobody knew about it but him! He got the Law Society to pay for his trip. [laughing]

BOB Right. And these are things that-- John Bowlby was the only Treasurer who had any sort of problems with the Secretary.

AF And this was Mr. Jarvis? Returning to our list then: Mr. Robins, Sydney Robins?

BOB Sydney Robins?

AF Yes.

BOB Well, Sydney Robins plays an important part in the affairs of the Law Society because while he was Treasurer, and later on as a judge, he was instrumental in getting legislation passed to permit the collection of money derived from interest on trust accounts. And this created a huge capital sum, and they created an organization to which this money would be paid: the Law Foundation, it was called.

AF Yes.

BOB And that money was distributed to libraries, legal aid, and things like that. And John, or at least Sydney Robins, was largely responsible for that movement of the creation of that fund.

AF Was that because he was Treasurer, or was that because that was something he was personally interested in?

BOB Well, the matter had been discussed on numerous occasions up to that time, but nothing much had happened. He decided to make it move, and it did.

AF Right.

BOB And Sydney Robins, as you perhaps know, became a judge and he's now retired as a judge, and he's back attending Convocation, and takes an active interest in it.

AF Okay. Stuart Thom.

BOB Well, Stuart Thom was a good, steady, hardworking Treasurer. He did his work well. I don't recall anything-- Oh yes, there was one thing he [laughs] took an interest in. The Law Society, as you perhaps know, has an iron fence around Osgoode Hall property, and it had fallen into disrepair. In fact, the City of Toronto had decided to expropriate ten feet of land on Queen Street to widen Queen Street, which would have torn down the fence for that ten feet. And the Law Society decided not to do any repairs

until this had happened. But the City then decided not to expropriate the ten feet, and this fence still needed repairs, so there was a spirited debate as to whether it should be repaired, or not. And, I was in favour of repairing it, as was Barry Pepper, but Stuart Thom was not, and the debate was waxing strong. And then, one of those opposed to repairing the fence – Elmer Sopha of Sudbury – and Elmer Sopha got up and gave a spirited speech saying how nice it would be to see mothers and children having their picnics on the front lawn!

[laughing]

BOB And that swung the vote around so the fence was repaired at considerable cost. It was the repair/sidewalk debate.

AF And do you have any idea why Stuart Thom opposed the fence: was it the cost, or another reason?

BOB Well, he-- He, the cost, and he had not quite the same view of picnics on the lawn that Sopha had, but he thought that the public access to the grounds would be enhanced if we didn't have the fence.

AF Was security ever an issue?

BOB No.

AF In terms of the fence?

BOB No, nobody ever, well the fence, the gates, it has been said, that they were cow gates to keep the cows off the Law Society property. But others have said that that was only a sort of a funny story. The real reason was security they have, if you look at them, they can be folded shut and locked for security, if that became necessary. And I think the only occasion when that might have happened, there was a slave that escaped

from the United States to Upper Canada, and the question of, the United States sought to extradite him back to the United States, and a spirited debate arose in Convocation, and there was threats that people would break into Osgoode Hall to release the slave, but, in fact, the court finally ruled that he would go back to the United States. But, somehow or other, they got it before the Privy Council in London who reversed Convocation's, or, at least, the trial judge's order, as far as I understood it, and he was transferred to England and [laughs] whether this was a worse fate I don't know. But in England they sent him out to Liberia which was a, meant to be a colony for escaped slaves. That's where he ended up.

AF Do you know what year this would have been?

BOB About, about the 1850s or 60s. Somewhere in there.

AF And you don't remember the man's name?

BOB There's a book written about it, and it's written in the law reports too, but at the moment I don't remember, no.

AF We just looked at Mr. Thom: George Finlayson?

BOB Well, of course, he's still around and takes an active part in-- He has been a Treasurer, he's been a judge, he's a retired judge now, still comes to Convocation. Recently wrote the biography of John Robinette, and still takes an active part in Law Society affairs.

AF And he was followed by John Bowlby. You talked about him briefly before.

BOB John Bowlby as I tell you, he was appointed judge in the spring of the year that I served a second term. And he didn't serve long as judge. He died, so that ended his career in law. And he used to, he had [laughs] a belief that he was sort of

impregnable. He used to, actually, go out for a run, five, five miles every morning and apparently he destroyed the cartilages in his knees, which really made him immobile.

But he died shortly afterwards.

AF Right. And you said that he had a personality conflict with Ken Jarvis?

BOB Yes.

AF What was that based on?

BOB Well, because Ken Jarvis, first of all, gave him instructions as to what he should do if he was spending money, send in a voucher first for his expenditures and so on, and he simply tore it up and just did it his way, [laughs] just didn't, he didn't like being told how to do things by Ken Jarvis.

AF Although that, probably, was Ken Jarvis's job to do that, wasn't it?

BOB Well, Ken was doing the right thing—

AF He was the Secretary and that was his job, right?

BOB The belief afterwards was that Bowlby spent a lot of Law Society money unjustifiably.

AF Right, right. And so you took a short term after him to fill in—

BOB I filled in from his appointment as a judge, until Laura Legge came in June of that year.

AF And so she was the first, well, she was the first woman bencher, and then the first woman Treasurer. Do you remember anything about that occasion, was that something that was notable to—?

BOB I don't remember anything notable. Mrs. Elliot came in later along, the second Treasurer who female. But Laura Legge did a good job and was very popular.

AF But you don't remember it being remarked upon, that she was the first woman Treasurer? There was a lot of media [interest] in it. In Convocation itself was that something that was noted at the time?

BOB That in itself was never a subject for discussion.

AF Yes. Okay.

BOB But she had, she commanded the respect of everybody.

AF Yes. And she had been a bencher for some years by that point.

BOB Yes.

AF Yes. And she was followed in 1985 by Pierre Genest, who was the first Francophone Treasurer.

BOB Yes.

AF Go ahead, sorry.

BOB Pierre Genest was an extremely able counsel and Treasurer but he, he suffered a stroke while he was Treasurer, and for a while his work was taken over by Arthur Scace, who was next in line. And then, [pause] then, what's his name again?

AF William Chilcott? Pierre Genest?

BOB Then Pierre Genest came back again, and had a second, more serious, stroke, and that ended his career.

AF Yes. Yes.

BOB He died shortly afterwards.

AF Do you remember anything about Pierre Genest while he was Treasurer?

BOB Well, he was capable, he was witty, and he did things in a very businesslike way. [pause] I don't remember anything in particular.

AF And, so, Arthur Scace basically picked up that year 1986 to 1987? That would have been Pierre Genest's year.

BOB Well, I think, I think Arthur Scace succeeded him then when he died.

AF Yes. Right. And then he was followed by William Chilcott.

BOB I don't remember William Chilcott at all as bencher, at least as Treasurer. He was Treasurer for a short time, then he became a judge, and I don't remember anything about his term of office.

AF What about Lee Ferrier, who followed [Chilcott]?

BOB The same with him. Well I'll tell you one thing [laughs] about Lee Ferrier. I reminded him of this, in fact, the other day. When he was Treasurer, the women benchers had not been assigned a room of their own for meeting, and putting their clothing and things like that, but there was a room that the previous Treasurer, Cyril Carson, for ex-Treasurers only, which had lockers in it, and a lounge -- it was called the Ex-Treasurers' Room -- so Ferrier said, because he was looking for a room for the women benchers, said to us ex-benchers, ex-Treasurers, "If you surrender this room for the women benchers, we'll provide you with another one." We never got it!
[laughing]

AF You never got it?

BOB Right! I reminded him of this the other day, so that was the—

AF Still waiting?

[laughing]

BOB Yes.

AF That was the late 1980s, so how many women would there have been then?

BOB There would have been a half a dozen.

AF So enough that they needed their own room?

BOB They needed a meeting place.

AF Yes. And Lee Ferrier was followed by James Spence in 1990.

BOB Yes. Nothing notable about that.

AF Right. Allan Rock after that.

BOB Who was after that?

AF Allan Rock.

BOB Oh yes, Allan Rock. Well, he served-- In fact, he was back the other day.

He's, he's now serving as Canada's representative of the United Nations. He was a judge, but he, he was a good Treasurer. I don't remember anything in particular.

AF There was recently an unveiling of his portrait.

BOB Pardon?

AF An unveiling of his portrait.

BOB Yes, he was back for that the other day.

AF Yes.

BOB It's funny, my wife went to a dinner when I was Treasurer. And, she found herself seated between one lawyer named John Ground, and Allan Rock, on the other. And she said [laughs] she was between a rock and a hard place!

[laughing]

AF OK. What about the remaining people we have. We're up to 1993. We have Paul Lamek, do you—?

BOB Paul Lamek died, as you probably know, shortly after his term of office. And he suffered some illness which required the amputation of his left leg below the left knee. At his funeral, the former Treasurer gave the eulogy -- Harvey Strosberg -- and, for a funeral, it was quite entertaining. And he said that after the surgery when the lower part of the left leg was removed, somebody asked him how tall he was. And he said, "Five foot eleven on the right side, left side a foot shorter!" [laughs] Anyway, he died.

AF And he was followed by Susan Elliott who was the second female Treasurer that the Law Society has had. Again, was that notable at all [her being a woman]?

BOB No, I don't remember anything special about her.

AF And you just mentioned Harvey Strosberg.

BOB Well, Harvey Strosberg was notable in one important way. Before he became Treasurer, the Law Society Errors and Omissions Insurance Fund had become bankrupt, almost. It was a real disaster facing the Law Society. And Harvey Strosberg took that in hand, and reorganized the Law Society insurance fund and it's now been working fine ever since.

AF So that was, was that in his capacity as Treasurer?

BOB As Treasurer, yes. But he also put others in charge, sort of under him. But he dominated the thing, and he saw to it that we didn't go out and meet disaster.

AF Yes, yes. And Robert Armstrong, after that?

BOB Well, he was Treasurer for only a short time, and became a judge, and still is. And Vern Krishna [laughs]: well, I've always admired him for two reasons. Well, he is an extremely capable person, but he had the clearest, most distinct voice of anybody in the Law Society. And he spoke, he enunciated well, but he, he articulated well. He could

really speak well. And he did a great job as Treasurer. And Frank Marrocco, of course, is the present Treasurer.

AF Yes.

BOB He's a much different person from Vern Krishna. He's soft spoken, and doesn't say too much.

AF Could you comment, then, generally, picking up from the two Treasurers that you've just mentioned, the different personalities and so forth—

BOB You mean Marrocco and Krishna?

AF Yes, [but] I'm thinking more generally of personalities: the impact that different personalities had on Convocation. Could you make any comment?

BOB Well, as I've told you, when John Bowlby was Treasurer—

AF Yes.

BOB --there was frequent conflict, and it was very unpleasant, and that didn't end until he had been appointed to the Bench. Now, there's never been another episode like that but when Lamek was Treasurer he became ill, and Strosberg, as I say, gave the eulogy at his funeral, which was very notable. But, I don't remember anything in particular about the others of that period, except Vern Krishna. Vern Krishna was in a class all by himself. And you never had any doubt what he was saying, or what he was trying to explain.

AF [pause] You've mentioned at least two initiatives that former Treasurers took in hand: Harvey Strosberg and the insurance fund and—

BOB Yes.

AF --the other was the interest on trust accounts on—

BOB Well that was—

AF --Robins.

BOB Robins, yes.

AF So, what impact would you say that individual Treasurers had in initiating important changes such as those? Can you think of anything else that—?

BOB Well [long pause] I don't think there's anything else of a singular nature that, when the Treasurer took something in hand. But I know that Vern Krishna did a great job as Treasurer.

AF Yes. Now, the one person we haven't talked about is you, as Treasurer. So you were Treasurer twice: once briefly, and once for a full term.

BOB Well, there were no crises of any sort on either occasion, and I had no difficulties in carrying out my duties as Treasurer. And Ken Jarvis, of course, was the Secretary at that time, and he did most of the-- You asked earlier about the duties of the Secretaries, that was Jarvis and Earl Smith, but they really ran the office and no Treasurer could do his work very well, unless he had a very capable Secretary to arrange meetings, and so on. And I think we had a few visitors while I was Treasurer. [laughs] One of them, if I think, and if my memory serves me correctly, while I was Treasurer we had the Chief Justice of the United States Earl Warren, we gave we gave him an honorary degree. And for the honorary degree they have a special scarlet robe that they put on and which was used on this occasion and [laughs], when he went home, he took it with him, which he wasn't meant to!

[laughing]

AF Did he ever return it?

BOB No, it's never been returned!

AF So, no particular initiatives that you can think of while you were Treasurer.

In the two year period 1966 to 1968: anything notable?

BOB I don't remember. I'm just trying to think if anything was. [pause]

Nothing comes to mind.

AF So, could you perhaps talk about what your work as Treasurer involved?

How many hours would you have been—?

BOB Well, it involved attending at least once every day to the Treasurer's office at Osgoode Hall, where papers were left by the Secretary for your attention and you'd have to look after that. Sometimes you'd be there practically all day looking after everything, and other times it would be very brief. But you'd be there part of every day. And the Treasurer, as a result, although when I was first Treasurer, he did not get paid but now the Treasurer does. And when I was Treasurer the second time, I was greatly surprised to get paid for three months, or whatever it was.

AF While you were Treasurer, did you need to cut back on your other work at the office? Was that something that generally happened to Treasurers?

BOB Yes. [pause] I used to [pause], well, I was cutting back on my office work at that time, anyway. I hadn't retired, but it did, to a certain extent, cut back on your office work. [pause] But I think, although I'd have to check on the records to be sure if I'm right on this, but I actually did work for the Law Society while I was Treasurer. Appeared in the Supreme Court of Canada, for example, that sort of thing.

AF Right. Other than the administrative work, I imagine there would have been a lot of social engagements as Treasurer?

BOB Yes. One of the most frequent was that when a new judge was appointed, you would have to appear when he was sworn in and, and make a speech of welcome. It was mostly boring stuff.

[laughter]

AF I imagine there would have been dinners and functions as well?

BOB Well, I'm sure there were functions I attended as Treasurer, but I don't recall any, in particular.

AF How did you come to be a bencher in the first place? What drove you to—?

BOB Well, I had run for bencher, but not been elected, but I was close behind, the next one.

AF Right.

BOB And then, shortly after, there was a vacancy when a bencher was appointed a judge. And I was elected to fill that vacancy. I became a bencher, and then when I was Treasurer I no longer had to run for bencher, because ex-Treasurers are life benchers. So that's what I still am.

AF Right, right. Your duties as a bencher: you attend Convocation monthly?

BOB Usually.

AF Right.

BOB Not always, but mostly.

AF Right. And you've been involved in a lot of committee work?

BOB No, I've not done a lot of committee work in recent years, anyway. I, I'm now 95 years of age! [laughs] I feel I've done my bit [laughs]

AF Yes. Yes. So, when you decided that you were interested in becoming a bencher, what drove you to do that, other than--?

BOB Well, I don't remember-- I know Bob Rutherford was a partner, my campaign manager and we discussed it--

AF Right.

BOB --and he organized the campaign and I nearly got elected, but not quite, and then, within two years, I was a bencher there, filling a vacancy, so that ended the doubt.

AF What did the campaign involve? Was it—

BOB Well, he had to write letters to people he knew to stir interest in the election, to get them to vote for me.

AF Would you say that you were fairly well-known in the legal community?

BOB Well, I was. I had the advantage over others in that I had been a lecturer in the law school, and I'd also lectured in the Bar Admission Course which gave me, I guess, a decided advantage over most people but—

AF And you had at that point been practicing for, I'm trying to think, do the calculations—

BOB Well, thirty-two. Thirty-two—

AF Yes.

BOB --was when I started to practice law.

AF Yes. Yes, twenty-five years?

BOB Yes.

AF So, you'd already had a substantial legal career at that point, yes. OK, we were talking earlier about Terry Sheard.

BOB Yes.

AF Yes. You mentioned him. Could you go back to what you were saying about—

BOB Yes, yes.

AF --before we started to—?

BOB Well, Terry Sheard was an extremely bright, witty, capable lawyer who did mostly wills and estates work. I think I told you already the episode where he came into court, came into the library, and asked Barry Pepper if he could understand how Oliver Cromwell had defeated the whole of England, Ireland, Scotland and Wales with only three thousand Roundheads, and when Barry expressed ignorance of the answer, he said, “Well, I’ll tell you, every man jack of them was a James Chalmers McClure.” And McClure was, of course, always seemed to be extremely unpopular. And one of the stories about McClure, I remember, was at a benchers’ dinner, and Arthur Maloney was speaking. Arthur Maloney had defended one of the last two people to be hanged in Ontario, and Chief Justice McClure had presided over the trial. But, in the speech, Arthur Maloney said that he’d been requested to defend this man by James Chalmers McClure, that great humanitarian as he then was not! [laughs] Of course, not only did he, he asked Maloney to defend the man, but then hanged him! Quite a sad story.

AF Now you mentioned a number of the former Treasurers became judges and left Convocation and then came back subsequently.

BOB That’s right, yes. Well, Sydney Robins is an example. And George Finlayson is another one.

AF Right.

BOB And I guess there's others. Gib Gray. Gib Gray, he died just recently. But he had, he had been Treasurer, then a judge, and then he came back. But he died quite suddenly, recently.

AF So that's obviously a common pattern, that movement—

BOB Well, it was. Except that some people, including, for example, me and Laura Legge, never did become judges. In fact, [laughs] this is another Terry Sheard story. While I was Treasurer, the first time, we had as our luncheon guest, Pierre Eliot Trudeau, who was then Minister of Justice (this was before he became Prime Minister of Canada), and we called him to the Bar in Osgoode Hall, and then we walked out onto the Civic Square up to the Courthouse where he was sworn in as a solicitor. And as we walked up from Osgoode Hall to the Courthouse, I was on one side of Trudeau, and Sheard on the other and then, the other benchers behind us. And Sheard said, "Trudeau, there's one thing that distinguishes O'Brien and me from those forty odd fellows behind us." And Trudeau said, "What's that, Mr. Sheard?" He said, "Neither one of us wants to be a judge!"

[laughter]

AF So that was never an ambition for you?

BOB No.

AF Now in the time that you were Treasurer they introduced lay benchers?

BOB Yes. Well, yes.

AF Could you comment on that, your perception of how that changed Convocation?

BOB Well, it didn't change it at all. And in fact we're most fortunate in the choice of lay benchers. They're been excellent selections. And still do. And I notice you have one of them on there.

AF Reginae Tait?

BOB Reginae Tait and [pause]?

AF June Callwood?

BOB Yes, June Callwood, that's the other one, yes. [pause] But we've had other excellent ones.

AF Do you have any memories of either of those benchers, Reginae Tait or June Callwood, while they were lay benchers? Do you member anything about—?

BOB No. No.

AF The other question I wanted to ask was: you've been in Convocation now for over forty years?

BOB Yes.

AF Do you have any perception of a change in tone? Is it less formal now, perhaps, than it was, anything like that? Any changes of that sort over that time?

BOB [Laughs] I'll tell you one anecdote about when I was first a bencher: Convocation was on Friday not Thursday, as it now is. And at that time in the Catholic church you were not meant to eat meat on Friday. And, the result is, the Law Society used to serve fish at Convocation on Friday. And then the church dropped this prohibition of eating meat on Friday, so Earl Smith phoned me and he said "I've spoken to Arthur Maloney, he would have no objection if we stopped serving fish, and I was sure you wouldn't" and I said, "Not at all." So the next Friday, at Convocation, there was no

fish and Isadore Levinter was outraged. He said [laughs] it was the one thing he looked forward to, was the fish!

[laughing]

BOB But the Convocation used to, as I say, just to give you an example of how things have changed, it started at 11 o'clock back on Friday morning, never went beyond lunch. There were no written reports you. You would do it orally so. I'll just see who that is—

INTERRUPTION

INTERVIEW RESUMES

BOB But, as I say, Convocation never went beyond lunch two hours as opposed to now starting at 9 o'clock, and often going on as late as 5 o'clock.

AF Is that simply due to more business?

BOB Well, it's due to, a sort of a, I don't know how to describe it. But people have, they don't understand how to be concise anymore. I know that when I last appeared in the Supreme Court of Canada, the Court had limited argument time to, I think it was ten minutes to present an argument. I found that ample time to present an argument. But there are some people who are quite incapable of being concise. There's a woman at the last Convocation who was asked to make a report, which was all in writing, everybody could have read it anyway, and she went on for half an hour to an hour, presenting this report. Now, why, I don't know. It's a sign of the times. People like to talk too much. And that makes Convocation much more lengthy than it need be. I spoke to the Treasurer about it, and I spoke to Vern Krishna, and he agreed with me that

we should have a time limit on presentation and make it shorter but that hasn't been approved yet, but it should come, I think.

AF Right. So, other than the length, and the day [of the week] is it less formal than it used to be? I understand that clothing used to be—

BOB We didn't, we don't gown except one day of the year, and it was always the same in that respect. I think we used to gown for the Call to the Bar Ceremony in June or May. Now they've changed the Call to the Bar Ceremony to a different period of time and they don't take place in Toronto anymore. Or at least they do, one in London and one in Ottawa, and so on. So, but there's, not Call to the Bar, and I forget what the occasion was even, but it's tradition.

AF Yes. And there are no other difference you can think of between now and when you first became a bencher? Same room, but more people?

BOB I'm sure there are differences. I know that [laughs] I can remember somewhere in the last thirty twenty years they started serving-- We used to get sherry served before lunch, but nothing else. Then they served any kind of drink you wanted, which is a change. And, [pause] I don't think there's much significant change.

AF Now some of these people we were talking about earlier, you would have known for a very long time, and worked with them for a very long time as a bencher. You must have formed some close friendships over that time? Could you talk about any of those people in particular? Not necessarily ones we've already mentioned, but perhaps other people?

BOB Well, let's have a look at the list here. [pause] I would say all on this list here. Have you got the same list?

AF Yes. All the Treasurers, yes.

BOB But, for example, Barry Pepper, I was very close to him while I was Treasurer, at least a bencher. And Laura Legge and John Arnup and William Howland and you have his name Wesley, Gib Gray we called him. Gibson Gray. I was very close to him.

AF Did you find that you perhaps had the same interests? Did you serve on the same committees?

BOB Well, when I did serve on committees, which I have ceased to do, I'd find that I'd usually have, I served on three different committees at the same time usually, and there'd be different people on each committee. I always remember a bencher, he has since died many years ago, Gordon Ford, and Gordon Ford had a habit of talking too much and he was on a discipline committee I was on, and G. Arthur Martin who's on your list there, was the chairman of the committee, and it was a rather complex case and the lawyer that was being disciplined was giving evidence. And Arthur Martin decided he wanted to ask a question and he decided to write out the question, it was a rather complex case, and he wrote the question out exactly as he wanted to put it. And he said, "I want to put this question to you," and he had no sooner put it out than Gordon Ford said, "What the Treasurer meant to ask was this"! [laughs]

BOB That was the way Gordon Ford was.

AF Well, Mr. O'Brien I think we've come to the end of the people I'd like to look at today. Is there anyone else you can think of that you'd like to mention?

BOB I don't think so. I think you've covered all this pretty well. I don't know that there's much else that we should be reviewing, but if you have any other subject matter I'm prepared to devote more time to it.

AF Well, I think we will finish here for today. Thank you very much.

END OF INTERVIEW

BRENDAN O'BRIEN INTERVIEW #3

DATE: JULY 7, 2004

PLACE: O'BRIEN HOME, TORONTO

INTERVIEWER: ALISON FORREST

MEDIA: 1 MINI-DISK APPROX. 51:01 MINUTES IN LENGTH, ONE MINI-TAPE, AND VIDEO RECORDING OF SAME. Tracks 2 and 3 record a description of three photos in Mr. O'Brien's house, approx. 4:47 minutes in length.

This is Alison Forrest, July 7th, 2004 interviewing Brendan O'Brien at his home for the Law Society Treasurers' Project.

....

AF Now, Mr. O'Brien, we were just talking about our theme today which is legal education.

BOB Yes.

AF And you made the point that it depended what you meant by what legal education was.

BOB Well, I could perhaps start by telling you my own legal education, because I was raw out of college and knew nothing about the law really to speak of, so when I

registered at Osgoode Law School I took two hours every morning at the law school in lectures, and then the rest of the day I was articulated at a law firm. This went on for three years.

AF Right.

BOB And at the end of the three years I was called to the Bar. And if I didn't have a university degree it would have taken me five years and I would have had to do five years articling, instead of three.

AF Right.

BOB And, oddly enough, some of the leaders of the Bar of my period all went the five year method. And didn't go to university. And they were the leaders. Mr. Chitty, for example, is one--

AF Right.

BOB --who was a leader in Canada, was a five year student. He was and lots of others. When I had to look back at the end of that three year period, and I reached the conclusion that nine-tenths of what I learned was at the office not at law school. In other words, law school was valuable in a certain way, it was no practical sense, they couldn't tell you what problems you were going to reach in the... The law office experience taught you how to be a lawyer. In other words, the law school didn't teach you how to be a lawyer, it taught you how snippets of law, and those snippets of law might be useful, or they might not. For example, if you take the common concept that you can't be liable for the debt for another person unless it's in writing, and this is an elementary principle you learn that at law school. But in your practice we never had such a case, so that it was useless. [laughs]

AF Right.

BOB So, you know, in that period, and I still think both from subsequent experience and what I saw in my own experience, that the apprenticeship was by far the most important part of legal education, and the luck of the draw was whether you had a good firm to be articulated with, and I was, and I was most fortunate in having top lawyers who would take me with them on trials and appeals, so that I got the very best of experience. If I didn't have that, and I know a lot of my classmates didn't, and they learned very little, in their articling experience, so that's the way it went.

AF At present, as you know, it's just the university stream, so it's just the three years –

BOB Well, I think—

AF --of coursework.

BOB I can tell you the fallacy of that, by saying that when I went through you could do it either way: five years or three years. But the leaders of the Bar of my period had all done it in the five year method, didn't go to college, so that we who did go to college were disadvantaged in the sense of practicing law, but we may have been, I think, you could perhaps learn to express yourself a bit better by going to university. You could perhaps put together a written argument better, but as far as the practical use of it, it didn't, it didn't work out that way.

AF Yes. Yes. You suggested in earlier interviews, when you were talking about your legal education, that the casebook method that was used was not a useful method for learning as well.

BOB Yes, that's right. That's another, separate, problem.

AF Right.

BOB The casebook method was used in the, when I went to two hours in the morning and they used the casebook method. And the casebook method meant that the lecturer had to if he was teaching contracts, say, he had to find cases to illustrate the contract that he wanted to impart to you, and he would find one case that maybe hit it on the head and one that maybe didn't, but you might never have a case like that in your whole experience.

AF Yes.

BOB So that it would be far more useful and you were in the law office and you took a contract case under your senior partner and learned how they handled it. To take a case that was somebody else's, the casebook method I found was a failure. At least I didn't learn much from it.

AF So, really it was an apprenticeship model was what you had, versus the higher education model we have now: that's the difference?

BOB Yes.

AF Yes. Okay, I'd like to ask you about your experience about lecturing at Osgoode Hall.

BOB Yes.

AF How did you come to teach at Osgoode Hall in the first place?

BOB Well, after World War Two there was a great influx of new students and a great shortage of teachers. And somebody invited me to take on a what was called the Pursuit of Practice, which is not the theory of law, but how to conduct a case really, and I was capable in that field, so they employed me. And then when the Bar Admission

Course came along later, I switched from one to the other. It wasn't a very big jump, but it was a slight change. And then that was the end of my continuing legal education. I did a very little of that, I would mainly appear on panels with others to discuss certain problems--

AF Right.

BOB --at a continuing legal education session. But throughout the whole of my experience, both as a student and as a lecturer, I found that the practical training was the more useful than the theoretical.

AF And so that's what you were teaching then?

BOB Yes.

AF So what did you teach? You said Practice: could you give me an example of the types of things that you did in the classroom?

BOB See, the Rules of Practice are set forth in writing.

AF Yes.

BOB And the Practice courses were largely familiarizing the students with those rules, and make them capable to write the examination based on what you've told them of the rules.

AF Right.

BOB But it didn't have much practical experience in how you run law in a law office. You might never have occasion to use those rules. But anyhow, that's the way it went.

AF And was this a mandatory course for all students to take?

BOB Yes. They had it in the first year Practice, and then there was second year Practice, and the third, I forget. There were three years in all. I did the first year in the law school, and, then, later on, the Bar Admission Course, which is largely the same subject, except that in the Bar Admission Course there was more of a “how to” rather than what the theory was.

AF Right. So it was more practical?

BOB Yes.

AF Yes.

BOB How to do it.

AF At Osgoode Hall, then, when would you have started that? You said after the Second World War?

BOB Yes, that would be about 1946.

AF And how many years would you have done that?

BOB I did it for about a little over ten years—

AF Oh, that long?

BOB --until I became a bencher, which would be in 1960 or 1961.

AF It was lecturing in the classes?

BOB Yes.

AF And how many students would there have been in the class?

BOB Well, it started out after very large classes of 150, but as time went on it became smaller, I think, it got down to seventy-five to a hundred in a class.

AF Still big classes, though.

BOB Yes, still big classes.

AF Did you have assistance with marking or teaching?

BOB I can remember the boredom of it. I don't remember exactly... I may have given it out to others to do. I don't remember. The [pause], it's funny, I think later on it was the valuable aspect from my teaching experience. I got a lot of votes from my students. When I ran for bencher I was elected.

AF Yes. Did you keep up with a number of your students, then, subsequent to teaching?

BOB Not very much, no.

AF But they knew who you were through having been your student?

BOB They would just remember you, yes.

AF A certain public profile, I guess? Did you enjoy teaching?

BOB Er [pause], yes. It had its boring aspects, as well as its entertaining practical jokes: we had a professor lecturing at the same time as I did, was Desmond Morton. He started his lectures, they had a student came up to him and said, "Could I make an announcement before you start your lecture?" so he sort of stood aside the podium, the student made the announcement, it was fake and spurious, and he took the professor's notes, and he went back out.

[laughter]

AF Nothing left?

BOB I didn't have any experiences like that. But one of the other ones was Walter Williston was a lecturer. And at this time we were using Convocation Hall in Osgoode Hall for lectures because it was such a big class. And the night previously there had been a dance in Convocation Hall at which they had required a piano. And the piano

was not far from where the podium was, and in the middle of Walter Williston's lecture two men came in with a dolly to take the piano out, and, of course, this distracted all the class from his lecture and he suddenly wheeled on these two men, and said, "Get the hell out of here" and they dropped the piano, and ran.

[laughter]

BOB But, the lectures were, for the most part, were not very exciting.

AF Were you able to direct what you taught? Or were you told by a committee, for example, what you should be teaching? The content of the courses?

BOB I set my own content. Nobody else.

AF Right. And do you have a sense of how that was similar or different from other people teaching at the same time?

BOB I think I pretty well followed the pattern of what predecessors had taught. I don't know, not that much different.

AF Did you belong to an organization that included other teachers teaching the same thing in other provinces?

BOB No, no.

AF And I wanted to ask how many hours in a week would this would have involved?

BOB Would I have taught?

AF And marking and—

BOB Well, I would say my lecturing would each time I lectured would be one hour, and it would begin at nine o'clock to ten o'clock, and it would be three days a week, so that would be three hours a week.

AF Yes, as well as all the administrative work that would go with it.

BOB Well, I didn't do any administrative work.

AF Right.

BOB Except marking papers. That sort of thing.

AF Right, right. Still a considerable amount of time away from your practice.

BOB Yes.

AF Yes. How did it affect our practice?

BOB Only, only in a minor way because my practice was not geared to any time pattern. In other words, I could do a thing today or tomorrow, depending on how time was available, and I had no real problem that way.

AF Your firm was supportive of you doing this?

BOB Oh yes, yes.

AF I was wondering also if, at that time, there was any payment for the lecturing, or if it was pro bono work?

BOB I got paid some modest amount, but it wasn't very much. I think it was twenty or thirty dollars per lecture, something like that.

AF Right. So this is more in the nature of a service to the legal community?

BOB Yes, mostly, yes.

AF Do you think there is a value in having practitioners teaching students, versus professors teaching students?

BOB There was, some perhaps, I think I got more out of it than they did, because in order to prepare for a lecture I had to do a certain amount of research, and this was work that I wouldn't have done otherwise. And having done the research, then, I was

better qualified on these subjects than I was, and that was the main value to me, was what I learned in preparing my lectures.

AF Yes, that's great. Now, I asked you earlier if you had kept in touch with former students. What about former colleagues who were also teaching? Did you meet a number of lawyers you would otherwise not have met otherwise, through teaching?

BOB Uh, well, in a general way, yes. But not in any significant way. There's a lot of people I got to know in a sort of a perfunctory way, but not in any depth.

AF Well, could we perhaps move on to looking at your Bar Admissions Course experience? You said earlier that basically when you finished with Osgoode Hall, you started with the Bar Admissions Course?

BOB That's right.

AF And they were more or less the same type of course?

BOB The same, only more on a how-to-do basis, rather than theoretical.

AF Was it still lecturing or was it a different type of teaching?

BOB Lecturing, except that occasionally I would invite an outsider to come in. For example, there was an English professor who later on became a judge, named McGowry, and he was in Toronto, and I got him to come to lecture to the students and then I got him to illustrate [laughs] how to cross-examine someone. I remember, we had a fight as to who would be the witness and who would be the cross-examiner because I finally got, I was the witness so I made all the mistakes. [laughs] It was quite interesting for the students. So occasionally we had episodes like that, but not very often. Mainly it was just lectures.

AF Yes. That's different from how it's taught now.

BOB Yes.

AF And what would the class sizes be for those classes?

BOB I would think that the classes ranged from seventy-five to a hundred, somewhere about there.

AF Oh, so still large. And still mandatory?

BOB Yes. Oh, wait a minute now. I don't know that attendance was mandatory, in the sense I never kept attendance.

AF But it was mandatory to be registered, in order to be Called?

BOB Yes, you had to sign up for the course, but I don't think anybody checked you whether you attended or not.

AF Right. And was this the same time commitment that you would have had: about three different sessions per the week, of about an hour each?

BOB Yes, that's right.

AF And where were those classes held? Were they also in Convocation Hall?

BOB Well, I think, practically all my lecturing was in Convocation Hall at Osgoode Hall, and it was a large group in there.

AF Yes. And when you were walking backwards and forwards to your office: how long would that have taken? How far was your office?

BOB Oh, the office was five minutes away.

AF So, easy—

BOB No problem that way, no. In fact, out of my office window I could see the front door of Osgoode Hall.

AF Oh right, so close. Do you remember having any assistance with marking or administrative matters?

BOB I'm sure I did, I think, for example, of having stuff printed and that sort of thing, marking and that sort of thing. Yes, we had assistance.

AF And were the courses created by the Law Society, or did you create them yourself?

BOB I created them.

AF And you were the only person teaching that course for Bar Admission?

BOB Yes, that's right.

AF How many years did you teach it?

BOB Well, I think the law school teaching occupied about eight or nine years, and the Bar Admissions Course three or four years.

AF So back-to-back.

BOB No lapse of time in between.

AF You made two points earlier, and I'm wondering how your lecturing assisted your career. Earlier you said you saw material you wouldn't have looked at perhaps because you had to teach it—

BOB Yes—

AF And you also said that more people knew you because you had been a teacher.

BOB That's right.

AF Was there anything else, any other way teaching assisted you in your legal career?

BOB I don't think so: I think those are the only two.

AF Okay. While you were a bencher you were on at least one committee to do with legal education.

BOB Yes.

AF Could you tell me something about that?

BOB I don't think, I don't remember any committee work that I did for the Law Society of any significance, except discipline which had nothing to do with legal education.

AF No. So it wasn't something that you were involved in. What about the Canadian Bar Association? You weren't involved in any committee work that had to do with legal education there?

BOB No. None at all.

AF Was that through choice, or was that something that never came up?

BOB Well, I, I used to go to the annual meeting of the Canadian Bar Association, which is sort of a Convention. Otherwise, I didn't have much to do with them. If you weren't on a regular committee of the Canadian Bar Association you wouldn't become too connected with them.

AF Yes. Since you were a student in the late 1920s and 1930s legal education has changed a great deal and continues to do so: do you remember any discussions while you were a bencher about education?

BOB Mainly discussion as to the value of articling, and as to how they would get more articling positions available. Otherwise, the students rightly complained that if they were going to be required to take articling, they must have the positions available to

them. And it was turning out that they wouldn't have them available, and the Law Society had to limit, I think, the amount of articling that you would take in order to fulfill that. Other than that, I don't remember any other discussion.

AF Continuing legal education is an important part of being a lawyer as well.

BOB I didn't do very much of that. I think I told you I didn't. I sat on panels and did discussions, but these are irregular events and would last maybe an hour or two.

AF Right, right. So, you would be requested to come in and attend with other people?

BOB That's right. Or you'd be asked to chair the panel or sit as a member of the panel. If you were chairing the panel, you'd have to meet in advance and decide what we were going to discuss, that sort of thing.

AF When you started being a lawyer, was it a mandatory part of being a lawyer to attend continuing education?

BOB I don't think it was. I don't remember now. But I can, I usually went to the lectures in the morning but I didn't require any attendance be taken. I remember one occasion, the Dean of the law school at this time was Dean Falconbridge, who was at this time in his nineties, he was much respected, and one morning (he had the ten o'clock lecture, and not the nine o'clock lecture), and he no sooner would he get started than another late student would arrive. So, finally, he said, "I'm going to wait for one more student, and then I'm going to lock the doors." So there was a long silence, the doors burst open, the student came in, went up to the back row, half way in got his glasses, and went out again! [laughs] Brought down the house.

[laughter]

AF Okay, so what I wanted to ask you as well, was if you did any continuing legal education, for yourself.

BOB No. No.

AF Because that's now a requirement: continuous legal education.

BOB Yes.

AF I wanted to ask you what think about that (the requirement of continuing legal education for lawyer): do you think that's a good idea?

BOB I'm not sure I know just what you mean.

AF Well, for example, each year lawyers in Ontario fill out a form documenting the hours in that year that they have used towards furthering their ongoing legal education. Had you ever done that?

BOB No, I, nothing like that.

AF Do you think it's a good idea?

BOB I doubt it. I doubt its usefulness. I think that this sort of enforced continuing education is of limited value, is my own thought about it.

AF While you've been a lawyer, law has undergone a tremendous change, for example, further specialization, new technology—

BOB That's right.

AF --more information--

BOB The only continuing education that I think is justified and useful, was where something new would be introduced. A new method of searching titles, for example, and then nobody would know how to do it, unless they had continuing legal education, a course of two or three lectures.

AF Yes.

BOB I quite doubt this new system. But aside from things like that, I don't know remember much of a useful nature.

AF Do you remember the issue of continuing education being discussed in Convocation, at all?

BOB Not very much. Not very much.

AF No.

BOB The main things I do remember are articling problems, and continuing legal education, as to subjects that had come up and required elucidation, so they would set up a system to teach that.

AF What would be an example. A new subject area?

BOB Well, I'm trying to think of one. But certainly a new registry office system would require, or maybe a new income tax system. Something like that. Things like that that required... A lot of lawyers' practical side was sort of indirectly related to his practice, but he would perhaps profit by having lectures on it, as well.

AF Now, I wanted to ask you about the Law Society and legal education. They are very involved in students' education. I wanted to ask you what you thought—

BOB Don't forget this: the law school, Osgoode Law School, has at the present time nothing to do with the Law Society, nor do any of the other law schools, Queen's or Western. They have their own faculty and dean and they meet and they discuss things with the Law Society, but they're not in any way connected.

AF No.

BOB But it's changed totally.

AF How would you describe that relationship then?

BOB Well, they might discuss what the Law Society would require for a Call to the Bar. How many years and what subjects. I know there's been a lot of concern in the Law Society over the lack of teaching of basic subjects, like evidence. Some law schools have dropped it, which has been deplored as a loss to the profession and to the public, that sort of thing.

AF So do you remember when that change occurred?

BOB Vaguely, yes. It happened back at the time when the Osgoode Law School ceased to be an adjunct of the Law Society itself. It was originally run by the Law Society, Osgoode Law School. And when they dropped it, after a good deal of acrimony, the, there had to be a sort of new Bar Admission Course scheme set up, and then they had to meet and come together again as, sort of, outsiders. This was in the 50's, I would think, the early 50s, and on into the 60s maybe. And John Arnup, for one, took a very active part in this and professor [pause], what's his name, he worked with John, and I forget his name for the moment. But the [pause] other law schools were set up. I think the Osgoode Hall, of course, was the first one, and then Western and Queen's, and so on.

AF Right. But you don't remember any discussions, other than the fact that it was somewhat acrimonious?

BOB Well, originally, I was not at the time when this acrimony was at its peak, I was not a bencher, so I knew this as an outsider.

AF But you were a lecturer at that point?

BOB That's right. But I used to, I remember mid-way at a meeting at the Canadian Bar Association at Niagara Falls, and the subject was very hot at this time and

the complaints were being made about students, articling students being sent to do messages: get the wife's hat fixed, that sort of thing. [laughs] A lot of discussion over that, and very entertaining. That led to the change in legal education that followed, and development of the present system.

AF Right. Well, the final area I'd like to ask you about is more general in nature. It's asking you to reflect on what you think legal education is all about. And I wanted to ask you to start with looking at what you think a law student needs to learn?

BOB I think that, from the beginning, I have entertained the view that apprenticeship was about three-quarters of the legal education, and academic training was about one quarter. Not of any practical use.

AF What about the knowledge they need before they begin to practice? What type of information do they need to know?

BOB Well, it would, of course, depend on the type of practice. Most lawyers join the larger firm, and they would therefore just blend in, as it were. But if you were starting your own practice, you'd find it difficult to sort of chart a course of your own. To get the right blend of talent to set up-- The way it is, even today, that large law firms, of course, take most of the students. But I've found, but this is mostly hearsay as far as I'm concerned, that most students today find the docketing of time extremely boring, and a lot of them have dropped out of law for that reason, and they can't put up with the annoyance of it. And I must say, that in my day I never docketed an hour of my time, ever, nor did any of my compatriots in my firm. In my firm we never docketed, we simply billed on a lump sum basis what we thought the services were worth, and that was it. And it worked well. But the docketing came into being largely because the taxing

offices who had to tax lawyers' bills have no practical experience, and when they had to tax a lawyers' work, they didn't know how much time they spent on it, they couldn't say if it was well done, or not. But I think the docketing system resulted in largely what we call the spinning of wheels. They're docketing time, but they're not doing anything. So that, the, I think, the practice of law has suffered for that reason.

AF So how would you have assessed a file when it came in? You would look at the nature of the file, and the complexity, and give an estimate to the client?

BOB Well, if the client asked for it. You wouldn't give an estimate, unless they asked for it.

AF Right, right.

BOB But I know that one of my compatriots, Stuart Thom, who was sort of a one of my confreres at the same time. He was surprised when I said that no client had ever asked me to estimate the cost of the work before. He said people always asked him to estimate before he did the work. That was a surprise to me. But, well, I, I never was asked to estimate by clients, and I never did. If the work proved to be virtually useless, I wouldn't charge for it at all.

AF Right. Yes. Do you think that that's a reflection in the change in law from being practiced as a profession to a business?

BOB I'm afraid that's the answer. I know, especially girls, who have come through law, and they've stuck it out for a couple of years, and then they've dropped out and quit. I suppose they want to get out of paying the huge errors and omission costs insurance and the annual fees. They just can't stomach it anymore, and they just quit. I think that's going to be the pattern, if they don't do something to limit this, what I call

sheer waste. See we had no errors and omission insurance. Well, you see, about the last year or two I was in practice, we used to get our errors and omissions insurance from Lloyds of London for \$250 a year, that was all we paid. And that coverage was all we needed. But gradually it went up, and up, and up, so that it's become prohibitive now.

AF Yes, yes. We were talking earlier about some of the courses that are taught in the Bar Admissions Course now including practice management and accounting and professional conduct: do you think that's where those courses should be? Should they be there, or should they be in law school?

BOB Well, there's been a lot of discussion about restructuring the legal education system. I have not been a party to that because it's been in the legal education committee, which I have not been a member of. But they have discussed substantial changes in the legal education system. What direction they're going, I really can't tell you.

AF What of your opinion, though, about what kind of training a lawyer should have, and when?

BOB Well, I think, my own thought is, he should have that kind of training that will enable him to conduct his practice. Now, professional conduct, he'd need to know something about it to know how to conduct his practice, but it's not a big subject-- Legal ethics, for example-- But these are the things that sort of become disproportionately large, if there's not something in control over them. They'll take too much of your time.

AF A part of the teaching of ethics and professional conduct is to protect the community and to give the lawyer or law student knowledge about what their role is.

BOB Yes.

AF I wanted to ask you about the role of a lawyer: do you see it as essentially a service to the community? Is that the nature of law?

BOB I think that most lawyers acknowledge that their justification of existence is as public servants. And that they must conduct their practice in such a way as to avoid causing a public problem, and if they see a lawyer who has departed from the routine they will be charged with professional misconduct. The acknowledgement, you see the *Law Society Act*, if you read the Act, I think it says the Attorney General is the protector of the public interest. I don't think there's any lawyer who would deny that his role is really geared to protection of the public interest.

AF Right. Right. It seems that legal education have been made with a view perhaps to protect the public interest. You mentioned, earlier, insurance and how expensive that was. But that's set up in order to protect the public interest.

BOB Exactly.

AF So, how do you balance those two things, then?

BOB Well, you can't, really. I find it's the same as pediatricians who have given up delivering babies because they can't afford their errors and omissions insurance. The same thing is happening in law, but not to the same extent. But I think a lot of people have dropped out of law because of those heavy expenses of insurance. And there's no reason why the Law Society should not provide this insurance at a cheaper rate. I think that, get out of the commercial side of it, see what... I don't know what they provide today, but they charge too much for it today I think. So that's my thought.

AF So, a better balance of keeping lawyers being lawyers and protecting the public at the same time. Do you have any thoughts about legal education for the future in Ontario?

BOB Well, legal education, as we said at the beginning of this discussion, means different things to different people. I say legal education is teaching a person how to be a lawyer, not the legal principles of what the speed limit is, or what the income tax rates are, but to teach them how to meet a client, how to conduct a trial, how to argue an appeal: those are the aspects of the teaching of law that I think should be important. I'm not sure that it'd ever be considered reasonable, though. I think that a large measure of academic instruction is necessary, and you can sort of, and the rest will take care of itself. I don't think that's true. I think every lawyer in his scholastic period, if possible, should be articulated to a senior person who can teach him how to do things, or her, and who would take the student on trials and on appeals, so that they would see at first-hand how it's done.

AF Yes. What about the importance of "thinking like a lawyer": so learning how to think in a particular way, find what you need to find, how to research and find that material?

BOB Most lawyers by the time they're starting to practice, they know how to look up and find what they need. If they have a question that, asks a question that they don't have the answer they know how to find. But you don't find it unless you have the question. But I think that the how to conduct a law office is the important of the aspect of the legal education, not the teaching of law in the academic sense. I don't know how law offices operate today, but the feedback I get from young lawyers is that they are very

unhappy with the way law offices are conducted, with dockets and so on. Perhaps you know more about that than I do.

AF Now you obviously enjoyed the practice of law, so those things were not issues for you when you were going through?

BOB That's right.

AF Yes. Now I guess the last question I would like to ask you today is another reflective question. A good deal of what you have done over the years is service to the legal community: you've worked as a lecturer, you've served as a bencher, you've served as Treasurer, and now you're a bencher again. Could you comment on this life of service to the legal community?

BOB In other words, can we justify the lunches? I think that the legal profession has been served pretty well by the Law Society and by the benchers, and the only thing, at the last Convocation I was at, a week or so ago, the present Treasurer is Frank Marrocco, but his predecessor was Vern Krishna, and he was the best we've had for a long time, in my opinion. And I was discussing with him invoking a rule that will limit the amount of talking that a person could do, and we both agreed that the time had come for such a rule. The Supreme Court of Canada would limit the amount of time to argue a case. The last time I was there we had ten minutes, and it was ample time to present... People can talk forever if you give them... But the Convocation is run [pause] loosely, and wastes a lot of time. Nevertheless, they do get the work done.

AF I guess what I also wanted to ask along the same lines is, you is: you've done all this work for lawyers for all these years, what motivated you to do that?

BOB Well, really it's very hard to answer that. You asked me what motivated me to go to law school in the beginning. That's very hard to answer because I suppose simply it was the various options I had: dentistry and medicine, a few other professions available to me. And law seemed to me to be... My father always said, "A man had enough problems of his own, without taking on another man's problems" so he was against me taking the law school course. Notwithstanding that, I started it and was very lucky to get into a very good firm, and I found them very congenial, and to go to a trial with a good lawyer was an experience, and I just carried on. There was no, once you get started you either stuck with it, or you didn't. And I found it most rewarding, so I did.

AF And the service you did: the committees you attended, your acting as a benchman, your teaching. Did that all fit together?

BOB Well, it did, but not in a very meaningful way. As a teacher I regarded that as rather a task and I didn't particularly enjoy it, but I knew somebody had to do it, and I knew it was better if somebody understood how to do it, and during the years I taught I think it was worthwhile. And I had to learn the stuff myself to teach it, so it was helpful to me in that way.

AF You were saying earlier how much you enjoyed being a lawyer. You were with the same firm throughout your legal career?

BOB Yes. As a matter of fact, I was with the same firm from the day I started as an articling student I stayed with that same firm right through to the end.

AF How many years was that?

BOB Well I started in 1932, and I retired in 1998.

AF That's wonderful.

BOB It's a long, long time.

AF Not many people could say that.

BOB No, they couldn't.

AF Well, thank you very much, Mr. O'Brien.

END OF INTERVIEW

BRENDAN O'BRIEN PHOTOS

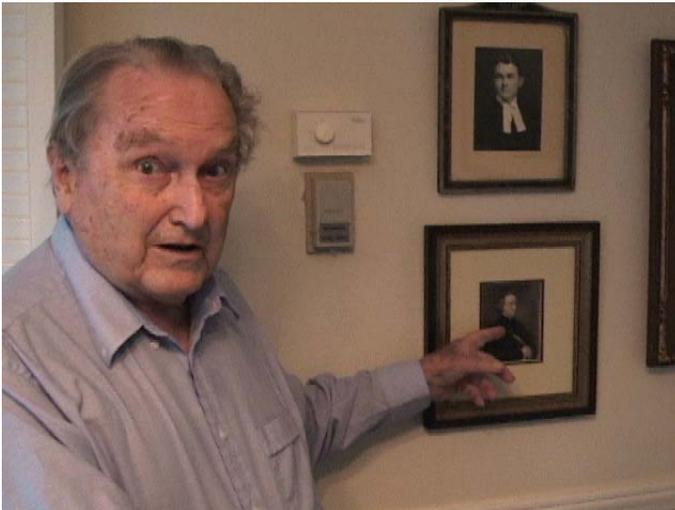
INTERVIEW NUMBER 3

DATE: JULY 7, 2004

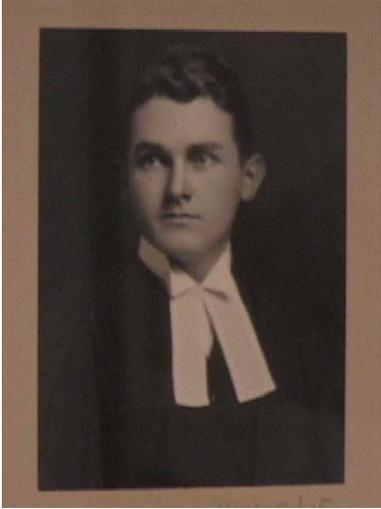
PLACE: O'BRIEN HOME, TORONTO

INTERVIEWER: ALISON FORREST

MEDIA: 1 MINI-DISK APPROX. 51:01 MINUTES IN LENGTH, ONE MINI-TAPE, AND VIDEO RECORDING OF SAME. Tracks 2 and 3 on second mini-disk record a description of three photos/paintings in Mr. O'Brien's house, approx. 4:47 minutes in length.



Mr. O'Brien indicating the painting of the Reverend John Miley (1805-1861), Mr. O'Brien's mother's great-uncle. He was the chaplain of Daniel O'Connell. Original painting, painted on ivory.



Mr. O'Brien, taken on the occasion of his Call to the Bar
(of Upper Canada) in 1932



**Mr. O'Brien's father, taken in the 1940s [?], towards
the end of his life.**

BRENDAN O'BRIEN INTERVIEW #4

DATE: JULY 21, 2004

PLACE: O'BRIEN HOME, TORONTO

INTERVIEWER: ALISON FORREST

**MEDIA: 1 MINI-DISK APPROX. 72:13 MINUTES IN LENGTH, AND ONE
MINI-TAPE OF SAME**

This is Alison Forrest speaking. I am interviewing Mr. Brendan O'Brien. Today is July the 21st, 2004 and this is the fourth interview. Today we are discussing the changing nature of the legal profession.

....

AF Now, Mr. O'Brien, I wanted to ask you first of all about the practice of law. I know that we have talked about your experiences in law school, and articling in a law firm. You began your articling experience in 1929, is that correct?

BOB Yes.

AF And you had over 60 years in practice? When did you retire?

BOB I retired in 1998.

AF Seventy.

BOB Thirty-two.

AF Yes, well over 60 years of practicing law.

BOB Yes.

AF You must have seen many changes in the practice of law. I wanted to talk to you about that today.

BOB Yes.

AF Now, the system of legal education – the half day classes and the half day in the office – do you think this resulted in a strong emphasis placed on mentoring juniors at that time? Do you feel that mentoring was an important part of—

BOB I think mentoring is a very important part of -- And I was fortunate to find myself in a firm where I had good senior people to work with. In other words, to participate in a case as a junior is a very different thing from being told about it, or watching it, or hearing about somebody else doing it. The other thing that I found of special importance when I was a student, I spent every spare moment that I could listening to cases being argued in the Court of Appeal. This was a great teaching experience to hear senior counsel arguing cases and grasping the points as they develop. In other words, there's no other better way to learn than to participate in a case, to see the way it's done. The next best is to see someone else argue a case. So, I was, saw a great deal of actual advocacy in the courts.

AF Can you think of anyone who stands out as being a particularly good speaker, a good litigator?

BOB Oh yes, I could distinguish. Certainly the good ones stood out from the incompetents. But, the, perhaps two of the leading advocates, when I was a law student, were Mr. Tilly, who was perhaps the most important advocate in the whole of Canada, and Mr. Helmuth, who was an older man, and who took a slightly different approach to things. But to see these men at work was a real treat.

AF Yes. And who would you say mentored you in the office?

BOB Well, Mr. Thomas Phelan and Mr. Edward Richardson, those two. Thomas Phelan was the, one of the senior advocates at that time. Edward Richardson was in a slightly less senior role, but Edward Richardson took me on more trials with him. I saw more trials in the Court of Appeal with Richardson. It was very interesting, a very interesting man to go with. He had a way with him that was I found interesting.

AF And, subsequently, when you were a lawyer yourself, did you mentor others in the office? Was that a role that you assumed?

BOB Well, when I became a lawyer myself, things had changed a little bit in that the firm was larger, and there was less sort of one-on-one relationship in the firm. But I did mentor a lot of the students who came up under me, and who I found it a pleasure to work with. And I think they learned a good deal from our mutual meetings.

AF Does anyone stand out in particular from the group?

BOB Well, Mr. Justice Montgomery. At least he became a judge later on. He was one of my juniors. And we got on very well together, and there were many others, but I don't remember names of those in particular. But there were good many that I had close relations with.

AF Now, your first trial: that was several years out of law school, is that right?

BOB I appeared on my first trial about three years after my Call to the Bar. And the first trial that I appeared on alone was in Cochrane, Ontario, which is in northern Ontario, before Mr. Justice Keilor McKay. And it was a learning experience in itself. The trial lasted, I think, about three or four days, and we succeeded on it. And these are the things that you remember.

AF Yes. So, between—

BOB By the way, I should tell you, that in that trial in Cochrane, in those days, the only way to get to Cochrane, was to go by train. And I travelled by train, which left Toronto at night, and in the morning at 7 am in North Bay you changed, or at least the car you were on, the sleeping car, went onto a different train, and amongst the passengers was Mr. Helmuth, whose name I mentioned, and he spent the whole day between North Bay and Cochrane reminiscing about cases he had tried, most interesting cases.

AF Wonderful, yes.

BOB I found that a fascinating experience, to have one of the senior members of the Bar, just to listen to him talk.

AF Yes, yes. So I wanted to ask you--

BOB That wouldn't happen today!

AF No. You'd probably fly in and fly out.

BOB Probably, yes.

AF So between articling and your first trial: how did you learn those skills? Was it pretty much that you went along with senior counsel to their trials, you were in the office with them, you worked fairly closely with them mostly. What other types of things to learn the skills?

BOB Well, the only other way I learned was either with my own seniors, or going to court listening to others argue in the court of appeal or the trial courts.

AF You've talked earlier about the importance of doing law rather than the theory, going to school--

BOB Well, the learning experience was an ongoing process. It never stopped. It didn't either begin or end.

AF Yes. Right. I wanted to turn, then, to courtroom practice, and some of the changes that have taken place over the period that you've been practicing law. I understand that factums weren't typically used in the early period that you were practicing.

BOB Oh, they were. Right from when I was a junior. Factums were used, but, perhaps, mostly in appeal work. Perhaps not in trial work, not very much.

AF I was going to ask you if there was any difference in practice? Was there less formality? The *Rules of Civil Procedure* now proscribe a high degree of formality in timing and process.

BOB Well, first of all the mechanical end of practice was greatly changed by the invention of the Xerox machine, which made copying so easy. And you could prepare a factum for your own use, even if it wasn't for the court for copying other materials and bringing with you what you wanted, in the way of copied material. Previously, if you wanted to argue a case in the court of appeal, or the trial, you'd get the actual volumes of the cases that you intended to rely, and you'd bring the volume to court with you, and you'd mark the page, and you'd read from it, whatever you thought was relevant. But as the Xerox machine came into being, you'd simply go to the library, take the book, go to the machine and take the pages you wanted, and you'd end up with half a dozen pages, rather than half a dozen books. It was much simpler.

[laughter]

AF So, what did that actually involve in terms of transporting the number of volumes you'd have to take?

BOB Oh, yes. In some cases, they had, in Osgoode Hall Library, they had trucks on which you could pile your books, and they were on wheels, and you could take two dozen books on one of those little carts. You'd take it to take it to court, and you'd take it back when you'd finished.

AF So you'd just trundle down the street?

BOB No, from the library in Osgoode Hall to the courthouse. From the library to the courthouse.

AF Right. So none of the courts in Toronto were on University Avenue at that point?

BOB No, well the trial court was either in City Hall, or in Osgoode Hall.

AF Right.

BOB And then later on the courthouse was built. Which, I happened to be on the committee that designed that courthouse and found a great deal of interesting things about-- We travelled all over the United States looking at courthouses. We designed that.

AF Which number University Avenue is that: is that 363 University Avenue?
[The correct address is 361].

BOB Yes, it's 363. The big....

AF So which committee was that?

BOB Well, the committee was set up by the Metropolitan Toronto Law Society, provincial government, and there were about ten or twelve people on it, and we did a

great deal of investigating of other courthouses, in designing that one. And, for example, whether or not the court clerk or registrar would have in his desk, would have a telephone from which he could speak quietly. Things like that.

AF Yes.

BOB You would never have dreamed of in the past.

AF So what years would this committee have been—

BOB I would think [pause] just at, a rough guess, by the way, there should be at the rear end of it, my name should be on a plaque for those who-- I think it was opened about [pause] in the 1960s sometime, but I wouldn't be sure.

AF Did you say that that committee was a Law Society committee, or was—

BOB No, it was a committee-- Really, see, the courthouse was actually built by Metropolitan Toronto, and they set up the committee, but the Law Society appointed people to it, because Metropolitan Toronto wouldn't know who, wouldn't know about that sort of thing. And I wasn't on it originally, but Fred Parkinson, who was a bencher at the Law Society, was on the committee, but he died, and when that vacancy became, I was appointed to fill it, so that's how I became-- There were about ten or twelve others, and we went to Washington and New York, and places like that to look at courthouses.

AF Just in the U.S.?

BOB Yes.

AF Did you go across Canada as well?

BOB No. No.

AF No. And were you pleased with the result?

BOB I think we, yes, we did pretty well. I remember going with Mr. Justice Gale, who was Chief Justice at this time, to inspect it, while it was in the course of construction and we got up on the top floor where the main big courtroom is, and there was a duct coming out of the wall into the courtroom, and out of the duct came a mouse! It was an interesting experience.

AF Getting back to courtroom practice, do you feel that over the time you were a practitioner, the nature of the bench changed: did they treated lawyers or juniors differently?

BOB Yes, the bench did change. I think it became more civil towards juniors than it was when I started. In the early days, a junior might have a very rough time before the court, but I think later on that attitude changed. It became more agreeable and more tolerant. But, on the other hand, the quality of advocacy did not necessarily improve very much. It seemed, I'd say, more or less constant.

AF Right. I'd also like to ask you about a common perception that lawyers are less courteous now than they used to be. Do you believe that this is the case?

BOB Well, let me start out by telling you I've been out of the practice of law now for roughly ten years, so that how it is today I can't tell you, but during the time I was in practice, I would say the courtesy and friendliness between lawyers was pretty constantly good. We got on very well together.

AF I guess a related question—

BOB And then as you perhaps know—

AF I'm sorry.

BOB --it was customary when I gave a case to refer to your adversary as a friend and that was a bit of a joke amongst-- Sometimes clients would become angry, and say why are you calling your enemy your friend? That's the way it was.

[laughter]

AF Another common thought is that we are now a more litigious society than we were in an earlier time. Is that a misconception, or do you think it may be true?

BOB I think it is true in the sense in that people in recent years have litigated things that are, in the view of most people, as absurd, that would never have got litigated in the past, and which the courts rarely entertain. But, they, nevertheless, get in the headlines by bringing in a law suit, and try and bring about some result which would be ridiculous.

AF And why do you think that they would do that?

BOB It's simply because of an easy way to get publicity for yourself. Some lawyers are publicity-seeking all the time. They like to take on hard cases for that purpose, get their name in the papers for that reason: it's a way of getting well-known and getting clients.

AF Yes. Yes. So, really, then the role in the media—

BOB The media has had a big role in that.

AF Another common thought, along the same lines, is that in the past litigators went to greater lengths to settle earlier in a case than is done now.

BOB Well, again, see having been out of the practice for some ten years. I can't say what happens now—

AF What about towards the end of your practice, then?

BOB --but certainly in my period of active practice, the ratio of settlements to trials was, I'd say, a great many more cases were settled than ever went to trial. Very few cases, I'd say, actually went to trial, because by the time you'd got through the examinations for discovery and investigated the witnesses, and so on, you knew pretty well what the result was likely to be, and so you'd settle it, and that was the way it was. Whether it's changed, or not, recently, I don't know.

AF OK, I'd like to turn now to office practice. We were just talking now about copying casebooks for the courtroom—

BOB Yes.

AF --and you were talking about the innovation of Xerox machines changing that. Was there some means of copying in your office between, I guess, copying by hand and Xeroxing?

BOB Yes, there was a preliminary to the Xerox machine there was a – what was the name of it--?

AF Was that the hand--?

BOB --you cranked the thing—

AF Yes.

BOB --and it was slow, and messy. You didn't get a clean copy from it. And that was the predecessor of the Xerox machine, which changed things totally.

AF Right. When would the other form of technology—whose name eludes us -- when did that come into your office?

BOB It came into the office roughly five years before the Xerox machine.

AF So not that long before.

BOB But before that, copying was by hand.

AF This would have been in the 1960s?

BOB Yes.

AF So you had, really, thirty years of practice with just handwritten copies?

BOB Yes, yes.

AF Did that mean you employed people to—

BOB Well, your own staff. Either students or secretaries, they would do it. You would send them out to copy. The main problem with copying was, if you are perhaps familiar with it, when you appeal a case the appellant's lawyer must provide the court with, I forget the number, but I think it's a least five copies of a case, which meant an endless amount of copying. And if you didn't have a machine, it would take a very long time to do it. But the machine changed all that.

AF I'm just wondering in terms of running an office, then, if you're paying people to copy things that were required: did that make a significant difference in terms of the way an office was structured, and the amount of money that was spent on copying?

BOB I think it made a difference, but I wouldn't say huge.

AF Not a significant—

BOB I think that the people who did the copying pre-xerox machine were usually at a low level of payment, they weren't paid huge amounts...

AF Something notable about law offices now is simply the amount of paper found in the law office.

BOB Well, I'll tell you one thing about law offices today, and as I've said I have not practiced for ten years, but any law office I've been in, without exception, I find the

lawyer sitting at his desk with a screen in front of him. Now what he's doing with them, I don't know! I never had them, so that is a different practice, and every law office has them, and it obviously has much to do with the present day practice of the practice of law.

AF Yes.

BOB He sits at a keyboard and a screen. And how he uses it, I don't know.

AF Something about a computer is the ease of making copies: you're hooked up to a printer at the other end—

BOB The other thing is, as I say, the lawyer sits in a relatively small office with a computer and a screen, but he doesn't interview clients in that office, as he used to, when I was in practice. They have, in most law offices, what's called a boardroom, or more than one boardroom, and when you meet with a client you meet the client at the front desk, you take him down to the boardroom, and sit him down at a big table that would seat perhaps twelve people. And the lawyer interviews the client or the witnesses, whoever it may be, in the boardroom, you don't do it in the lawyer's office. But in my day, you'd interview in the lawyer's office, which was big enough to entertain five or six people

AF So, quite a big difference. Did you have had armchairs in your office?

BOB Yes. And now you don't.

AF Was there a table for them to work at, as well?

BOB Yes. Well, yes. Usually, yes, there was a table and several comfortable chairs in your own office. Now they go to the boardroom. It's quite different.

AF So was your office set up for entertaining in a sense?

BOB So you'd have people would come in and sit down, and then you might send out for coffee, for refreshments, whatever they were. It was a social engagement. It became more formal and more [pause] mechanical as you moved out to the boardroom.

AF So would you say that affected client/lawyer relationships?

BOB Well, probably a little bit. I think that the client had a more intimate relationship with his lawyer under the old system, in the long term it wouldn't change things very much.

AF What about as a junior: would you have had an office that facilitated that type of relationship with a client? Would you have had a larger office with the chairs for clients?

BOB No, no, no. That would be the senior lawyers would have that.

AF So the juniors would come in?

BOB Yes, the juniors would come in, if they were required, yes.

AF Nowadays, in offices, even though clients don't typically come into your office, having a clean desk is considered to be an important thing, although it's a work space. Was that something of an issue at that time, when you did have clients coming into your office?

BOB It was always something of a joke. Some lawyers were notorious for having a horrible desk piled six inches thick to a foot high with papers, and it was said that these lawyers, while seemingly not know where anything was, could reach in and pick out anything they wanted!

[laughter]

AF Right!

BOB Whenever they needed. That was true: some lawyers had dreadful desks, others they would be clean.

AF Right. I guess that's always going to be the case. Now if there was less copying, to return to copying, then there must have been less need for storage? Storage is a real issue in a law firm now, the money it costs to store the material.

BOB That's true. There's more storage required today than there was then. But there had to be a certain amount of storage space for keeping originals.

AF And you wouldn't have had a boardroom?

BOB Well, let me say this: some of the larger offices, especially with corporate clients, had boardrooms that were used as such for those companies that had boards of directors that were those clients.

AF Right.

BOB They would use the boardroom for that. That's the way they got their name, really. But, latterly, they've become a meeting place with clients. That's the way it works.

AF Right. Now, if you weren't, getting back to the copying issue, if you needed copies of things and you weren't able to get the originals, did that mean that law offices typically had good reference libraries? Or did you go to the Great Library?

BOB No. Most law offices had a very modest library with, well, first of all, every law office would have the Statutes of Ontario, the Statutes of Canada, and a few of the law reports that were easily stored, but they would have to go to Osgoode Hall or City Hall Library to get the reports that they needed for a widespread investigation.

AF As a junior, in particular, was that an important part of your junioring experience: going to the library to research?

BOB Well, it was. You'd have a ranging for example if an appeal was to be argued, as I tell you, they had at Osgoode Hall little carts and you could take a dozen case books and stack them up on the desk before you, and when the case was over, you'd have to take them back again. But now, they won't let you take a book out of the library unless you almost sign away you soul! [laughs]

AF Yes.

BOB So that that's changed totally.

AF You talked earlier about what people do when they sit in front of a computer. A lot of what they do is the research that they did then looking in a case book. They had to physically go and get the book. Now they sit at their desk and the cases are online. So it's a very different researching experience.

BOB A very different world. A very different world. I must say, that I have never become accustomed to using a computer. My wife is very skilled at it: she can dig up anything she wants, but I can't. I don't know how to use it.

AF Who did the drafting in the office? Was it done by articling students and juniors?

BOB No. The drafting of a pleading, unless it was a purely routine pleading of some sort, would usually be done in the initial stages by the senior, and then the junior might take it and finish it from-- The senior might decide what line of defense you would take, how you'd plead a defense, that sort of thing. Then it would be prepared and filed.

AF What office assistance did you have, other than articling students?

BOB Yes, I think every lawyer relied a great deal on a competent secretary. And competent secretaries were quite common in the bigger firms. Students were not given the same responsibility as a competent secretary.

AF Right. How many secretaries were in your office in those early years?

BOB Well, our office was a relatively small one. I think that we had probably five or six senior lawyers, and we would have five and six secretaries, and then juniors, students as well.

AF And what type of work did the secretaries do?

BOB Well, nine-tenths of their work was taking dictation, taking letters and typing and bringing them back for signature, that sort of thing. But she would be a shorthand secretary, she wouldn't use a Dictaphone, although some of them did. But I think a good secretary was expected to be able to do shorthand.

AF Yes. Did they have Dictaphones in the early years of your practice?

BOB Yes. They did. And the funny thing about it really, the early Dictaphones that I first was familiar with, they used a wax cylinder that slid on a drum that revolved, and the wax cylinder could be used over again, when you'd finished, you'd scrape it, and then use it again. But the real tragedy of wax cylinders was that if you dropped them, they broke. And then you had to start right back at the beginning. But Dictaphones-- Then later on they used a plastic disk, and they were in widespread use.

AF And how did you dictate? Did you always dictate to a secretary who took shorthand for you?

BOB Yes.

AF Did you always dictate in this way?

BOB No, I occasionally would use a Dictaphone, and give it to the secretary and she would take it and she had a machine, and she worked it with a foot pedal and she would record it, and listen to it, and type as she listened. But I would say that most of my work was done through a shorthand stenographer. I suppose, either one was equally efficient, but the Dictaphone was probably a bit quicker.

AF Were the secretaries involved in file-keeping?

BOB Yes. Yes.

AF What of billing clients?

BOB Well, billing of clients: it's funny that in my practice, until the last couple of years, we never kept what were called dockets of time spent on a client's work. We charged what were lump sums based upon what we considered to be the importance of the work, and the type of the result, the satisfactory result you'd charge a bit more. But a lot of the other firms, especially the larger firms, used the docket system, which simply drove me and students wild, because they had to keep all these records. But the billing: you'd never let the secretary do the billing. You'd tell the secretary what to put in the bill, and then the secretary would type it out and mail it out.

AF Now, I'm trying to imagine litigating without the email system we have now, and the phone systems we have, where you can leave voice messages and so on, so that you have a paper trail of everything that was said along the way in negotiations. So, how were negotiations different then? How did you negotiate and keep a paper trail?

BOB Well, if you wanted to keep a paper trail, after a meeting, for example, you'd sit down with your secretary with a Dictaphone, and dictate a summary of what

happened, and then that would be transcribed and you would keep that on the file. But it wouldn't be verbatim. Just a rough abbreviation of the matters that were discussed.

AF So your own recollection—

BOB Yes. That's right. Not only your own recollection, but you'd only include the things you thought were important, so that it mightn't be a total recollection, but the highlights.

AF Likewise, for client instruction and client contact: you would keep a paper record of what instructions had been received, and so on?

BOB Well, usually if you had any instructions for a client that you regarded as important, you put it in a letter. That would be a record of it, so if the client ever raised the question later on, you would have proof of what you had told the client in a letter.

AF And if you wanted to discuss with the other side negotiations at various points, you didn't have phone machines where you could leave messages: did this mean you had to work within the constraints of business hours and know that you would be in the office in those hours? How did that work?

BOB Well, you worked business hours and were available by telephone, if necessary, outside of business hours, but that was certainly not the practice. And some people refused to discuss matters on the telephone. They'd say, "See me in the office in the morning."

AF Right. Right. Now I wanted to turn now to the issue of time management which is something that is often talked about now. Lawyers are always talking about creating a healthy balance between work and other commitments. There is a perception that in the past finding this balance wasn't as difficult as it is now. Is that really the case?

BOB Well, I don't ever recall the term time-management ever having been used in my practice. And, I know that your time had to be managed to achieve a result, but that was simply a sort of de facto use of your time as you needed to accomplish what you had to do. There was no goal, such that you could say my time management calls for this goal, it didn't happen.

AF Right. Now I wanted to ask about the hours you worked when you were practicing. Again, lawyers feel that they often work very long hours. But from what you've told me, at different times as we've talked, your hours were very long.

BOB Well, a law office usually opened at 9 o'clock in the morning, and usually worked until 5 or 5.30 in the afternoon. That was the considered a working day. Saturdays, first of all they worked half days on Saturdays, and gradually that was eased out so that you didn't work Saturdays. But you had 9 to 5 more or less and that didn't mean, though, that the lawyer didn't have a lot of work to do at night at home. He'd bring that work with him home and work on it, and either dictate it at home, and bring it in, or dictate it in the morning after the work was done at night. But a lot of the work was done at night after hours.

AF So in fact you would have worked longer hours. And the holidays then weren't the holidays we have now. In your early years, you would have had less time off for holidays, would that be right?

BOB In the early years, two weeks was regarded as sufficient holidays for anybody. And then, gradually, it got to be three weeks, and I don't know what it is today. But you didn't get, Christmas maybe you got a few extra days, Easter, but the rest of the year you worked full-time 9 to 5.

AF Yes. What about when you were preparing for trial: you would have had to work longer hours again?

BOB Oh, yes. Well, preparing for trial meant not only getting the facts in your head, but you had to have somebody interview the witnesses, and get statements about what they would be saying, and you had to use that for purposes for either examination-in-chief or cross-examination, as you saw fit. And the trial, some trials took weeks and weeks and weeks. There was one trial that John Arnup was in, Bill Gale, I think it lasted for four or five months. In fact, there was so much money involved in it, and because they knew the trial was going to take so long, they put special life insurance policies on the counsel in case either one of them died, they'd both have something to fall back on to start doing it over again. Fortunately, they both outlived the trial.

AF Now another way that you would have spent a great deal of time in your work life was in travel. I understand that you went all over Ontario in your early years to different courts?

BOB That's right.

AF And we were talking earlier about the fact that it would have been mostly train travel.

BOB Mostly train travel, yes.

AF So that would have taken a great deal of time and effort to get there and back?

BOB It did. And yet it was regarded as time you could use, if you wished, to catch up on your work, or talking to others about matters that were in issue. But the

travel involved-- I can remember my first ever air travel it was on a trip to Windsor on a case, which I didn't like, and I've never liked air travel ever since. [laughs]

AF And what year would that have been?

BOB In the mid, in World War Two, in 1945.

AF Oh, probably a small plane, was it?

BOB It was, well, thirteen passengers: seven on one side of the aisle, six on the other.

AF Was it common for juniors in this time period to do so much travel? Or was it just your office, or you, that seemed to find that kind of work?

BOB I think it was not common in the sense that everybody did it, but some offices did a great deal of travel, as did ours, and others did practically none, depending on the type of practice they were engaged in. But I think in my junior years, and then in my senior years, I visited at least once, every county town in Ontario except Lorimer, which is down near the Quebec border. That's the only one I didn't visit.

AF Yes. Extraordinary. Now, you were with the same firm from the time you articulated until the time you finished practicing, and you became partner there. Do you think in your early years, before you became partner, there was the same emphasis as today in putting in time as a junior in order to make partner? Was there the same sense of timing and hours and commitment that needed to be shown?

BOB Well, nobody, I don't remember anyone speaking about putting in time, or putting in hours, it was really doing the work. You didn't think of it in terms of time, you thought of it in terms of getting the work done, whatever it took, you used it.

AF Right. I would like to turn to the theme of insurance work: you did a lot of work in the insurance industry?

BOB I had a lot of insurance clients, yes.

AF So, you received a lot of the work from insurance firms?

BOB That's right. An insurance firm would telephone you and say one of our insurers has been injured by someone else, under our policy we must defend them, you are employed for that purpose, you'd get the file from the insurance company, see the client, then conduct the, as I said, you were conducting for the insurance company and that was the way it went.

AF And could you name some of the firms you worked for at that time?

BOB Well, even if I could, I wouldn't. I don't make it a point of discussing clients.

AF Sure, sure. In the time that you were practicing insurance litigation, were there any changes in practice, or did it remain the same type of practice?

BOB The [pause], I think the inclination towards settlement did increase somewhat, otherwise I don't remember any change.

AF The insurance companies, themselves, have actually changed a great deal. In the time that you would have practiced they have become larger, and would have amalgamated and so on—

BOB That's correct.

AF Did that change the relationship you had with those insurance companies?

BOB No, not really, not really. I had a number of fairly large like a group of companies would practice in a, one consortium as it were, and I'd act for all of them.

But, I would say I represented, over the years, maybe five to ten different insurance companies.

AF I would like you to reflect on whether you feel lawyers now have a different sense of their role than they did in your early years of practice, thinking, for example, of ideas of service to community, and what it is to be a lawyer.

BOB Well, again, I must remind you that it is some years since I have retired. So that what lawyers are like today, I don't know.

AF I'm thinking of the end of your practice.

BOB At the end of my practice: not much changed, no. They were very much the same as when I started.

AF Right. And I wanted to ask you in your career that you represented clients pro bono, or if the nature of your work was such that it didn't cover that?

BOB I certainly did some pro bono work, for one reason or another. Maybe because I was satisfied at the end of the case that I hadn't really done anything for the client and I wouldn't charge them anything. And occasionally I would -- See, in the early days of my practice, there was no such thing as legal aid, as we know it today. But the sheriff of York county, used to be given the job by judges, of finding lawyers for an accused person, and he would go around and shop around and see if he could get a lawyer to act. And we would act for them that way, occasionally.

AF Right. Did they tend to be the same people doing that, or was it just anyone?

BOB Well, it was just anybody. And you would do, during the course of the year, maybe half a dozen legal aid, pro bono cases.

AF Now I wanted to look briefly at changes in law firms. One of the biggest changes that occurred over your time in practice was the change from law firms being predominantly small firms or sole practitioners, to law firms being predominantly medium or large sized firms.

BOB Yes, the big change has been huge firms compared to the relatively small firms when I was practicing. I think when I first started to practice law there were two or three what we called large firms, McCarthy's was one, and they would have forty lawyers would be very big. Now they're three times that size, so that they've grown immensely. But I've heard, on the other hand, that it's become very impersonal. I know I've spoken with people who've graduated, and become connected with a big firm, but became so fed up they gave up the practice of law, and found it very boring. Now, whether that's true of everybody, I don't know, but I've heard many people tell me they couldn't put in the hours docketing time, and so on.

AF Right. So I was going to ask you how you felt that that has affected the practice of law. So I guess one is the practice of docketing, which we've discussed. Is there any other way that these big firms have affected the practice of law, in your view?

BOB Well, yes. The bigger firms have tended to represent corporate clients, not individuals, and not take on criminal defense, as a rule. And the smaller firms, there's a few lawyers become, Mr. Greenspan, for example, they're sort of solo practitioners that do criminal work. It has changed over the years, yes.

AF And your firm remained fairly small throughout, despite the general tendency of law firms to expand?

BOB That's right.

AF Did your firm ever consider expansion? Getting bigger or amalgamating?

BOB Well, we did amalgamate. That was the only change in all my years of practice with-- In 1986 we merged with the firm of Aylesworth Thompson which was an old established firm from the last century. But Jim Craig was the senior partner, and our firm had reduced in size, and Paul Shannon was the most active of our partners at that time, and almost coincidental with the merger, he died. So that ended his relationship with them, but the merger has continued ever since. The Phelan O'Brien Aylesworth Thompson partnership has continued.

AF Right. Now another change that has occurred over the time that you've practiced law, is the increasing specialization of practitioners, going from a more general practice to a more specialized type of practice. Did that affect the practice of law, at all, for you?

BOB No, I think that specialization would sort of change from one case to another. You might have ten cases that were not specialized, and then one or two that did. For example, there were problems got up into the law courts which were never heard of when I was younger, and this called for specialized-- For example, copyright disputes, and things like that.

AF And were you a certified specialist in litigation?

BOB Yes.

AF And when would that certification have --

BOB It started before I retired. I'd say 1985, maybe.

AF Right. And a last major change that occurred over the time you practiced law, is that law went from being a predominantly male profession to now when law schools are graduating approximately equal numbers of women and men.

BOB Yes. I would say that that's about right.

AF Do you think that that's changed the practice of law in any way?

BOB Yes, it has. The, well, it's hard to put your finger on it, but I think it has changed it. I think that in the earlier days, the practice of law was not only was restricted to men, but only to a few men. A lot of the men never saw, into practice. At least, they got into the lower end of practice, but not the trials and appeals, and that sort of thing.

AF That's true. The last area I'd like to address today, are the questions that the current Treasurer of the Law Society wanted to have asked concerning the opening of court. In what capacity did you attend the opening of court?

BOB Yes, as Treasurer. That would be one of your duties. And, but don't forget the opening of court would involve other, like the Chief Justice and the Attorney General who were the, who were two of the important people at the opening of the court. And they would sort of use this, especially if you had anything that you wanted the Attorney General to do in the terms of legislation, you'd use this occasion to publicize that and you'd do it in public. Or you'd complain that it's been so many years-- For example, we need a new courthouse, this would be a common thing, you see, we've been so many years without a new courthouse. Any complaint, it was sort of state of the union occasion when you would single out things that you thought deserved attention, and that would be the time to bring them up.

AF And did you expect a response?

BOB Oh, yes. You would usually get some response because it was made, you see, in public. You would bring this out and the press would listen and this would get in the headlines.

AF Did you attend the opening of court in any other capacity, other than as Treasurer? Would you, for example, have been present as a bencher at any time?

BOB Well, I always attended the opening of court simply as a bencher, as a lawyer, just as a spectator. I made it a practice to do that.

AF When would this have occurred?

BOB Well, I would have been a constant attendant of the opening of court for the last forty years, I would say.

AF Now, thinking about the ceremonial aspects of it, did people dress in a particular way?

BOB Well, I would not gown for that occasion. I'd just go as a spectator in my civilian attire. But anyone taking any part of the proceedings would be gowned. That is, the Treasurer, the Chief Justice, whoever else might, the Attorney General. I should tell you, the Attorney General did not always attend in person. You'd often have a junior there, and he would take all the flack they'd throw at him. He'd have to go back and report.

AF Was it a very ritualized or formal occasion? How would you describe it?

BOB Well, usually, it lasted for one hour, an hour and a half, and each one would talk for fifteen or twenty minutes, and it was usually entertaining to listen to.

AF Do you remember the content of any particular Treasurer's speech? Does any one speech in particular stand out, perhaps one of your own?

BOB Mainly complaints about some failure either in legal aid or in the court system lack of court space, and the need for more court rooms, courthouses, that sort of things, that would come up from time to time.

AF They sound like issues where you're asking the government for more money for funding of legal institutions?

BOB Yes, that's right. Something of that sort. That was the nature of the plea put forth by the Treasurer, on such an occasion.

AF Right. And how many people would have been present at these occasions?

BOB Well, there was usually a fair number because the courts would go on to resume their business at the end of these ceremonies, and the juries waiting to be called would be sitting in the courtroom, sort of a captive audience, so there'd be a pretty full courtroom.

AF Right. Did you--

BOB I'll tell you an interesting story about, when I was a junior my senior partner, Mr. Thomas Phelan, was retained to defend a murder case, and the murder had been committed by this client, there was no question about that. The only question was whether he was insane. And Mr. Phelan got a good deal of evidence where he came from in England, about his background, and there was no doubt about his insanity. And when the case got to court Mr. Justice Rainey was on the bench as the judge, and they read the charge out, and Mr. Phelan stood up and said, "We take the position that the accused is too insane to stand trial." And Mr. Justice Rainey said, "Oh no, Mr. Phelan. In a capital punishment case, the accused must always enter his own plea." He said to his clerk, "Read the charge over again." So the clerk read it over a second time, and the man stood

up and said, "Guilty." And the judge, he said, "Strike that out Mr. Phelan", and all the jurors sitting in the court heard this, so when they were called upon to attest to the trial of the man, because of insanity, so they all thought it was short order that he was too insane to stand trial!

AF Did you attend similar ceremonies, the opening of court, in other jurisdictions?

BOB Well, yes. I'd been at the Supreme Court of Canada, at the opening ceremony session. And it's usually the much, it's a formal occasion usually, nothing, nothing very exciting. No other province have I ever, no.

AF And there's a church service that goes along with it, I understand?

BOB That's usually in the first weekend in January, yes.

AF Can you tell me something about that?

BOB It usually occurs the first Monday after the resumption of court work in January, it's probably about January the fifth or sixth, somewhere about there. And it's a ceremony with no formal legal features, except that the clergyman in his sermon usually would use a sort of legal theme for his-- But that's all.

AF And you said earlier that the press were present on these occasions. Did they have an opportunity to ask questions afterwards?

BOB The press? No.

AF So they were simply spectators?

BOB Just spectators.

AF Did your own speeches change? Did the content change from year to year?

BOB I don't remember-- I think it would be much the same. I think that the only change would be what the needs were on the subsequent occasion. You might need more courthouses this year, or something else.

AF Now I would like to ask you very quickly about your work for the Law Society as a practitioner. You represented the Law Society in a number of cases?

BOB I did a few times, yes. And usually at the Supreme Court of Canada level, usually. There was one case that started in British Columbia, that gradually found its way up to the Supreme Court of Canada.

AF *Jabour*.

BOB *Jabour*, yes. And we got permission to intervene, and I appeared in that case. And I like to think that I had something to do with the reasons for judgment in which Mr. Justice Estey said that free, a free society could only exist with a free bar. I'd argued that. It's in the ratio.

AF So, that was your—

BOB Well, I think I had something to do with it.

AF How did you come to represent the Law Society?

BOB Well, the Treasurer usually would appoint me. I represented the Law Society, I would think, in half a dozen cases over the years.

AF This would have been in your latter years of practice?

BOB Yes.

AF And could you tell me briefly what it was like to appear before the Supreme Court of Canada; very few counsel have done so.

BOB Well, I found the Supreme Court of Canada very easy to appear before. In fact, interestingly enough, the last time I appeared in the Supreme Court of Canada, before I retired, for the first time I was subjected to a time limit for argument. Previously

the Supreme Court of Canada had not done that. But they found, I suppose, because of the pile up of cases, that it was necessary. So I was assigned ten minutes to present my argument, which I found quite ample, but I could tell from watching other lawyers that they didn't know how to limit their time. It was quite awkward for them to try to present a short argument.

AF Do you have any particular memories of appearing before the Supreme Court, anything that stands out?

BOB Yes, I'll tell you, you never know how a case is going to go. When I got this case, I was arguing for the appellant, and the case had started as a motor vehicle accident on John Street in the City of Toronto, just south of Queen Street. And the plaintiff had been walking across John Street in the block, he was walking across the block, and halfway, three-quarters across the way, a car backing up, that was a parked car, hit him, and the trial judge found them equally at fault, the Court of Appeal Ontario found 90-10 in favour of the pedestrian. So when I was opening my case, I was telling my facts in the Supreme Court of Canada, I was saying in the middle of the block he was crossing the street, and Mr. Justice Pidgeon, who was the justice in Quebec, said in a high pitched, said, "Is there no law against j-walking in Ontario?" So I knew he was on my side. And sure enough, they restored the trial judgment.

[laughter]

BOB On another occasion the judge, I forget who it was, but he knocked over a glass of water and nearly drowned counsel at the bench in front of him.

AF Were you, was it, 89 years old when you last appeared in court?

BOB That would be about right, I think.

AF What is it like to act as counsel at 89 years of age?

BOB Well no different. Except Eric Murray who was on the same case with me, on the last case, introduced me to the court as his junior. Somewhat entertaining.

AF What did you enjoy the most about the practice of law?

BOB I think the most was in presenting argument: either at trial or on appeal. And being affective, or trying to be effective.

AF We've talked extensively about various aspects of your professional career. Is there anything you would like to add that we haven't covered?

BOB I can't say there is. There's been a lot of change, I suppose, over the years, but the practice of law has been fairly consistent, as far as I'm concerned.

AF Mr. O'Brien, thank you very much.

END OF INTERVIEW