

Ontario Justice Education Network

Ottawa Summer Law Institute for High School Teachers August 2003

Remarks of The Hon. Brian W. Lennox, Chief Justice of the Ontario Court of Justice

I am pleased to have been asked to speak to you today in the context of this Summer Law Institute. As you have heard, the Ontario Justice Education Network and its Courtrooms and Classrooms project is a key education initiative of the Chief Justices of the three courts of Ontario. I would like to thank Taivi Lobu and Justice Judy Beamen, together with the organizers of this Institute for having invited me.

For people of my generation, the teaching of law and of civics in the high school curriculum is a relatively new and welcome development. We had, I think, for too long assumed that lessons of civics and the fundamental principles of our democracy would simply be absorbed by everyone through a process of osmosis and readily understood and applied by students through the classic school curriculum and by virtue of living in Canadian society. The same assumptions were also made about our system of justice, its Courts and court structures and were made at a time when our Courts were complicated and arcane institutions with names such as Admiralty, Chancery, Exchequer, *Oyer and Terminer* and Common Pleas.

While the number of Courts may have been reduced over time and their jurisdictions and names simplified, their functioning and the principles upon which they operate are no less obscure to the casual observer at the same time as their importance has increased and their influence is being much more widely felt. There was a time, if I may

be allowed a gross oversimplification, when a court judgement impacted only upon the litigants. To-day, largely as a result of the enactment of the *Canadian Charter of Rights and Freedoms*, judgements can and do have much more far-reaching consequences, affecting not only the litigants, but also large segments of society who have neither appeared nor had the opportunity to argue their case, to the extent that the criticism is often voiced that the Courts now legislate as well as adjudicate.

All public institutions have come under increased scrutiny and criticism over the past several years. As teachers, you are perhaps (and unfortunately) better placed than most to witness first hand a generalized tendency to contest both authority and public institutions. In part, this may be a result of the *Canadian Charter of Rights and Freedoms* and its emphasis on individual rights with no direct reference to individual responsibilities. In part, it may be also come from increasing scepticism if not outright cynicism. Politics appears to some to have become a full contact sport, if not a blood sport, and few voices are raised to defend public institutions, including our parliament and legislative assemblies and the Courts.

It appears to me that you, the teachers of this province, have an important role to play in fostering the development, not necessarily of criticism, but of the analytical and critical faculties of our students and the opportunity to do that in a reasonable, reasoned and informed manner. As teachers, you have always had the ability to influence children and youth. What has been lacking from time to time is the means to do so, whether that be through a lack of facilities, resources or information. There is, however, in my mind, no question that one of the most appropriate and effective venues for discussion of our country's institutions is within the high schools of this nation.

What I would like to do with you to-day is to begin a discussion of the Courts and their functioning, starting with a general discussion of democratic principles; the rule of law and parliamentary and constitutional democracy; the *Canadian Charter of Rights and Freedoms*; judicial interpretation and judicial activism; values and criticism.

According to the preamble to the *Canadian Charter of Rights and Freedoms*, Canadian society "...is founded upon principles that recognize the supremacy of God and the rule of law." While the place of God in a secular society is the subject of much debate, there can be no doubt that Canada is founded upon the principle of the rule of law.

What does the rule of law mean? In its simplest expression, it means that all of the obligations imposed on the individual and all of the restrictions on his or her liberty must be justified by law. (Chief Justice Brian Dickson: September 18, 1988, remarks at the Opening of the Commonwealth Magistrate's Conference). The Supreme Court of Canada dealt with the principle in more detail in its decision in the 1998 *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 and stated as follows:

[70] At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

[71]...the rule of law has three elements: first, the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second..."the rule of law requires the creation

and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". third "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law.

There is an additional principle, which applies in the rule of law model, and that is the principle of constitutionalism. Prior to 1982, constitutionalism meant that the federal parliament and provincial legislatures could only legislate in those areas that were expressly reserved to them by the *British North America Act* of 1867 (For example, criminal law and divorce for the federal parliament; property and civil rights for the provinces.). Except for that limitation, parliament was supreme and the constitutional role of the Courts was essentially limited to determining whether a particular statute was within the authority of the legislature that enacted it (Constitutional law vocabulary included such phrases as *ultra vires*, *intra vires*, "pith and substance").

The study of constitutional law was dry, stale, singularly uninspiring and largely irrelevant, unless you were a constitutional lawyer. The enactment of the *Charter* in 1982 represented a fundamental shift in the nature of our democracy that is little understood or appreciated, especially by people of my generation. There are some who say that they may never understand it.

On April 17, 1982, by virtue of the democratic decision of all of its elected assemblies (with the exception of Quebec), Canada ceased to be a parliamentary democracy in which the majority will (in theory) always prevailed. It became instead a

constitutional democracy in which the Constitution became the supreme law of Canada to which all other laws were subject (s. 52 of the *Charter*) and in which constitutional values and principles could over-ride the wishes of parliament and of the majority. Parliament and legislative assemblies could no longer legislate without controls, even within those spheres that were reserved to them. They could do so only if their legislation did not violate the Canadian constitution, and that determination was to be made by the courts.

For our purposes and those of your students, I think that it is important to understand the structure and the operation of the *Charter*, and I would ask you to bear with me briefly as I go through it. As I indicated earlier, the *Canadian Charter of Rights and Freedoms* begins with the broad statement that Canada is founded upon the principle of the rule of law and concludes with a declaration that the Constitution is the supreme law of Canada to which all other laws are subject (s. 52) (Unlike the *Bill of Rights* of the 1960's). Section 32 states that the *Charter* applies to the Parliament and government of Canada and to the legislature and government of each province in respect to all matters within their authority. Section 1 provides a guarantee of those rights and freedoms set out in the *Charter* "...subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Those rights and freedoms are then set out in sections 2 through 23, divided into: (a) Fundamental Freedoms (2), (b) Democratic Rights (3-5), (c) Mobility Rights (6), (d) Legal Rights (7-14), (e) Equality Rights (15), (f) Official Languages of Canada (16-22) and (g) Minority Language Educational Rights (23). (It is perhaps indicative of the nature

of our democracy and of its history that almost one third of the *Charter's* operative provisions deal with the issue of language rights.)

It is section 24 of the *Charter* that makes the Courts the ultimate arbiter to determine whether a *Charter* right or freedom has been violated, providing that “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” It is in the exercise of this remedial authority and in their traditional role of legislative interpretation that the Courts have come in for the strongest criticism and have at times been said to usurp the role of Parliament. Criticism is sometimes voiced in terms such as the “government of judges” or “judicial activism”.

I, for one, would argue that these criticisms are unwarranted. In the first place, the Courts of Canada did not come to their constitutional role by accident, but rather as a conscious and deliberate, collective decision of the Parliament and legislative assemblies of the nation. The Courts did not seek the change from a parliamentary to a constitutional democracy; the decision was made by the governments, Parliament and legislative assemblies of Canada. Inherent in this constitutional role is an almost inevitable tension on occasion between the apparent wishes of the majority and the rights of individuals or minorities which the Courts are constitutionally required to protect. In a dynamic, constitutional democracy, such periodic tensions are not only normal, but also healthy.

While the Courts will continue to be subject to criticism and comment as they have been in the past, and while criticism is a necessary aspect of any democratic system

of government, criticism, to be meaningful and constructive, should preferably be informed and not simply reactive.

Any developing human society will create norms and rules for conduct and interaction, followed or accompanied by some form of dispute resolution mechanism. This can perhaps be most readily seen in the mundane example of a children's society. Children are forever inventing games or variations of games, which inevitably require rules and which just as inevitably lead to disputes. The referee or the umpire is the resolution mechanism for games. It is almost impossible to have a game without rules and rules without a referee or an umpire. In our democratic society, it is the judge, who has for centuries been the referee of our major disputes, both individual and societal. Some would say that judges have now gone beyond enforcing the rules... that they are on occasion interpreting them in a new light and sometimes just making them up. Why can a judge not simply interpret the rules, in this case, the law, as it is given and leave the rest to the legislator?

The answers are relatively simple ...first, the law is not always clear, and accordingly requires interpretation. Second, it is impossible for a legislator to foresee all of the situations to which any law will apply. Some examples may serve to illustrate both points. Take simple language: *la Déclaration universelle des droits de l'homme* of the French Revolution or the preamble to the American Constitution which held this truth to be self-evident "... that all men are created equal". Does the word "man" or "men" mean simply the male of the species; even if it has a broader meaning (which it did not in the 18th century), does it refer only to white men or to all human beings of whatever gender, colour, sexual orientation, race, language, or religion? Is it limited to citizens of the

country or does it extend to landed immigrants or even to those illegally within the national boundaries? Does the definition change with time (as it did in the U.S.) or circumstance?

To take another simple example, what is the meaning of the word “person”? At one time in Canada, our own Supreme Court held that women were not included in the definition of “persons” for purposes of voting legislation. Even assuming that the meaning of the word “person” with reference to human beings is clear, can a law that applies to a “person” or to “anyone” also apply to a corporation or partnership? If it cannot directly, can the corporation seek indirectly to benefit from the provisions of the law in any event? Sometimes we create our own linguistic anomalies. The *Criminal Code* of Canada defines “cattle” to include “...horse, mule, ass, pig, sheep or goat.” (Dickens’ Mr. Bumble could therefore have said, in Canada, not only that the law is an ass, but also, presumably, that the law are cattle, although the latter expression may not have had the same impact and meaning.)

Within the Constitution itself, there are numerous examples of legislative ambiguity. Section 1 guarantees rights and freedoms “... subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” What is reasonable? Who has the onus of demonstrating the justifiability of the limits imposed? Which societies are free and democratic?

What about s. 24, the enforcement section? Anyone whose rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction (what is a court of competent jurisdiction?) “...to obtain such remedy as the court considers appropriate and just in the circumstances.” The Constitution nowhere sets out a list of

available remedies. Furthermore, it seems that the remedy that is “appropriate and just” will vary with the circumstances. And who is to decide what remedy is “appropriate and just”? Quite clearly, it is a Court.

Can the Courts in this difficult task look to Parliament for assistance? Since the Constitution is the supreme law of the land to which all other laws are subject, it would appear to require a constitutional amendment with all of its attendant difficulties before an Act of Parliament could have any impact.

Is it not then the case, as some may argue, that Parliament has abdicated its responsibilities or that the Courts have arrogated to themselves those same responsibilities? I would answer “no”. The Courts have retained their traditional role in applying and interpreting the law and have been given an expanded role under the Constitution with respect to the rights and freedoms guaranteed by that document. Parliament retains its legislative role and, despite the change from a parliamentary to a constitutional democracy, can override the Constitution where it sees fit to do so by express declaration for periods of five years at a time under s. 33 of the *Charter*. The so-called “notwithstanding” clause has, I believe, been invoked only three times since 1982.

An interesting example of its non-use and of the dynamic between the courts and governments may be found following the 1998 *Vriend* decision in the S.C.C. In that decision, the Court read into provincial legislation in Alberta a provision prohibiting discrimination on the ground of sexual preference. The initial strong reaction of the provincial government was to indicate that it would consider invoking the notwithstanding clause to nullify the effect of the Supreme Court’s judgment, a step which would have been unusual, but entirely in keeping with the provisions of s. 33 of

the *Charter*. Instead, it did nothing. The general consensus is that the political cost of taking such a step was deemed to be too high. The original discriminatory legislation could have been maintained for years if the Court had not spoken, but the situation changed completely when the government would have been required formally to declare that it intended to enforce legislation that the Supreme Court had held to be discriminatory and unconstitutional.

What about the criticism of judicial activism? What is sometimes referred to as judicial activism is, in my mind, simply the exercise of judicial decision-making. The courts do not have the luxury of deciding not to decide, as does Parliament. For example, when faced with the question of the constitutionality of the abortion provisions of the *Criminal Code* in 1988, the Supreme Court of Canada could not defer its decision or declare that the issue was too difficult or too politically or emotionally charged, or that its decision would lead to too much criticism and involve the Court in too much controversy. It was obliged to come to a decision and it declared that the section of the *Code* dealing with abortion violated the guarantees of security of the person under s.7 of the *Charter*. Parliament was in effect invited to act, but has not done so since 1988 largely because no clear, sustainable consensus has ever emerged as to what type of legislative change would be appropriate and politically acceptable.

Some would ask why, In Canada, we even need a Constitution which guarantees individual and minority rights? Are not the principles of parliamentary democracy and our long tradition of tolerance and fairness sufficient to protect those rights? The short answer could be... maybe not now, if you are gay or lesbian. Certainly not historically if you were a woman in significant portions of Canada in various periods in the 20th

century; a single woman, a married woman, a pregnant woman, an unwed mother; a Ukrainian in World War I in Canada; a Chinese immigrant in the 20's and 30's; a Japanese Canadian in World War II; a Franco-Ontarian in 1917 and for the subsequent 20 years; a Canadian of the Jewish faith and, at various times, an Irish Canadian, an Italian Canadian, a Hungarian-Canadian, an African-Canadian a native Canadian and so on. And it has never been simply enough that the law appears to apply equally to all.

A classic example of this statement can be found in the following example; A law that prohibits anyone from sleeping under the bridges of the City in the winter, however egalitarian it may sound, is not of equal application to the rich and to the poor.

Unfortunately, there are also, as the Supreme Court of Canada pointed out in the Quebec Secession Reference, occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Human history is replete with such examples.

It is regrettable that Courts are seen by some to be fundamentally undemocratic. They are, however, independent, impartial, unemotional and deliberative. As Roy McMurtry, the Chief Justice of Ontario, has said on more than one occasion, "The values which should direct a judge are basic and fundamental values rather than the outcomes of public opinion surveys. They cannot be the transient and revolving fashions of the day. They are not headlines. They reflect history rather than hysteria. A judge is not to express the changing winds of the day but ... the basic values of our society. And when a society is not faithful to its basic values, a judge may be required to intervene."

What are the enduring values of Canadian society? They are those which are found in our Constitution: they include freedom of conscience and religion, of thought

and expression; democratic rights; life, liberty and security of the person; freedom from arbitrary or unreasonable state intrusion; the right to an independent and impartial tribunal; equality, tolerance and justice.

There is no question that all of these values, as well as our democratic institutions and constitutional structures and processes will be tested in ways that we perhaps can not yet imagine in a world that is developing in ways that we have not foreseen.

Through the courses that you will teach to the youth of Ontario, our future citizens, opinion-makers and leaders, you, as the teachers of this province, have a fundamental role to play in the ongoing debate that will ultimately determine the nature of our democracy. It is a challenging and a difficult role, but one that I see to be of critical importance and one in which, I must confess, I do envy you.

Thank you.

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