

# **THE ROLE OF THE COURTS IN TURBULENT TIMES**

## **REMARKS TO THE CANADIAN CLUB**

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**DECEMBER 3, 2001**

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I am very pleased to have the opportunity of addressing this distinguished club, which has been a major forum over many years for discussions of important public issues. I am also pleased that a number of my legal colleagues and other friends have taken the trouble to come and hear the ageing Chief Justice.

While the legal system should be regarded a vital pillar of any democratic society, I am at the same time aware the administration of justice has never lacked critics. Indeed, some of you may recall a cartoon that appeared in The Globe and Mail last July. It shows a courtroom with the judge and jury at the end of a trial. The sign on the front of the judge's bench reads: "his highness the big enchilada" and it has the foreman of the jury reading out the jury's verdict. "we the jury find the defendant as well as all the lawyers on both sides and you, your honour guilty as all get out."

The subject of my address is the role of the courts in turbulent times which, of course, relates directly to the horrific tragedy of September 11<sup>th</sup>. Understandably we are experiencing an intense debate in relation to whether we can maintain our traditional commitment to individual rights in the face of escalating international terrorism. In the

U.S., the issue has been characterized by the New York Times as "Civil Liberty vs. Security: Finding a Wartime Balance".

The Bush Administration supported by the great majority of Americans believes that it is fighting acts of war, not mere crimes on American soil. This is the principle behind the administrations proposals to establish military tribunals to try non-U.S. citizens accused of terrorism, to track down and question thousands of immigrants who have entered the U.S. in recent years, mostly from middle eastern countries and to monitor conversations between some individuals in federal custody and their lawyers. It should be mentioned that there are 20 million non-U.S. citizens living legally in the U.S.

In Britain, the British Home Secretary stated very recently that "we can live in a world with airy fairy civil liberties and believe the best in everybody and they then destroy us". Britain moved quickly to introduce emergency legislation allowing in certain circumstances detention without trial for renewable six-month periods, the jailing of uncooperative witnesses in terrorist investigations and the right to search and take into custody airline passengers who have aroused suspicion.

In Paris, marines and police officers patrolling the subway have been given the right to intercept travelers and search their baggage without any reason.

It has often been acknowledged that in times of fear, the majority of people place security above all else and are quite willing to cede government extraordinary authority. As one U.S. law professor recently expressed it "we love security more than we love liberty". This was dramatically and I think tragically illustrated for example by the jailing

of Japanese Americans and Japanese Canadian citizens during the second world war and the imposition of *The War Measures Act* in Quebec in 1970.

In so far as the Bush military tribunals are concerned, the New York Times has called them a "travesty of justice" and added that "in his effort to defend Americans from terrorists, the president is eroding the very values he seeks to protect including the rule of law".

In the context of the rule of law, I am often reminded of a scene from Robert Bolt's play "A Man For All Seasons" which was made into a successful movie by the same name. The play revolves around the life of Sir Thomas More, Lord Chancellor of England who found himself in what turned out to be a fatal clash with King Henry VIII over the monarch's desire to divorce Queen Catherine. In one memorable scene, Sir Thomas More's future son-in-law, a young man by the name of Roper argues the proposition that the end justifies the means and that therefore the villain of the play should be arrested not because he has broken any particular law but is clearly evil and therefore offends the law of god.

"Then let god arrest him" replies Sir Thomas and goes on to state that he would let the devil himself go free until he had broken the law of man. Roper is shocked and states that in order to get after the devil he would be prepared to cut down every law in England. To which Sir Thomas replies: "and when the law was down and the devil turned round on you, where would you hide, yes this country's thick with law from coast to coast, man's laws not god's and if you cut them all down do you really think that you

could stand upright in the winds that would blow then. Yes, I'd give the devil benefit of law for my own safety's sake".

Sir Thomas More's reply represents a traditional commitment to the rule of law in that even when faced with evil, there must be a respect for basic rights and values and, in Canada's case, the rights and values entrenched in our *Charter of Rights*.

The Canadian security proposals to date have raised many concerns as Canadians debate how to defend the Canadian model of a diverse and tolerant society in the face of international terrorism.

The national debate taking place in Canada is obviously taking place at a critical time in the history of the world. Furthermore, there can be no doubt that the Canadian government has a duty to take measures to protect Canadians against international terrorism.

The complexity of the task is illustrated by the debate that took place recently between professor Irwin Cotler M.P. and Alan Borovoy, General Counsel of the Canadian Civil Liberties Association. Both men have lengthy and distinguished records in their commitment to individual rights. Their disagreement in relation to the federal legislation illustrates the particularly difficult balancing act faced by the federal minister of justice who herself has a deep personal commitment to the values enshrined in our *Charter of Rights*.

Professor Cotler properly notes that the terrorist threat is unprecedented and that the counter-terrorism law involves the protection of the most fundamental of rights;

namely, the right to life, liberty and the security of the person. In this context, he argues that the domestic criminal law due process model is inadequate and inappropriate. At the same time, he also acknowledges that the legislation must confirm with the Canadian *Charter*.

Mr. Borovoy's principal objection appears to be that the definition of terrorism in the bill is so wide that in his words "it could catch behaviour that doesn't remotely resemble terrorism". He is also concerned about preventative detention and the right to compel testimony in a terrorist related investigation.

It would, of course, be entirely improper for me to state my personal views with respect to any legislation unless it is related to a matter before me in court. However, the legislation may well be tested in our courtrooms and as a result the role of judges could be subjected to closer scrutiny than at any time before in our nation's history. While the accountability of any important institution is essential in a democratic society, it is appropriate that it occur with an understanding of the basic principles of judicial interpretation of our constitution.

*The Constitution Act, 1982* provided that the constitution which, of course, includes the *Charter of Rights* "is the supreme law of Canada and any law that is inconsistent with the constitution is invalid".

In the past decade, some Canadian commentators have argued that the *Charter* has given the courts too much power to enforce the rights of minorities and criminals.

They state that courts have generally become too activist and give too liberal a meaning to the expression of the rights and freedoms in the *Charter*.

Some of the criticism simply ignores what is necessarily involved in the process of judicial interpretation. It often assumes that in every case that comes before the court, there is a simple right answer in the constitution awaiting discovery by judges. There is no validity to this assumption as the key words and expressions in the *charter of rights* are very general such as "freedoms of thought, belief, opinion and expression", the "right to liberty and security of the person", the "principles of fundamental justice", "unreasonable search and seizure", etc. etc. These terms are inherently indeterminate in that they are often susceptible to more than one reasonable meaning.

The use of indeterminate terms in a constitution was deliberate as the document was intended to evolve in response to new challenges and conditions. Our constitution was intended to endure without having to be reinvented by an endless series of constitutional amendments.

The courts are therefore driven to make law but the subject of judges making law is by no means a new concept. Charles Evans Hughes, Governor of New York and a future Chief Justice of the U.S. Supreme Court stated almost a hundred years ago that:

*“We are under a constitution but the constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the constitution.”*

When I worked on the development of the *Charter* in the early 1980's with Jean Chretien and Roy Romanow it was clear to all of us that in order to secure public support for the *Charter* it had to include an element of balance between the role of elected governments and sober second thought by way of judicial review.

At the same time, while our *Charter of Rights* limits the powers of governments to enact laws inconsistent with the rights and freedoms set forth in it, the *Charter* also contains sections that provide that its rights and freedoms are not absolute. The principal form of limitation is contained in section 1 which provides that the *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In particular, the objective of the legislation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The objective must be "pressing and substantial". The task of the legislature and perhaps the courts will be to balance the strength of the concern around terrorism against the reasonableness and rationality of the means selected to combat it. This test of proportionality and balance includes a consideration of whether there is a rational connection between the threat and the response, whether the response impairs constitutional freedoms as little as possible, and whether there is a balance between the deleterious effects of the measures and their salutary effects.

While judges have the task of interpreting the often uncertain provisions of the charter, i would like to stress that judges recognize that their task must be exercised in a principled fashion. We are very much aware that any suggestion of judicial imperialism

can only serve to undermine the public confidence that is essential to the discharge of our responsibilities. My court and other appellate courts have stated in many decisions that without public confidence the courts cannot effectively fulfill their role in society.

Any uncertainty in a law is a reflection of the reality that law is not mathematics. The uncertainty derives from human limitations, the nature of society, and the unpredictability of the future. There is simply no one single legal answer to every legal problem. Judicial creativity is part of legal existence and law without discretion has been described as a body without a spirit.

Courts are not representative bodies in that they do not represent specific or special interests. They are impartial bodies that must reflect the basic values of our society. Courts are not necessarily democratic institutions, as they are not bound by the majority of public opinion. However, I believe that when the majority takes away the rights of a minority that is not democracy. Democracy is, therefore, a delicate balance between majority rule and individual rights.

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 again is to express the basic values of our society and when a society is not faithful to its basic values, a judge may be required to intervene.



In many cases, judges are told that the solution to the conflict lies in a balance between the conflicting values. However, there is no legislation or legal precedent that adequately indicates what weight should be attached to each value and how a judge should balance between the conflicting values.

However, it does not follow that a judge can be whatever he or she wishes. There is no absolute judicial discretion; indeed, any absolute discretion for judges or any other public official would be the beginning of the end for democracy.

The history of our legal system has been gradual development and evolution not revolution. While a judge should often be guided by public consensus, there are times when a court should lead and be the crusader for a new consensus such as in *Brown v. Board of Education* where the Supreme Court of the U.S. held segregation in schools to be unconstitutional.

Generally speaking, a judge's decision should reflect the deep values of society not merely his personal values. It means that the judge must free herself or himself from personal biases. The interpretation of the *Charter* requires balancing and judicial neutrality. If there is a dispute as to the constitutionality of any legislation, the conflict should not be viewed as between the court and parliament but between parliament and the constitution.

While a judge must be impartial, neutral and objective, the goal of objectivity is not to cut a judge off from his surroundings. Furthermore, the goal of objectivity is not to

liberate a judge from life experiences but to make use of these experiences in attempting to reflect the fundamental values of a nation.

The maintenance of confidence in the administration of justice does not mean a need to seek popularity but it means that the judicial discretion must be perceived as being exercised objectively and impartially through a neutral application of the laws.

I conclude by recognizing that the pressures on our national parliament and legislatures as a result of September 11<sup>th</sup> are virtually unprecedented. In the months that lie ahead, a high order of legislative and judicial statesmanship will be needed which will require wisdom, courage and restraint under the watchful eye of an informed public.