# Remarks to Summer Law Institute – August 2005 Ottawa

**Chief Justice Brian Lennox, Ontario Court of Justice**

I am pleased to have been asked to speak to you to day in the context of this Summer Law Institute. As you have heard, the Ontario Justice Education Network and its Courtrooms and Classrooms project is one of the key education initiatives of the Chief Justices of the three Courts of Ontario. I would like to thank Justices Judy Beamen and Jennifer Blishen, together with the organizers of this Institute for having invited me to speak. I would like also to recognize the dedicated efforts of Taivi Lobu, the outgoing Executive Director of OJEN who has been so important not only to this program, but to all of the programs of the Network.

For people of my generation, the teaching of law and of civics in the high school curriculum is a relatively new and welcome phenomenon. 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. These assumptions have been with us for decades and were first made at a time when our courts were complicated and arcane institutions with names such as Admiralty, Chancery, Exchequer, Sessions of the Peace, *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, 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 usually 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 may feel that they have had no opportunity for input. This has in part led to comments that the courts now not only adjudicate, but also legislate.

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. Some have suggested that this may, in part, 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 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. You also have the opportunity to do that in a reasonable, reasoned and informed manner. Teachers have always had the ability to influence children and youth in a positive and constructive way. 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 to-day is to begin a discussion of the courts and their constitutional role: dealing firstly with a general discussion of democratic principles, the rule of law and parliamentary and constitutional democracy and moving then to the *Canadian Charter of Rights and Freedoms* and issues of judicial interpretation and "judicial activism".

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.
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> [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 in Canada and that is the principle of constitutionalism. Prior to 1982, constitutionalism generally 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", etc.). The study of constitutional law was typically seen as dry, stale, singularly uninspiring and largely irrelevant, unless, of course, you happened to be 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. 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. Speaking to the Canadian Bar Association at its meeting in Vancouver on August 15, 2005, the federal Minister of Justice, Irwin Cotler, stated that the enactment of the *Charter* in 1982 represented a constitutional revolution through which the courts came to have an influence not only on the law, but also on our lives. He further said that the courts, as a result of the Charter, had moved from being an arbiter to being a guarantor of human rights.

Since 1982, and particularly since 1985, when the equality provision of the *Charter* came into effect, Parliament and provincial legislative assemblies can no longer legislate without controls, even within those spheres that have historically been reserved to them. They can now so only if their legislation does not violate the Canadian constitution…and that determination is 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 (i.e. the *Charter* applies to state actions). 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 and are 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 in determining 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 accused of usurping the role of Parliament. This criticism is sometimes voiced in expressions such as the "government of judges" or, more frequently, "judicial activism".

I, for one, would suggest 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 in their role as elected representatives of the citizens of Canada. The courts did not seek the change from a parliamentary to a constitutional democracy. Indeed, while I earlier referred to the apparent declining support for different forms of authority in Canada, the *Charter* continues to be consistently viewed with favour by the Canadian electorate. Inherent in

the constitutional role of the courts 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. Parliamentary democracy is about the rule of the majority as expressed by parliament: the principles of constitutional democracy, on the other hand, require the courts to guarantee and to protect minority rights where the majority will which would otherwise prevail would lead to an infringement of those rights. Criticism is a necessary aspect of any democratic system and courts will and should continue to be subject to criticism and comment as they have been in the past. However, to be meaningful and productive, criticism should be informed and constructive and not simply reactive. That is where the role of teachers and of schools comes into play.

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 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 the rules 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 answer is relatively simple:

in the first place, the law is not always clear, and accordingly requires interpretation; secondly, it is virtually impossible for a legislator to foresee all of the situations in which a statute may 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. The American Constitution held this truth to be self-evident "…. that all men are created equal". Do the words "*homme",* "man" or "men" mean simply the male of the species? Even if the word "*homme*" or "man" has a broader meaning (which it did not in the 18th century), does it refer only to a particular race or ethnicity 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 national boundaries? Does the definition change over time, as it has in liberal democratic society, or does it change with circumstances? 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" is now 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 to benefit indirectly 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." In *Oliver* Twist, Dickens' Mr. Bumble said "…the law is an ass" Presumably, in Canada, Mr. Bumble could have said not only that the law is an ass, but also that… "the law are cattle", although the latter expression may not have had quite 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 reasonableness and the justifiability of the limits imposed? Does "law" refer only to statute law or does it include the principles of common law? Which societies are free and democratic? (At what point in time did the United States become a democracy? Could it have been before the Civil War, or before the end of official segregation? Example of Switzerland, where women given the right to vote only recently. Can a country which disenfranchises a large part of its population ever be said to be either free or 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" in what circumstances? On this point, the Charter is unambiguous. It is not parliament or a provincial legislature, but a court. Beyond that, the *Charter* itself offers little or no assistance.

Can the Courts in the difficult task of interpretation and application of the provisions of the *Charter* then 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.

Does this summary analysis not confirm that Parliament has abdicated its responsibilities or that the courts have arrogated to themselves those same responsibilities? I would answer "no". The courts have maintained their traditional role of interpreting and applying the law, although they have been given an expanded role under the Constitution with respect to the rights and freedoms guaranteed by that document. The legislature 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 been invoked only a handful of times since 1982. Some commentators conclude that the infrequent use of the "notwithstanding" clause demonstrates the strength of our Constitution; others would argue that its more frequent use would strengthen both the *Charter* and our democracy. An interesting example of the dynamic between the courts and governments may be found following the 1998 *Vriend* decision in the Supreme Court of Canada. 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, the province did nothing. The general consensus at the time was that the political cost of taking such a step was deemed to be too high. The original discriminatory legislation could have been maintained and applied for years if the Court

had not spoken, but the situation changed completely after the Supreme Court's decision. The government would have then been required to declare formally that it intended to enforce legislation that the Supreme Court had held to be discriminatory and unconstitutional.

The debate over same sex marriage in the winter and spring of 2005 provides a similar context for discussion of the "notwithstanding" clause, with the *Globe and Mail*'s Jeffrey Simpson writing a series of articles pointing out that s.33 of the *Charter* represented the only parliamentary vehicle to block same sex marriage.

What about "judicial activism"? What is sometimes referred to as "judicial activism" is, in my mind, simply the necessary and traditional exercise of judicial decision-making. Courts have always been called upon to resolve difficult issues, often on the basis of legal interpretation. They 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.* By that decision, Parliament was in effect invited to act, but it 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.

On a simple analysis, the question of whether a particular court decision is viewed as an appropriate exercise of judicial decision-making or a blatant case of "judicial activism" frequently depends on whether the commentator agrees or disagrees with the decision.

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 a Muslim immigrant, or two years ago if you were gay or lesbian. Certainly not historically, if you were a woman in significant portions of Canada in various periods of the 20th century; a single woman, a married woman, a pregnant woman, an unwed mother; or a Ukrainian Canadian in World War I in Canada; a Chinese immigrant in the 1920's and 30's; a Japanese Canadian in World War II: a Franco-Ontarian in 1917 and for the subsequent 20 years; a French language political activist or *indépendantiste* in Quebec in October of 1970, or, at various times, a Canadian of the Jewish faith, an Irish Canadian, an Italian Canadian, a Hungarian Canadian, an African Canadian, a Native Canadian and so on. And for true equality, although the concept may initially be difficult to accept, it has never been simply enough that the law appears to apply equally to all. A classic example in literature of truth of this statement can be found in the writing of Anatole France, who wrote in his book *The Red Lily* in 1894: "*The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.*"

Unfortunately, as the Supreme Court of Canada pointed out in the Quebec Secession Reference, there are occasions when the majority in a democracy will be tempted to ignore fundamental rights in order to

accomplish collective goals more easily or effectively. Human history is replete with examples and the current world climate since September 11, 2001 provides both the opportunity and the incentive for such actions. Terrorism or the threat of terrorism may yet prove to be the most difficult test of our constitutional democracy.

It is regrettable that role of the courts is seen by some to be fundamentally undemocratic. Canadian courts are and are intended to be independent, impartial, unemotional and deliberative and it is precisely for that reason that they have been entrusted with such an important constitutional role. 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 now developing in a manner that we had not foreseen.

Through the courses that you will teach to the youth of Ontario… our future citizens, opinion-makers and leaders… you, 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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