ONTARIO JUSTICE EDUCATION NETWORK

SUMMER LAW INSTITUTE FOR HIGH SCHOOL TEACHERS

LUNCHEON REMARKS OF

THE HONOURABLE R. ROY McMURTRY

CHIEF JUSTICE OF ONTARIO

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Ladies, gentlemen, I would like to extend my personal welcome to all of you a very special welcome to the first summer law institute in London, Ontario. Your decision to commit your personal time and resources to attend this forum is much appreciated.

I would like to congratulate Justice Lynn Leitch, Karen MacKay, Associate Dean Ben Hovius, Kerry Thompson, Marion Boyd and Justice Debra Livingston for their hard work, commitment and successful efforts in arranging a most interesting program as well as expressing my appreciation to the other distinguished panelists who are participating in the program.

Having brought together the members of the original task force in relation to the enhancement of pubic legal education in Ontario I am absolutely delighted with the progress that has been made to date as a result of the efforts of so many people across our province.

We realized from the outset that the strengthening of the public legal education would require a principle focus, of course, on our high schools and that we should include representatives of the education community as members of our task force from the beginning in order to benefit from their advice.

As teachers you are absolutely crucial to the strengthening of public understanding that the administration of justice is a cornerstone of any true democracy. While judges and lawyers have an essential role in shaping our administration of justice our efforts will mean little if they do not command the respect of the community in my view. It is our teachers who have the most vital role of all in shaping the future of our society through your efforts in the classroom.

Canadians generally take for granted our fundamental freedoms and an independent administration of justice. Nevertheless, when we look around the world we should appreciate that these principles are foreign to the reality of the lives of the great majority.

In an age of growing international terrorism however individual rights and freedoms cannot be taken for granted even in a highly developed democracy like Canada.

The subject of my remarks today will relate directly to the horrific tragedy of September 11, 2001 and the ongoing battle against international terrorism. During the past two years we have experienced 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 has stated that "we can live in a world with airy fairy civil liberties and believe the best in everybody and they then destroy us". After 911, 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 have patrolled the subways for many months and have been given the right to intercept travelers and search their baggage without any specific 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 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 in his words 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 that has been 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.

It would, of course, be entirely improper for me to state my personal views with respect to any legislation federal or provincial unless it is related to a matter before me in court. However, the federal security 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*.

The entrenchment of a *Charter of Rights* has, of course, increased the responsibility and role of the judiciary to a significant extent and judicial decisions have led to the amendments of legislation both federally and provincially. We all have witnessed the controversy that has resulted as many commentators and editorial writers have fulminated against the role of non-elected judges interfering with the decisions of elected legislators. However, this was the clear intention of the government of Pierre Trudeau when it proposed an entrenched *Charter of Rights*.

In this context I well recall a particular exchange between Saskatchewan Premier Alan Blakeney and Prime Minister Trudeau in 1980 at a first ministers meeting on the constitution in which I participated as the attorney-general of Ontario:

Blakeney: "*Canadians ought not to have taken from them their fundamental right to participate in all political choices. If we were to decide to place the charter of rights in the constitution, we would be taking out of the hands*

of the elected representatives and given to the courts the power to decide some of the country's most significant political issues . . ."

Trudeau: *"well, I say "what is wrong with going to the courts," or "why shouldn't a minority which is adversely affected be able to call us to account in front of the courts?"*

In any event some of the criticism of so called judicial activism 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, which 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 recognize that the pressures on our national parliament and legislatures as a result of September 11th are virtually unprecedented. In the months that lie ahead, a high order of legislative and judicial statesmanship will continue to be needed which will require wisdom, courage and restraint under the watchful eye of an informed public.

I would like to conclude by wishing our teachers gathered here every continuing success, fulfillment in carrying out your vital responsibilities.