

# LECTURE

## The Challenge of the Law in the New Millennium

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THE HONOURABLE  
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**B**ACK AT THE DAWN of the English common law, the form of legal reasoning revolved around the existence of writs—a formulaic incantation of Latin or Law-French describing something bad or wrong that a defendant had done. There were only a finite number of these writs, and plaintiffs had to fit the substance of their complaint into the formula of an existing writ. If there was no writ describing your particular problem, then there was no recourse before a royal court. Over time, it became apparent that such an inflexible system was utterly unsatisfactory, and the exhaustive completeness of the writs was gradually undermined. First, lawyers and judges began to accept that factual situations need not conform perfectly with what was said in the writ, and the legal form slipped into legal fiction, a mere cover for discussion of other issues. Legal historians are not entirely clear on the extent to which judges and lawyers deviated in reality from the forms laid down by the writs, but it is clear that they did. Pressure mounted from competition in courts set up by towns, and later, courts of equity set up by the Chancellor of the Exchequer. Then someone—either the Chancellor or the Inns of Court—decided that it was time to expand the number of writs available to cover a broader range of situations. And finally, over the course of several hundred years, the writ system was dispensed with entirely and lawyers, judges, and lay people alike started to talk openly and explicitly in their pleading about contract and tort, breach and negligence, even though these notions had been around under the surface of legal forms for centuries.

This description is, of course, a gross simplification of a complex history, but as we stand on the threshold of a new millennium, one wonders how changes in contemporary society will come to be reflected and dealt with by the law and the legal system, and whether the same revolution in thought and structure will

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be necessary for our law. One cannot help but wonder whether the same filings which beset the old common law and eventually spurred it to change are not also inherent in our legal order. Essentially, the question is: is our legal system responsive to the changes happening in our society, and to the concerns of everyone confronted and affected by the challenge of those changes? How is it doing this? How *can* it do this? How can we make it do this *better*?

It is impossible to foresee every category of change in society that is going to confront our legal system and prescribe solutions for individual issues. Instead, I hope to describe here three fountainheads of change which are likely to present serious challenges both to legal doctrine and to standard methods of adjudication as they currently exist in Canada. First, the presence, and insistent demand for recognition of other sources of rules in our society. I am thinking primarily of aboriginal law and international law, although it is easy to imagine others which perhaps appear marginal at the moment. Second, the scope of what human beings can know and do is expanding exponentially due to technological advance. Not only do new, previously unimagined activities and relationships make it difficult to apply law developed in another context, but sometimes those new situations throw into doubt the simpler foundations on which cherished principles were first developed. And third, and this to some extent overlaps with the previous two sources of change, new methods of adjudication and enforcement of imperative norms are developing in society which may undermine the presumed supremacy of the current legal system. I propose to examine each of these in turn, as they have begun to affect the law thus far, and to hazard some predictions as to where these pressures might push our law, both as a doctrine, and as a practising, functioning social institution.

The days when judges and lawyers could credibly claim to be discovering an immutable truth in the law are now gone forever. The cataclysmic events of this century, combined with an onslaught in academic circles on the idea of "objective" truth have led judges and lawyers to the awareness that subjective views will always be a part of the adjudicative process. This does not mean that judges throw up their hands when faced with a difficult problem and go with their "gut instinct." Rather, it means that in the process of searching for the missing piece of the jurisprudential puzzle which any novel case represents, judges should and must be conscious of their own biases and moral inclinations. Being conscious of those background moral and ethical views does not mean that they can—or should—be entirely suppressed; indeed, in interpreting past jurisprudence and following precedent it is hard not to utilise some measure of ethical perspectives which may be equally valid in the task of determining the law that binds everyone. This may be especially true in a country like Canada, whose very history is comprised of the recognition of various identities and communities within a single country.

Perhaps for this reason the existence of normative codes which exist independently of the traditional sources of the common law have come to be recog-

nised in Canadian law, and recent developments suggest that this will continue as an enduring and challenging aspect of our law in years to come. The very recent decision in *Delgamuukw v. British Columbia*<sup>1</sup> gives explicit recognition to aboriginal norms as a part of Canadian law. The majority judgment states,

The course of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.<sup>2</sup>

Moreover, the Court concluded that “traditional real property rules” could not appropriately describe the content of aboriginal title and proceeded to describe a type of property right which gives effect to the unique nature of aboriginal presence on land over hundreds of years. Not surprisingly, that *sui generis* property right is a novel creation and one which will no doubt require many cycles of trial and appeal before its precise character is fully fleshed out. In the meantime, the tapestry of property law has a piece missing of indeterminate size which places considerable strain on the coherence of the structure. And yet, can there be any doubt that aboriginal interest in lands, which they have used since time immemorial, must be recognised and protected under our law? The difficulty is in accommodating, adjudicating, and vindicating that obvious reality when it doesn’t quite fit into the conventional paradigms of property law. And where will these *sui generis* property rights fit in with the rest of our hierarchy of legal rights? We have embarked on the road of refashioning our legal tools. Time will tell whether aboriginal aspirations, and realities, of land occupation can be successfully and sensitively recognised by our law. The livelihoods and sense of identity of millions of people are at stake, and there can be no doubt that this difficult—perhaps even defining—issue will be with us for many years to come.

Another area in which a normative order is arising from a persistent reality is the growth of international law. “Globalisation” has perhaps become a cliché; but there can be no doubt that more and more issues are coming before Canadian courts involving individuals claiming redress on the basis of international agreements binding Canada. The conception of international law as concerning exclusively state-actors has become a fiction as the subject-matter and sheer quantity of international regulation has expanded and as issues arising from that regulation become increasingly pressing and unavoidable. The traditional interpretative stance of the common law is that, by and large, domestic and international law are sealed off from one another. In cases of ambiguity in a statute purporting to implement a treaty, that ambiguity may be resolved by recourse to the treaty. Supreme Court jurisprudence has now accepted that international

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<sup>1</sup> [1997] 3 S.C.R. 1010.

<sup>2</sup> *Ibid.* at 1099.

sources are perfectly valid means of elaborating the meaning of the *Charter*,<sup>3</sup> and there is no reason to believe that the same principle applies to the elaboration of the common law, as has been accepted in Australia. Indeed, Australia has gone even further in breaking down this barrier, with the High Court ruling that a treaty ratified by the national government can give rise to “legitimate expectations” in applicants before administrative proceedings, even if those provisions have not been enacted into domestic law.<sup>4</sup> Meanwhile, it has long been recognised that customary international norms not contradicted by a domestic statute are a valid part of Canadian domestic law.

What is new, however, is that with the explosive proliferation of international treaties, accords, instruments, and co-operation, the claim that a customary international norm has been created is far more common than in the past. For example, many commentators and national governments now take the position that the “precautionary principle” is such a norm. Essentially that principle asserts that there is an obligation on states to “[t]ake precautionary measures to anticipate, prevent or minimise damage to their transboundary resources and mitigate adverse effects” and that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing such measures.”<sup>5</sup>

I am not suggesting that this, in fact, is such a norm, merely that it demonstrates the extent to which vigorous state practice in areas of vital transboundary concern is changing the traditional sources of international law. There can be little doubt that over time, at some point in the future—whether it be now or in a hundred years—many more customary international norms will come to be recognised in a diversity of fields never previously imagined. The question is: will Canadian judges, lawyers, and legislators accept such a development? And will this create tremendous uncertainty in our conceptions of the valid sources of law? Conversely, if this tendency is resisted stubbornly, how anachronistic and conservative will the judiciary appear for refusing to recognise international law as valid source of prescriptive norms? Particularly where an important issue affecting the lives of every Canadian, such as environmental protection, is concerned, there will be pressure to adopt and vindicate such norms. There will be little concern amongst lay-people for the doctrinal purity

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<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

<sup>4</sup> *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995), 128 A.L.R. 353 (H.C. Aus.); disapproved in *Baker v. Canada (Minister of Citizenship & Immigration)* (1994), 142 D.L.R. (4<sup>th</sup>) 554, Strayer, Robertson, and McDonald, JJ.

<sup>5</sup> Submission of Hungary to the International Court of Justice in *Republic of Hungary v. The Czech and Slovak Republic on the Diversion of the Danube River*, as quoted in O. McIntyre & T. Mosedale, “The Precautionary Principle as a Norm of Customary International Law” (1997) 9 J. Env. L. 221 at 231.

of sources, although the issue *will* raise important questions about the relationship of international co-operation and commitment on the one hand, and domestic democratic control on the other. In the absence of systematic legislative treatment of this issue, courts will be forced to address this difficult question.

As with aboriginal legal norms, developments in international law raise the question of whether a pluralistic structure of normativity can be accommodated in a single, coherent legal order. Individual issues will come and go, but that structural issue will remain. Will our legal system really evolve from an essentially unitary doctrinal structure to a much more pluralistic one, with competing valid normative orders? That is a question which underlies the specific challenges inherent in the enhanced status which has been—and may be granted over time—to aboriginal and international law.

That larger question is also posed by the dramatic emergence of what I would reluctantly describe as cyberspace. It is perhaps the most stunning example of a technological innovation which defies traditional legal models and which will probably continue to do so for many years. I say I am “reluctant” because to concede that the medium of computer-assisted communication is a “space” is immediately to accept certain premises about the separateness of that realm from real world models of spatial jurisdiction. If it really is cyberspace, then doesn't that imply that there should be separate jurisdiction of cybercourts, with cyber-rules, cyber-citizenry, and cyber-normativity? There are legal academics who argue just that.<sup>6</sup> And probably the majority of cyberspace participants are excited at the prospect of an Eden unspoiled by insidious legal regulation, and insist on the viability of self-regulation based on technological borders rather than the frontiers of states.

Searching for the right metaphors which relate cyberspace to conventional law is a huge challenge precisely because there are no precise analogies to cyberspace in the real world. Moreover, many questions are implicated by the nature of cyberspace which have never been previously raised and which pose insoluble problems for legal doctrine as currently constituted. Questions such as: [w]hen users are in different countries, where is a contract made over the Internet for jurisdictional purposes? When a defamatory statement is made on the Internet, does every state where the statement is accessible have jurisdiction over that tort? Are criminal sanctions against, for example, hate speech, gambling, or pornography subject to the authority of any jurisdiction in which that speech is accessible? What type of communication on the Internet should be considered private and what should be considered public? Is a “chat-room” public or private? How private does the “chat-room” have to be before it is considered analogous to the privacy of one's home? Does, for example, the delicate balancing required under the *Charter* apply with equal force to all forms of speech

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<sup>6</sup> D.R. Johnson & D. Post, “Law and Borders—The Rise of Law in Cyberspace” (1996) 48 *Stanford L. Rev.* 1367.

on the Internet, even though that speech and the opportunity for response, rebuttal, control, and tuning-out are greater than in any other "public" forum?

The Internet raises a host of other issues which I have not canvassed here, particularly in the realm of intellectual property law. In fact, it is hardly an exaggeration to say that cyberspace is sufficiently distinct from any other model of communication and human interaction that almost every important issue in civil law, and many in the criminal context, may need to be reviewed according to the particular circumstances of this new technology. Moreover, courts will need to be aware as in no other domain of developments in other jurisdictions and the dictates of inter-jurisdictional comity. But this will be an elusive task for a medium where a message posted onto the Internet can simultaneously be available in every country in the world. The borders of cyberspace do not map onto the borders of real space, which poses a fundamental problem for courts whose jurisdiction is based on geography. New tools and new doctrines will need to be developed, and perhaps certain doctrines that have been developed heretofore, particularly in the realm of conflict of laws, will need to be revisited. While this challenge may not require the acceptance of a new normative order, as in the case of aboriginal or international law, it does present a whole area of such rapid technological change that it will be a challenge for legal models to adapt quickly and yet remain coherent and comprehensible over time. And depending on the response of other jurisdictions and users of cyberspace, what amounts to an independent normative code could develop and demand deference from Canadian courts.

Another area in which technological innovation will no doubt continue to challenge the limits of legal determinacy is biomedical engineering. Fetal tissue research, genetic research, and new methods of fertility treatment all are gateways to unexplored and unimagined human relationships. Not only are these on the frontiers of legal analysis, but also ethics and morality. Further, the very language in which that ethical and moral debate will be conducted in will no doubt be affected by the legal language which either the legislatures or the courts come to adopt.

Aside from the potentially exotic applications of genetic cloning, there are mundane examples of the range of issues which may arise from the Human Genome Project. This project is a worldwide study which is an attempt to completely map the human genetic code. The potential clinical benefits are said to be dramatic. But possibly insidious applications of that technology are already emerging. A study by an American insurance company of 400 of its corporate clients indicated that by the year 2000, 15 percent plan to assess the genetic status not only of job applicants, but also their dependants, before making em-

ployment decisions.<sup>7</sup> The difficulty with such tests is that they reveal characteristics which fall on the fault line between an immutable and irrelevant characteristic analogous to race, and what, in some circumstances, might be a valid indicator of propensities which, for certain jobs or activities, might be dangerous. Perfect knowledge of future events, if that can ever be achieved, promises to blur the line between merit and discrimination based simply on identity. Can such perfect knowledge be squared with the principle that we all should be treated with equal respect? That we should be respected as human beings rather than treated simply as instrumentalities for the good—or at the will—of others? Perfect knowledge, whether of human beings, or at some stage in the reproductive process, or of any other aspect of our lives which, until now has been the province of risk, of challenge, and of hope, threatens to justify decisions in the name of science. Law is largely dedicated to protecting a sphere in which hope is possible, in which crushingly rational—or supposedly rational—decisions are prevented from shattering the legitimate aspirations of individuals, even if they appear futile. The fruits of the Human Genome Project have tremendous potential for good and alleviating suffering and allowing individuals to flourish; and yet they also have the capacity to reduce autonomy by quantifying risk to perfection.

These concerns are as yet somewhat vague because it is uncertain where this technology will lead us in the new millennium. Reconciling law and science, and accommodating the semi-prescriptive norms of biomedical ethics with the prescriptive norms of law may become a more pressing conflict in the years ahead. Examples of such incidents as the conception of a child purely in order to use the fetal tissue for the benefit of an ill child are still rare, and yet it is likely that they will become more, not less, common as the powers of medical science extend further and further.

The substantive pressures of technological advance and normative competition will undoubtedly be mirrored by competing structures for adjudication and dispute settlement. As I have mentioned, there are those who seriously recommend the creation of a “cyber-court” which is better-suited and more knowledgeable regarding Internet practice and generally accepted norms by users in that space. Although such an institution might become a viable forum by way of arbitration clauses between commercial parties, or where governments allow consumers to opt into such a court, it seems unlikely that many states would acquiesce to such a jurisdiction.

In other areas, though, alternatives to conventional courts are gaining ground. Mediation, arbitration, the many forms of alternative dispute resolution—all of these are likely to draw disputes away from the traditional court

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<sup>7</sup> K. Deyerle, “Genetic Testing in the Workplace: Employer Dream, Employee Nightmare—Legislative Regulation in the U.S. and the Federal Republic of Germany” (1997) 18 *Comp. Lab. L.J.* 547 at 558.

system and, in many cases, away from the rigorous application of traditional legal norms. Where disputes can be settled by these means, they are probably more expeditious and less contentious than resort to a court. Indeed, developments over the last fifteen years in administrative law indicate that Canadian courts—more so than their counterparts in the United Kingdom—are ready to defer to judgments of expert tribunals in many situations. But especially with respect to issues not arising from consensual relationships, the law and traditional courts may prove irreplaceable as a forum of vindication of many interests which require the particular coercive force of the state. There is fear that some will be coerced into arbitration, that commercial arbitration will affect the development of the law and lead to an uneven application of legal principles.

Although coercive force lends the ultimate stamp of legitimacy which encourages many to come before the conventional justice system despite its shortcomings, there is evidence that, even within that system, alternative forms of control are being tried. Perhaps the most notable form of this development is the growth of the sentencing circle. Becoming increasingly common in northern and isolated communities, this process involves the usual participants in the court process sitting in a circle with members of the community in which the act has taken place who wish to participate. The circle takes place prior to final sentencing by the judge, and the usual rules as to what may be discussed are relaxed. This approach pursues “restorative justice,” whereby healing of the community as a whole and reintegration of the offender are of paramount importance. Such a model responds better to traditional aboriginal conceptions of restoring harmony in the community, and gives control to those communities which have felt deeply disenfranchised and alienated by Canada’s criminal justice system. Sentencing circles often place a greater emphasis on community service or involvement, or non-custodial forms of penance. Although there is sometimes a reaction against such methods of sentencing as “soft,” this idea is hard to sustain where the victim, the victim’s family, and the arresting police officers form part of the circle—as they often do. More is required of the offender in terms of true repentance and seeking of forgiveness, although less institutional incarceration is imposed. The sense of community and encouraging by unconventional forms of social control and involvement the integration of the individual in that community is the essence of this sentencing process.

These circles appear to have worked well in their context. Some have argued that they can be extended to some urban environments as well. Whether they can function in less tightly-knit communities, where the forms of social involvement may be harder to sustain, remains to be seen.

The sentencing circle addresses, essentially, a deep-seated sense of alienation from the normative force of punishment. That alienation may also arise because of a sense that access to justice has been denied or is remote from real problems faced by individuals with limited means. This is a major threat to the moral force which law and the legal system can command. If legal aid is granted

only to defend the most serious crimes, then individuals will feel disenfranchised. Not only will potentially important matters in their lives go unlitigated, but their faith in the legitimacy and validity of the system will be eroded. If the law is reduced to a game which the rich and well-lawyered can manipulate, then there can be little hope that any of the solutions to the difficult problems I have already discussed will command a moral allegiance. By moral allegiance I do not mean to say that they must or should accept all of the products of the system as right or even correct; but they should have faith that the system is designed in such a manner that all parties have a fair chance to present their views, and that this—generally—yields an answer which is right and correct according to law.

This is particularly important in the age of the *Charter*, where judicial output is often perceived in highly-charged political terms. One way to convince Canadians that the courts are not administering anti-democratic fiat from behind judicial robes is to show them that they too have access to justice where important interests are at stake, and not simply when their liberty is threatened by a criminal charge. Assuming that some of the trends I have described above occur, in particular a decentralisation and privatisation of judicial roles, then it is of the utmost importance that access to justice for those of modest means be maintained—otherwise access to justice really will simply be a matter of money, and the moral authority of law will be replaced by the efficiency of market opportunity.

I began by referring to the old English common law based on writs. Today, we stand on the edge of transformations in our world and in our way of perceiving the world. These transformations are more than discrete issues that need to be solved by a more or less unchanged legal system and doctrine. Rather, they represent challenges which will require, over time, a rethinking of how we conceive of our law, of how the reality of the new fits into the forms of thought created by the realities of the past. Whether the challenge be incorporating aboriginal or international norms into our law, or in addressing relationships or knowledge that have never before confronted humanity, or in keeping our law relevant to people's hearts as well as to lawyers' minds, our law will need to adapt and re-make itself. And it must do so now in the context of our highly developed sense of democratic morality, whose constitutional guarantee is our *Charter of Rights and Freedoms*. I do not believe that, like the writs, our current system of law, including the *Charter*, will be swept away by the tides of change. The difficulty will be in finding and remembering what is essential, what is timeless, in our law, while remaining open to the new realities of a new millennium.

