

## *THE PUBLIC RESPONSIBILITIES OF LAWYERS* The Honourable Mr. Justice Brian Dickson\*

I fully confess my strong bias for Chief Justice Samuel Freedman. I hope this bias will not disqualify me from passing judgement upon him. Sam has been my warm friend for over 25 years, and colleague on the Court of Appeal of Manitoba for more than five of those years. He is one of Canada's most respected jurists. He is held in high esteem for his technical legal acumen, as well as for his deep and perceptive insights into the larger function of the law. His opinions reflect a rich background of culture and learning. He has always ruled out as irrelevant anything mean or petty, intolerant or trivial; devoted to the noblest ideals of our profession, he has ever sought the enduring. He combines a disciplined mind with matching eloquence in speech and writing.

I was relieved of the difficulty of selecting a subject for this address as Justice Matas has furnished me with this daunting title: "The Legal Profession in Canada: Changes and Challenges for the Profession with reference to the *Canada Act 1982* and the *Charter of Rights and Freedoms*: The Responsibility of Lawyers as Members of the Public Profession of Law." A short title might simply be "The Public Responsibility of Lawyers".

An early canon of ethics, approved by the Canadian Bar Association, stated that:

The lawyer is more than a mere citizen. He is a minister of justice, an officer of the Courts, his client's advocate and a member of an ancient, honorable and learned profession. In these several capacities, it is his duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself.<sup>1</sup>

That is what it means to be a lawyer. Those are his responsibilities; to the state, to the court, to the client, to his fellow lawyers and to himself. It is a life of public service.

Dedication to public service is the mark of a professional. The legal profession takes that responsibility more seriously today than ever before, and the historical perspective which I will sketch for you will show just how far we have come. While the profession is more conscious of its responsibilities toward society, so too, however, society has come to expect more of the legal profession. Lawyers have long assumed that self-governing status is indispensable to public responsibility. I have no doubt this is correct but non-lawyers are not so easily convinced. Implicit in the legislative grants of self-government and monopoly is concern for the protection of the public interest. Monopoly is only a means to an end, and that end is service to the public.

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\* Puisne Judge of the Supreme Court of Canada. Lecture delivered on April 8, 1983, at the Winnipeg Convention Centre. I would like to acknowledge with gratitude the assistance of my law clerks Ian F. McGilp, Ph.D., and Dianne Pothier, in the preparation of this paper.

1. "Canons of Legal Ethics" (1920). 5 *Proceedings of the Canadian Bar Association* 261 at 261.

As Chief Justice Deschênes has aptly observed, and I translate roughly:

The day when the professional corporations withdraw onto themselves, the day they concentrate on the immediate self-interest of their members, and forget, or relegate to secondary place, the primary responsibility to society which is the very reason for their existence, on that day their knell will sound and popular resentment or indifference will sweep them away.<sup>2</sup>

### The Perspective

The earliest question about the relationship between lawyers and society in Canada was whether society needed them at all. Several civilizations have managed without lawyers, and I am not referring to remote tribes, but to such great cultures as the classical Greek. It may come as a surprise to know that for a time the official response, in what is now Canada, was: "No, we do not need lawyers".

In New France there were notaries to handle the drawing and execution of documents, but no advocates. This was a deliberate policy of the French authorities, the official view being that the administration of justice could be carried out much more efficiently if advocates and attorneys were not permitted in the colony. Notaries did to some extent function as advocates during the French regime, but the overall policy was to discourage judicial disputes.<sup>3</sup> When the British took over after the fall of New France it was decided the colony was sufficiently developed to warrant the introduction of lawyers, but the British did not always view them as indispensable. The early development of the west was undertaken without lawyers.<sup>4</sup>

The real beginnings of the legal profession in Canada date back to the 1760's. In 1764, when the British civil administration established the Court of Common Pleas, there was a recognition of the right of lawyers to appear. In 1766 this right was extended to appearances in any court on a civil case. The origin of the profession is thus English, and associated with English style courts.<sup>5</sup>

From 1765 to 1785 admission to the practice of law depended on receiving a commission from the governor. There were no minimum requirements: no educational standards, no training, no apprenticeship, no examinations. Enjoying the favour of the governor seems to have been the only criterion.<sup>6</sup> There was one celebrated case which caused consternation among those already admitted to practice. In 1784, an elderly merchant from Trois Rivières, who had gone bankrupt several times and was not well disposed towards lawyers, was given a commission despite strong protest from his would-be colleagues.<sup>7</sup> These were not exactly lofty beginnings for a profession. For lawyers who wax eloquent about the great tradition of independence of the legal profession, the

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2. Jules Deschênes, "La responsabilité sociale du Barreau" (1964), 24 R. du B. 267 at 267 (translation by the author).

3. André Sinclair, "L'avocat au Québec: 209 ans d'histoire" (1975), 16 C. du D. 689 at 690; E.C. Common, "The Role of the Notary in the Province of Quebec" (1958), 36 Can. Bar Rev. 333 at 334-335.

4. See Dale and Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (1972), Chapter 1.

5. Sinclair, *supra*, n.3, at 689-693; Bora Laskin, *The British Tradition in Canadian Law* (1969), at 76.

6. Sinclair, *Id.*, at 691-692.

7. *Id.*, at 692.

first twenty years is a piece of history that does not fit. A dedication to public service does not seem to have been the *raison d'être* of the legal profession at its inception.

The first requirements for admission to the practice of law came not from the legal profession but by government ordinance in 1785. To qualify as a lawyer under the ordinance it was necessary to serve five years of apprenticeship and pass examinations.<sup>8</sup> A distinction was made between notaries and lawyers<sup>9</sup>, a distinction that still exists in Quebec, but no separation between barristers and solicitors, as in England, was adopted. Such specialization was a luxury that a new society and a small profession could not afford.<sup>10</sup>

The legal profession did not attain any form of self-government until the formation of the Law Society of Upper Canada, in 1797. The Society took over the regulation of admission standards in Upper Canada, but in Lower Canada the 1785 Ordinance remained in force until the establishment of the Barreau du Bas Canada in 1848.<sup>11</sup>

With the formation of bar associations throughout Canada, the early pattern of apprenticeship was retained. The emphasis was on practical training and technical skills. It was a continuing sign that the profession was inner directed. Gradually, however, minimum educational requirements were established and recognition given to the academic component of legal training.

The first move to embrace full-time academic studies in law as the principal requirement for bar admission was undertaken in Nova Scotia, shortly after the establishment of the Dalhousie Law School in 1883. As Professor Willis has written:

The founding of it was an ambitious undertaking, a pioneer step not only in Canada but in what was then the British Empire. For the idea that a University, an institution dedicated to the giving of a liberal education, should train men to pursue the money-making craft of practising law was quite foreign to English thinking of the time.<sup>12</sup>

By 1891 the Nova Scotia Barristers' Society adopted as admission requirements a period of full-time academic study supplemented by a shorter period of articles of clerkship.<sup>13</sup> The rest of the country eventually followed this example, but development across the country was uneven. For a long time many of the provincial law societies insisted on part-time academic studies concurrent with work in a law office. It was almost three quarters of a century before the conversion to full-time academic studies was complete, a change initiated by Manitoba in 1964.

During this era university law schools had to compete with law schools run by law societies. In Ontario it was only in 1957 that the Law Society of Upper Canada finally recognized that all law schools were created equal. Prior to that time the Society's own school, Osgoode Hall (now part of York University)

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8. *Ibid.*

9. *Ibid.*; Laskin, *supra*, n.5, at 76.

10. Sinclair, *Id.*, at 693; Laskin, *Id.*, at 2.

11. Sinclair, *Ibid.*

12. John Willis, *A History of Dalhousie Law School* (1979), at 19.

13. *Id.*, at 6.

had been given favoured treatment, and, until 1949, recognition of Osgoode had been to the exclusion of all other Ontario law schools.

The developments at Osgoode Hall marked an important step in Canadian legal education. A report of a special committee of benchers of the Law Society of Upper Canada in 1949 reflected the tension between university teaching staff and benchers. The full-time law school staff aggressively advocated a full-time law school. The benchers committee resisted. One member of the committee said: "In essence Osgoode Hall Law School is a vocational or trade school". Another bencher, in a radio broadcast, said that Osgoode Hall was not an educational institution. Three members of the full-time staff, Dean Wright, Professor Willis and Professor Laskin resigned and moved to the University of Toronto Law School.<sup>14</sup>

This episode in Ontario legal education, though dramatic, was merely a reflection of the historic antagonism, as old as the common law itself, between the universities and the bar. In England, for 500 years, the teaching of law was left to practitioners. The English common law of the King's courts was not taught in the universities. The disorderly mass of procedure and substantive law that was the common law was only to be learned at the courts. "From 1256, when Bracton stopped writing, until 1758, when Blackstone started his lectures at Oxford, there was hardly a single book on English law that could be described as literature".<sup>15</sup> For a supposedly learned profession the law was remarkably hostile to learning. It is small wonder then that there lingers in certain corners of the legal profession in Canada traces of residual anti-intellectualism.

Law societies' attitudes as to appropriate qualifications for admission to the bar say a great deal about the profession's view of its role in society. The decision, long and painful in some parts of Canada, to make full-time university legal studies the largest component of admission requirements was a sign that the profession saw itself in a broader context. It saw lawyers as more than mere technicians or legal mechanics practicing a recondite craft of limited social value. Law had come to be recognized as an institution with intellectual and normative content having broad philosophical ramifications. The effect was to raise the intellectual level of the profession and improve the quality of justice. A better educated profession has produced a more public-minded profession.

In a recent essay on legal education Professor Paul C. Weiler notes that the law is in an endless state of flux; new social demands must be handled by lawyers and judges in ways not dreamed of when they were in law school. He continues:

Therein lies the challenge to a system for educating practicing lawyers; not to send out young lawyers fully trained in how to perform the tasks which are required in their first three

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14. Chief Justice Bora Laskin, "Cecil A. Wright: A Personal Memoir". March 10, 1982 (unpublished paper delivered at the Wright Memorial Lecture, Faculty of Law, University of Toronto).

15. John P. Dawson, *The Oracles of the Law* (1968), at 47.

or four months of practice; rather, how to develop the mental equipment needed for creative responses to issues which may only arise thirty or forty years hence.<sup>16</sup>

With respect, I agree.

### Law Reform

Law reform has always been regarded as one measure of the responsibility of lawyers as members of the public profession of law. The obligation of the profession to promote law reform has been a recurrent theme in the presidential addresses to the Canadian Bar Association's annual meetings, and the Association has, throughout its history, backed up those lofty words with action. The Association or its sections has evaluated proposed legislation or made its own proposals for reform in numerous areas, such as the law of evidence, divorce, criminal law, and constitutional reform. The Canadian Bar Association has sometimes even been listened to by the legislatures. In addition, the Conference of Commissioners of Uniformity of Legislation in Canada, an early offshoot of the Canadian Bar Association, over the years, produced very valuable examples of model legislation.

Despite the volume of its law reform activities, the Canadian Bar Association has a reputation of being staid and conservative. This is not really the paradox it might seem. Oscar Lundell, President of the Canadian Bar Association in 1964, made the following observation in his presidential address:

However, men who are carrying on the daily duties of a demanding profession have only a limited time to spare. The result naturally has been that many of the reforms have pertained to adjectival rather than substantive law, to revisions of existing statutes rather than to fundamental changes in the law itself. It has been more a matter of patching up existing garments than of cutting and putting together new garments which are more up-to-date and more suited to the new climates and the different social needs of today.<sup>17</sup>

Lawyers as a group have not generally been noted as advocates of radical change. "It is perhaps only natural for one to be satisfied with the *status quo* when income status and prestige are relatively high".<sup>18</sup> But lawyers are not a monolith. Some lawyers who view the Canadian Bar Association as being too conservative have joined provincial associations of lawyers, self-styled as "law unions", to advocate a more activist view of the role of lawyers. The point of all of this is simply to note that the profession, as a collective, takes seriously its obligations to improve the law.

May I say a word about the academic side of the profession and law reform. I am impressed with the increasing flow of good scholarly work emanating from our law faculties. The teachers have done a great deal to create a friendly climate to new laws, through radio, television and newspaper interviews and articles. There is in Canada a great and growing interest in all things legal.

There is also a growing recognition of the importance of academic writing to the judicial process. Much of the common law has grown in a haphazard and disjointed manner, leaving to scholars the task of finding unified and consis-

16. Paul C. Weiler, "Past and Future in Canadian Legal Education: Personal Reflections", in *Essays on Legal Education* (Neil Gold ed. 1982) 1 at 5.

17. "Presidential Address", 1964, 47 *Proceedings of the Canadian Bar Association* 123 at 128.

18. Neil Gold, "Continuing Legal Education: A New Direction" (1975), 7 *Ottawa L. Rev.* 62 at 71.

tent theoretical bases, as simple and workable as possible, from which problems can be analyzed and further progress made. There are policies and principles imbedded beneath the surface in all our legal rules. The difficulty is that members of the practising bar and judges have often failed to devote the time and thought necessary for the sustained and proper articulation of those principles. Regrettably, one rarely finds reference to scholarly writing in the factums that counsel present to the courts. There are historical reasons for this. In early days, counsel were not permitted to cite articles appearing, for example, in the *Canadian Bar Review*. An author could be cited only after his death, presumably because he could not thereafter change his mind. But even today, too many counsel spend too much time quoting the dicta of judges, and too little time analyzing the principles which underpin particular cases and statutory provisions. Counsel have not in general availed themselves of the gold which can be found between the covers of the academic journals.

In the last two decades law reform has gained a new legitimacy with the establishment of government-sponsored and funded law reform commissions at the federal level and in many provinces. Distressingly, few of their recommendations have found their way onto the statute books. Interestingly enough, some of the recommendations of the law reform commissions find their way into the legal fabric by means other than statutory enactment. For example, in the unanimous decision of the Supreme Court of Canada in *R. v. Vetrovec and Gaja*<sup>19</sup> the Court specifically adopted the reasons of the Law Reform Commission of Canada for abrogating the common law rule requiring corroboration of an accomplice's evidence.

Some of the law reform projects are ambitious. For example, the Law Reform Commission of Canada is undertaking a projected five-and-a-half year review, scheduled for completion in 1987, of the entire area of criminal law. The Commission will endeavour to produce a new draft Criminal Code. The fate of its proposals will no doubt be an indication of the real impact of the Commission.

When all of the above is taken into account it is apparent that there is a significant amount of "lawyering" directed to law reform activities of one form or another. The profession as a whole is much involved in law reform.

### Accessibility

Within the context of public responsibility I would like to say a word or two on the subject of accessibility. In days gone by, the accessibility of legal services was not really viewed as something about which lawyers needed to be concerned, although individual lawyers sometimes gave free services to those in need on an *ad hoc* basis. As society came to recognize its obligations to the disadvantaged, however, access to legal services was one of the many areas reassessed.

The organized bar did not immediately respond to the challenge. The idea that legal services were a social service to which persons had a right of access took a while to gain acceptance. It is to the credit of the legal profession that the first initiatives in the organization of legal aid came from the bar and Manitoba

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19. (1982), 41 N.R. 606 (S.C.C.).

provided the lead. In 1937, the benchers of the Law Society of Manitoba established the "Indigent Suitors Committee" to organize provision of legal aid services in civil (primarily in family) cases. The scheme depended on the voluntary services of lawyers, one of whom was a certain Samuel Freedman. The Manitoba Bar, in 1948, moved to organize a system of criminal legal aid as well.<sup>20</sup> The plans were, however, far from comprehensive. Other bar societies followed the Manitoba lead, but it became clear before too long that the need for legal services among the poor and disadvantaged was too widespread to be adequately handled on a private basis. It took a long time, and a lot of pressure from the bar and other groups, before governments became convinced. It is only within the last fifteen years that governments have become heavily involved in the provision of comprehensive legal aid schemes.

The development of legal aid has proven that poor people are not just the same as rich people except that they cannot afford to pay for legal services. Poor people have different kinds of legal problems, compendiously embraced under the rubric of "poverty law". The development of legal aid has exposed the profession, or at least parts of it, to new areas of law. Lawyers get a chance to see how the other half lives.

With rapidly rising costs of legal services it is becoming increasingly apparent that the poor are not the only ones experiencing difficulty in affording a lawyer. The middle class too is hard pressed. One of the most important problems facing the profession today is how to make more economical legal services available to middle income groups. It is a problem for both the profession and potential clients. Lawyers want the business; clients want the services. One partial solution may be a system of pre-paid legal services and group legal services plans, i.e. legal insurance to cover basic legal needs. Such plans have become common in the United States and Europe, but have not been much tried in Canada.

Is greater accessibility to legal services to be obtained through special community legal clinics utilizing standardized procedures? A report of the American Bar Association on the role of the lawyer in the 1980's<sup>21</sup> states that in 1974 there were eight legal clinics in the United States. Today there are nearly 700. They follow the principles of high volume, low margin, high visibility through aggressive marketing and low legal fees. Does the answer to the problem of accessibility lie in part in the greater utilization of paraprofessional people? Is there a place for service professional centres with, for example, a lawyer, an economist, an accountant, a sociologist, available to provide interdisciplinary advice and support? These are some of the possibilities. There are complex issues involved in each, but any scheme that might facilitate access to legal services for those who need and want them merits serious consideration.

There are countless lawyers who from day to day, in cities, towns and villages attend to the interests of their clients with ability and integrity, and at reasonable cost. Thousands of satisfied clients have placed their confidence and trust in the trained professional lawyer and that trust has not been mis-

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20. Norman Larsen, "Legal Aid in Manitoba", in *The Law Society of Manitoba 1877-1977* (Cameron Harvey ed. 1977) 158 at 159-162.

21. American Bar Association, *Task force on the Role of the Lawyer in the 1980's* (1981).

placed. But the twin demons that plague our judicial system remain: the cost of legal services and delays in the delivery of those services. Learned Hand uttered a stinging indictment of the courts in words, as true today as when they were spoken:

... as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.<sup>22</sup>

Hamlet summarized the seven burdens of men and put the law's delay fifth on his list. If the meter of his verse had permitted he might have given it a higher rating. One recalls the wisecrack of a few years ago "Okay, blind; but why so slow?" I am frequently distressed at the time between the initiation of an action and the date the case reaches our court — four, five, six, as many as ten or twelve years. How can these delays possibly be justified? What can one say about the ever-rising cost of legal services? Are lawyers pricing themselves out of the market? I fear the day when these two evils — delay, and cost — will bring a tide of public disapproval washing over the professional shores. If that day comes no amount of advertising or propaganda will stem the tide.

Let us look at our cases as if we were client and not lawyer. Look and see whether it is possible to expedite the case. Look and see whether expense can be spared. Think of the hopes, the anxieties, the suspense, the time, the trouble and the expense of those who, perhaps through no fault of their own, become involved in a law suit. Justice should be swift. It isn't. Justice should be inexpensive. It isn't.

How can we pare cost? It may be of interest to know that in the Supreme Court we are now examining a system whereby our judgements will be printed by word processing machines, then sent to the law editors, later to translation and finally to the Queen's Printer where compatible machines will be available to process, print and publish the final product. We hope to eliminate several retypings, typesetting and proof-readings. This should expedite the process, reduce cost and generally increase efficiency.

Another possibility which has been examined is the use of closed circuit television for certain hearings. At the present time counsel come to Ottawa every second Monday from across the country seeking leave to appeal to our court. The hearing of a motion may take all of 30 minutes yet counsel from distant centres may need two days coming and going. The cost in terms of air fare, hotel expenses and time of counsel can be substantial. I would hope that closed circuit television could be provided in a manner that meets the requirement that the court be open, and at a cost which would make this an attractive proposal.

Cost is not the only obstacle to the accessibility of legal services. Although large corporate clients will usually not have much difficulty in selecting appropriate legal counsel, most occasional users of legal services have difficulty in knowing where to begin in seeking a lawyer. For many, picking a name at random out of a telephone book is the only available means. The introduction of lawyer referral services and the authorization of limited forms of advertising

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22. Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter", (1926), *3 Lectures on Legal Topics* 89 at 105.



in which lawyers declare their preferred areas of practice seem to me to be logical developments.

The twin issues of specialization and lawyer advertising are contentious but they are not peculiar to Canada. They have been the subject of much study and debate in the United States. In England, a Royal Commission on legal services recommended the introduction of a specialist scheme for solicitors in some fields. In Australia and New Zealand specialization has been a subject of close attention.

There can be little doubt that an increasing number of Canadian lawyers are limiting their practice to one or two areas of the law. They handle certain matters and not others. As far as I am aware there are no hard statistics, but in 1972 the MacKinnon Committee in Ontario found that of 4,411 lawyers responding to a questionnaire approximately 50% said they specialized rather than engaged in general practice.<sup>23</sup>

The mere fact of limiting a practice to a particular area however does not ineluctably make the practitioner an expert. Specialization is not the same as expertise. It is to be hoped that the term "specialist" will not be accorded on some "do it yourself" self-designating basis, but only after completion of advanced post-graduate study, as in the medical profession. Some provincial law societies have been studying the issue but, to date, no comprehensive programme of formal certification has been initiated.

Advertising is allied to specialization. Is there a need to reach out and through informational advertising make the public aware about lawyers and their services? I would answer with a qualified, "yes". Advertising of the price of legal services may be another matter. The traditional, and still widely-held, view was expressed by Roscoe Pound in his work entitled *Jurisprudence*:

There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation, and advocacy to the best of his abilities. But competition with fellow members of the profession in any way is forbidden. Competition belongs to activities which are primarily acquisitive. It is not allowable in those primarily for the public service.<sup>24</sup>

The United States Supreme Court took a different view in *Bates v. State Bar of Arizona*<sup>25</sup>. The Court held, five to four, that forbidding lawyers from advertising violated the right to free speech. The Court's decision limited advertising to "truthful" information on the availability and terms of "routine" legal services; lawyers may advertise their specialties, education, professional honours, base fees and acceptance of credit cards, but cannot promote the quality of their work.

I accept the proposition that if the profession is going to permit, regulate and control the limiting of one's practice, there should be some means of informing the public that one's practice is limited. I confess to some hesitancy, however, in adopting the view that lawyers should be permitted to seek business through advertising the price of their services.

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23. The Special Committee on Legal Education in Ontario, chaired by B.J. MacKinnon, Q.C., now Mr. Justice MacKinnon of the Ontario Court of Appeal.

24. Roscoe Pound, *Jurisprudence: Part 8. The System of Law* (1959), Vol. 5, at 677-678.

25. 433 U.S. 350 (1977).

Before leaving "accessibility" I would like to say a word about accessibility of the profession itself. Within recent years many more students than it has been possible to accommodate have been seeking admission to our law schools. Entry has been on the basis of merit, as determined by undergraduate grades and the law school admission test scores. Does this tend to favour students from middle and upper class families? Professor H.W. Arthurs has observed:

Entry into the legal profession *via* law school is now, and for the foreseeable future, a considerable privilege. Equal access to that privilege for everyone of equivalent ability, regardless of sex, race, or economic status, must be a democratic objective of importance to both the legal profession and the general community. However, it is an objective of special importance to groups which have been badly underrepresented in the past — women, native persons, recently arrived ethnic groups, and the working class generally. So long as these groups are absent from the profession, qualified individuals will be denied the privilege I have mentioned.<sup>26</sup>

A political process is now underway to define the special position of our native people — treaty and non-status Indians, Metis and Inuit — within the new constitutional framework. Is this not an appropriate time for the profession and particularly the schools of law to consider in what manner it might be possible to make the profession more accessible and more attractive to our native people?

### The Charter

So far we have considered the origins of the profession's sense of public responsibility, and examined some of the practical problems facing the lawyers today. The greatest challenge in the future will undoubtedly come from the *Canadian Charter of Rights and Freedoms*. The *Charter* has replaced parliamentary supremacy with constitutional supremacy. A limit has been placed upon absolute executive and legislative powers. Public authority has been bridled by constitutional guarantee. A new dimension has been added to the responsibility of Canadian lawyers.

One of the questions which arises is this: does the entrenchment of fundamental rights and freedoms in the Constitution mean that Canada now has a constitution more similar to the American than the British? Has parliamentary sovereignty now been replaced by judicial supremacy?

The principle of parliamentary supremacy needs no explanation here. The British parliament can pass any law it wishes; no British court has jurisdiction to deny the force of law to any British statute. In Canada this was always subject to the jurisdiction of Canadian courts to invalidate federal or provincial statutes that are *ultra vires* the enacting legislature by sections 91 and 92 of the *British North America Act*. This was never seen as a significant limit on the parliamentary supremacy rule, however, because it has always been assumed that legislative power in Canada is as ample as it is in Great Britain, except that here it is divided between two levels of government. Save where distribution of powers issues arise, Canadian courts have always regarded the legislative power in Canada as being superior to the judicial in exactly the same sense that

it is in Great Britain. The supremacy of elected officials over appointed ones was considered fundamental to democracy.

A spirit of uneasiness, even of guilt, colours some of the cases decided under the *Canadian Bill of Rights*. Some judges were clearly troubled by the *Drybones*<sup>27</sup> decision. Why should a majority among nine appointed judges be permitted to render inoperative acts of elected officials? Judicial review, it was urged, was an undemocratic shoot on an otherwise respectable tree. It should be cut off or at least kept well pruned. It was also said that the participation of the courts in what was largely a political function would lead to the destruction of the independence of judges, and thus compromise other aspects of their work. The propriety of judicial review itself was never far from the surface.

That thinking and those misgivings are now behind us. The new Constitution makes it abundantly clear that Canadian courts must now deny effect to a federal or provincial statute that offends against the rights and freedoms guaranteed by the *Charter*. That responsibility and power now exists as an integral part of the process of Canadian government. The political proposition underlying the power is that there are some phases of Canadian life which should be beyond the reach of any majority, save by constitutional amendment. In Mr. Justice Jackson's phrase: "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."<sup>28</sup>

Our courts have to some extent always been involved in protecting fundamental rights and freedoms. Judges have been alert to ensure that an accused is presumed innocent until proven guilty, a protection assured him under s.5(1) of the *Criminal Code*. When courts have applied sections of the *Criminal Code* dealing with arrest procedures and search warrants, they have been sensitive to the accused's right not to be deprived of his life or liberty "except in accordance with the principles of fundamental justice" (*Charter* s.7). When criminal courts decide whether a confession should be admitted in evidence against an accused, they are always responsive to the principle that a person charged with an offence should "not be compelled to be a witness... against (himself)... in respect of the offence (*Charter*, s.11(c)). Our civil courts have also been involved; administrative tribunals and government officials exercising statutory powers must act in accordance with the principles of "natural justice" and "fairness", or a reviewing court may "quash" the administrative action. Canadian courts have to some extent always balanced the fundamental rights of the individual against the exercise of governmental powers.

Now, however, the principles on which our rights and freedoms are based have the status of constitutional law. Now, when a court weighs the rights and liberties of the individual against the objectives sought to be achieved by offending legislation, the court will be balancing a constitutional value against a statutory one. The entrenchment of fundamental rights and freedoms means that these values are higher, more sacred, than other public interests.

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27. *R. v. Drybones*, [1970] S.C.R. 282.

28. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at 638.

The entrenchment of basic rights in the Constitution is a profound statement about the fundamental nature of Canada. Yet, by itself, the *Charter* says very little. So much depends upon how it is interpreted. Although the override provisions of s.33 give the final word to the legislatures, the primary task of defining the content of constitutional rights is left to the courts, and hence to the legal profession generally.

It is not enough for the rights and freedoms to be proclaimed on paper. The Constitution of the Soviet Union sets out an impressive list of human rights and liberties; outwardly they correspond closely to the standards of a free society. But there is a fundamental difference. They are not interpreted by an independent judiciary. It is only where the law is interpreted by an independent judiciary, assisted by a free and able legal profession, that the rule of law, and therefore the citizen's rights and liberties themselves are safe.

There have been some widely divergent interpretations given to particular provisions of the *Charter*. It will take time for major issues to be identified, and judicially determined. But even after that state is reached, it would be a mistake to expect finality. The American experience has certainly been that the content of constitutional rights can change dramatically over time. The responsibility upon lawyers to give meaning to the *Charter* will be an ongoing one.

It will be up to lawyers to identify and bring before the courts the cases that raise serious *Charter* issues and I emphasize the word "serious". It is essential that lawyers resist the temptation for overkill. The *Charter* was not intended to provide a full employment program for lawyers or to protect every minor right which people might think themselves ideally to possess.

We must exercise reasonable sense, restraint and self-control but the constitutionally protected rights and freedoms must not be cut down by any narrow or technical construction. The *Charter* is capable of growth and expansion within its constitutional limits. There is room for interpreting it *sui generis* with less rigidity and more generosity than other acts of parliament or legislatures. It must be treated as a constitutional instrument enjoying a special status and calling for principles of interpretation of its own.

In some ways s.1 of the *Charter* which makes the enumerated rights and freedoms subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society is the most important provision. The determination of what can amount to reasonable limits will never be easy. Such issues will often not be amenable to traditional forms of legal analysis. Consider, for example, the decision of Chief Justice Deschênes of the Quebec Superior Court concerning certain educational provisions of Bill 101, the *Charter of the French Language*, R.S.Q. 1977, c.C-11; *Quebec Association of Protestant School Boards, et al v. Attorney General of Quebec, et al. (no. 2)*<sup>29</sup>. Chief Justice Deschênes undertook an extensive analysis of demographic statistics, the legitimacy of the objectives of cultural policy, the socio-economic threats to the French fact in North America, and the implications of the discussions between Quebec and the other provinces on access to schools. The ability to analyze these types of factors is not the kind of skill for

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29. (1982), 140 D.L.R. (3d) 33 (Que. Sup. Ct.).

which lawyers have been traditionally trained. The adversary system under which we work is not ideally suited for some of the tasks which lie ahead. It is intended for adjudicating factual disputes between parties and for finding adjudicative facts — who did what to whom — but it is not so well suited for finding legislative facts — those facts of social context and legislative effect which are necessary for policy making. Should the use of “Brandeis briefs” be encouraged so that statistical, economic and sociological data can be brought to the attention of the court prior to decision? Should interventions be freely permitted by persons or organizations who are not parties to the proceedings but feel they have a very real interest in the outcome? It would be unwise, indeed improper, for me to attempt an answer at this time to these and many other questions which arise. I mention these issues only to indicate the type of question which will provide a challenge to the practising bar.

The remedial powers contained in s.24 of the *Charter* will also offer a test of the creativity of the legal mind. The section provides that anyone whose rights and freedoms have been infringed or denied may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances. The outer limits of s.24 have yet to be tested but American experience teaches us that the remedial aspects of constitutional rights litigation will often be the most difficult and most important. In a very real sense the 1954 decision by the United States Supreme Court in *Brown v. Board of Education of Topeka*<sup>30</sup> that racially segregated schools were a denial of equal protection of the laws was the easy part. Almost thirty years later problems of how to enforce desegregation are still being sorted out. Similarly, American judges have been expected to run railroads and preside over state prison systems. Where the vindication of constitutional rights simply involves the nullification of past wrongs, the remedial options are quite straightforward. But where positive action is needed to correct the denial of constitutional rights, the remedial questions become more vexing. The protection of equality rights is especially amenable to such complexities, so that the coming into force of s.15 of the *Charter* in 1985 may provide further perplexity in the fashioning of remedies.

I hope we are not pushing too many problems that are too complex into the courts. We are having thrust upon us many policy issues of profound importance left unresolved by the other branches of government. People in increasing numbers are coming to the courts for the assertion of rights to political, economic and social equality. The courts cannot shy away from decision-making on controversial questions. The judges have tenure and they must give some answer, right or wrong; from the judicial system people expect, and get, in the words of one observer, “enforced fairness”<sup>31</sup>. It is presumably easier and cheaper to look to the courts for social changes than to go through the laborious and time-consuming process of persuading legislators. Litigation is being substituted for politics; the judicial process for the political process.

The greatest legacy of our legal and judicial institutions in the western world has been in securing the rights of people. The greatest obligation in the years ahead will lie in the protection of that legacy and in making the *Charter of*

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30. 347 U.S. 483 (1954).

31. J. Vincent Aug. United States Magistrate for the Southern District of Ohio in Cincinnati, quoted in Richard Reeves, “A Report at Large. American Journey” — *The New Yorker*, April 5, 1982, 53 at 73.

*Rights and Freedoms* the basis of further vindication of individual and collective rights. Courts, practicing lawyers, and law facilities, face the necessity of shaping laws which give order and form and reality to social relationships within the new constitutional and political infra-structure. But we are fortunate. We will do so in a free and open society.

Other countries are not so lucky. We debate legal details but we are assured of basic freedoms, in contrast to the arbitrary, unpredictable and ultimately dehumanizing prescriptions of despotic authority.

What protection is given to freedom of speech, freedom of press, freedom of assembly and the other freedoms in countries behind the iron curtain — Russia, Romania, Poland? What freedoms does one find in some of the countries of South America or Central America with appalling civil rights records. In many countries the courts are mere rubber stamps of a dictator's will, judges are the tools of the state and the secret police a law unto themselves. Traditional means of dissent are suppressed. Terror and violence reign in the place of law.

We can be very proud of our statesmen and politicians for giving us a *Charter* which stands comparison with any statement of individual rights in the world. We should reflect for a moment or two on what we are so apt to take for granted — the supremacy of law and the rights and freedoms assured by law. We must guard those rights and those freedoms as they are fragile and can prove to be evanescent and ephemeral if taken for granted.

I conclude my remarks with Henry Brougham's speech on English law reform in 1828. He asked the King to issue a Commission for inquiring into the defects of the laws of England. His speech concluded with these words:

It was the boast of Augustus...that he found Rome of brick, and left it of marble...but how much nobler will be our sovereign's boast, when he shall have it to say, that he found law a sealed book — left it a living letter; found it the patrimony of the rich — left it the inheritance of the poor; found it the two edged sword of craft and oppression — left it the staff of honesty and the shield of innocence.<sup>32</sup>

Even if we cannot achieve that goal, can we not, at least, move appreciably closer to it?

Thank you ladies and gentlemen for your attention. May I say again how happy I am to be here today joining in the tribute to Chief Justice Freedman, a good man and a great judge.

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32. Parl. Deb., New Series, Vol. XVIII, col. 247.