

# THE CANADIAN LEGAL PROFESSION AND INTERNATIONAL LAW

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My delight at participating with so many distinguished friends of the Chief Justice in these happy proceedings is overcast a bit by the responsibility of giving this paper, and the knowledge that most of you would prefer to be elsewhere. Not that I have been entirely "speechless" these many years since Sam Freedman and I were, perhaps, among the most "feared" debaters in the long history of forensics at Manitoba; indeed, feared far beyond provincial boundaries. We share the secrets of an old friendship where much disclosure is permitted and, alas, even more is forbidden.

But on all splendid occasions '*pearls come before wine*' and so I suppose it was inevitable that these celebrations should have the respectability of substance as well as the license of pleasure. Valuable insights about the professions already have been shared with us from the wisdom and wit of Mr. Justice Dickson and Sir Robert Megarry. I am assuming their Lordships were placed first on the program yesterday not because of any statutory or constitutional superiority but because their presence would ensure that a severe standard was to be expected from those who followed. However, since there would be no doubt about Madame Justice Wilson, and everyone took for granted the decorous declamations and the comedy of Dr. Cherrick, it must have been the uncertainties about myself with whom Mr. Justice Matas and his Committee were concerned. I can only hope, therefore, that as an 'old boy' from Manitoba, returning home to expose myself to friend and foe alike, I will be forgiven if I mix the anecdotal with the analytical and so launch the morning, secure in the certainty at least of the high performances that are to follow me.

This is a singular occasion. The Chief Justice's retirement (as he has remarked) reminds everyone of the almost sixty years of his continuity with University and Law School, with the Bar and the Bench of his province and city. A whole lifestyle was shaped in this extraordinary centre, Winnipeg, not merely the geographic mid-point of Canada, but itself a major catalyst of the modern Canadian fact. Most of you have shared in this dynamic social and professional environment for longer than I have done, having removed myself from home almost fifty years ago. But I have never lost touch with my family and friends, with the totality of my links here. These proved to be a continuing thread running through all the varied patterns of experience that took me to many other places, but never at the cost of forgetting where it all began.

Interesting memories and comment still surround the Manitoba Law School as I knew it in the early nineteen-thirties. But whatever views are held about the old days — before Brian Dickson, Richard Bowles, Sam Freedman and others helped to introduce the modern fulltime faculty — there were many able men who devoted hours, energy and experience to the school of those years.

My recollections recapture vital images and personalities: Judge Robson, E.K. Williams, Dean Coleman, Harvey Streit, Fred Read, Pete Tallin, aided

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by the dedicated practitioners whose support assured the continuity and the integrity of the School. Here again are names that will not be lost to memory: Joe Thorson, R.B. Graham, Judge Adamson, E.B. Loftus, Charlie Guild, and so many others. And, of course, there was Rhodes Smith. He was daring enough in his teaching tastes to have taken on International Law, no doubt because he knew that one day it would prepare him so well to become Attorney-General and Chief Justice of Manitoba.

Significantly, international law was a compulsory course in those days and Manitoba must have been one of the few Canadian schools where it was not a "soft option" or ignored altogether. A very satisfying recollection is a meeting with Rhodes Smith to be told that my international law final exam snared a good grade and therefore justified his support for an application I had made to pursue graduate studies in Chicago at Northwestern where John Henry Wigmore's fame still presided in scholarly glory

One last comment about the Law School. Whatever the debate about those years some quite remarkable graduates carried its colours in Winnipeg and beyond. Perhaps bright minds seeking to master the law are only marginally touched by teaching. This may be a harsh judgment to hear from someone whose life has been spent in the profession mostly as a teacher. But I doubt whether graduates of the front rank ever were in need of much teaching, systematic or socratic, and however perceptive and persuasive the teacher. These young lawyers would have risen on their merits whatever route they took to achieve professional competence. The inspiration of men on the Bench and at the Bar, as models and peers, often may have counted for more than the classroom itself. I say 'may' advisedly since good theory and good practice are forever partners in assuring the likelihood of high performance in every profession.

Of course, the Law School lived in the unique environment that was Winnipeg and Western Canada. It is said that some 21 foreign language dailies or weeklies were published at that time. The *Manitoba Free Press* had been for over fifty years a dominant editorial voice in the West and for much of Canada, too. The Canadian Institute of International Affairs had one of its principal sources of inspiration and leadership here from John Dafoe and Edgar Tarr. The overseas sensibilities of both an immigrant and an exporting society gave to Winnipeg its international outlook. This was reflected daily in the literate dialogues which the *Free Press* carried on in Dafoe's editorail page, and the general public awareness of a world and its sorrows.

Added to all of this was a veritable powerhouse of national and international thinkers among town and gown — Fieldhouse, Chester Martin, Lower, John Bird of the Tribune, Edgar Tarr, Dafoe and his protege George Ferguson, and later William Morton, who became, perhaps, the most distinguished Canadian historian ever to graduate from Manitoba. Think, too, of the extraordinary mixture of ethnic tensions and the search for "nationhood" evoked by Winnipeg's inter-racial life. Led by John S. Ewart and later by Dafoe and Tarr these group interactions gave rise to specific patterns of Canadian nationalism, western style, which was as dynamic and significant as anything to be produced in Montréal by Bourassa and Le Devoir, or in Toronto with Goldwyn Smith and those who followed him in providing the Mid-Canada

view of the Canadian Dream. And a western populism fathered both the C.C.F. and Social Credit and thereby reshaped the politics of the West and of Canada itself. In Winnipeg, nationalism and internationalism thus coexisted amid the uneasy ideological tempos of the time and indeed became a mirror of the great debates of the 1930's. Not unexpectedly, given these germinating conflicts, an original Canadian race relations provision found its way in section 20 of *The Manitoba Defamation Act*, sponsored by the late Marcus Hyman, Q.C., M.L.A., in 1934. Whatever its constitutionality, it was the first serious parliamentary effort in Canada to deal with those political obscenities that took their model from a rising Hitlerian era, and its racist ideologies.

Nationalism and internationalism; public affairs and social awareness; intellectual style and the literary skill to express it — this was Sam Freedman's environment and perhaps this explains why his natural talent found the soil within which he was to become a flourishing image of Manitoba at its public best.

To the extent, therefore, that Winnipeg was so hospitable to a kind of international mind, among the young particularly, it prepared those who left the city for risks 'out there', and to take those risks with some realistic sense of the times and the world. For that world of the 1930's was lurching towards war and, unbeknownst to its actors, they would share in experiences that ran from near defeat to total victory, from the Holocaust to the United Nations. Thus to the extent that Winnipeg, the University and the Law School helped to create this intellectual readiness, it is not surprising that those of us who left to try our luck elsewhere, should have found in themselves that adaptability to cope with events as an undefined gift of our Winnipeg origins.

This brings me to the Legal Profession and its present involvement with international problems and international law. Cannot one today assert, with some confidence, that international law increasingly is a "bread and butter" subject for the bar and not simply and sadly an attorney's "mantle" cast over the shoulders of power, as Alfred Zimmern once described it so derisively? It is thirty years ago to the year that I undertook a study of those international law problems that seemed to be of interest to Canadian lawyers and relevant to Canada itself. The results were published in the *Canadian Bar Review* of 1954. The analysis made some rather simplistic estimates about the number of law firms that might have matters coming across their desks containing an international component, directly or indirectly. It was interesting to attempt some projections based on the volume of reported cases in the preceding five years from 1948 to 1953. These included such recognizable categories as Maritime and Aviation Law, immigration and citizenship, international taxation, foreign judgments, extradition, state and diplomatic immunities, and extraterritoriality (particularly the alleged growing reach of U.S. law into Canada).

It became quite clear to me that the so-called 'marginal' place of international law in the professional mind, and professional income, tended to be less marginal the closer one examined the variety of reported decisions. I assumed then, perhaps optimistically, that for every reported judgment there were possibly ten files or cases that never reached the Reports and were disposed of one way or another in large and middle-sized firms.

If a similar survey were to be made of 1983, judging by the reported materials of today, it would probably demonstrate that the international law questions regularly before the law firms of Canada may have doubled or tripled in volume even though, very often, today as before, a busy practitioner may not recognize all of the international legal issues in the facts or law under review.

Hence, if the "bread and butter" status of international law, for a skeptical Bar, was still in question in 1953, that surely can be no longer so true for our own day. Two of the most dramatic illustrations of these changes are to be found in: (1) the private and public law consequences for the increasing interaction of U.S. and Canadian law within the Canadian legal system, now multiplied by the immense network of economic and socio-demographic relations that increasingly touch the joint interests of "persons" and property in both countries; and (2) the extraordinary impact that the *Canadian Charter of Rights and Freedoms* will produce in the interfacing of it and the international human rights doctrines and documents to which the *Charter* is directly or indirectly indebted, or where it purports to implement Canada's international treaty obligations in the human rights field, particularly the two U.N. Covenants of 1966, ratified by Canada in 1976.

There is hardly a clause in the *Charter* that does not have some connection with the two main historical influences affecting the draftsmen one way or another: the Anglo-Canadian constitutional and criminal justice tradition, and the modern international law of human rights, treaties and principles, that have multiplied so swiftly since the United Nations Charter opened a new era in 1945. No Canadian lawyer, pleading the *Charter*, is likely to find it possible to avoid the temptation of resorting to these once exotic footnotes of international principles, conventions and treaties that only a few years ago would have seemed remote for practical and daily use in a busy firm.

No Canadian judge will be able to avoid, I say with respect, the obligations and the analogies which principles and agreements, from the international human rights field, now will impose upon the Courts, as counsel argues from these persuasive sources. Judicial hesitancy about a resort to international "rules", or instruments and their preparatory materials, for so long a Canadian tradition, is likely to yield to the pressures of recognizing what the varied sources of the *Charter* will now require of, and impose on, all Canadian tribunals if justice is to be done to the *Charter's* magistral commands.

It is sometimes forgotten that the legal profession, Bench and Bar, has often been closer to the development of international law than modern and traditional practice and professional views have suggested. The great names in international law from the 16th century onwards were very practical men: lawyer-theologians, lawyer-diplomats, lawyer-advisors to sovereigns. Each lawyer brought a professional realism to his advice from the hard bargains of life and states where he had participated often as a key actor. And so, Hugo Grotius of Holland, whose 400th birthday is celebrated this very day, and who created much that remains durable about the international legal order we know, was such a very practical mixture of statesman, legal adviser, diplomat and theologian.

As Judge Manfred Lachs recently observed, some of the great men of English law in those years were also excellent international lawyers: Lord Mansfield, Lord Eldon, Lord Stowell and others, while the U.S. had Kent, Story and Marshall. Canada had its fine practitioner-scholars in Eugene Lafleur, Percy Corbett, H.A. Smith, N.A.M. Mackenzie and the scholar-bureaucrat-judge, John Read of the International Court of Justice. In Britain, they were often members of Doctors' Commons, that celebrated professional guild whose college provided for centuries the international law advice required by the British sovereign. In the 1870's Sir Travers Twiss, the Queen's Advocate-General, was the last of that noble line. These "doctors" were also fine students of the civil law and indeed, as Mansfield's judgments indicate, he borrowed from the civilians in modernizing so much of the common law of his day. One of Canada's national ironies is to think of how little, until recently, common lawyers in Canada knew about the civil law; whereas in Québec it was the reverse since so much of that Province's commercial and public law was Britannic and Anglo-Canadian in origin. Thus international law has been fathered and nurtured by practitioners and judges over the centuries as perhaps the principal creators of its doctrines and its credibility, a fact noted with high candour by that superb mixture of scholar, teacher, practitioner and judge Lord McNair:

If I may give my own testimony both as a teacher of law and as a practitioner, I can say that I have constantly had the following experience. Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I have constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or of contributing to a judgement, I have been struck by the different appearance that the rule of law may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts. As stated in a textbook it may sound the quintessence of wisdom, but when you come to apply it many necessary qualifications or modifications are apt to arise in your mind . . . it is probable that the legal element in the resulting solution will be a more useful and more practical rule of law than a rule elaborated by a teacher or writer in his study working alone and in the abstract.

International law has also been a natural bridge between civilian and common lawyers whose joint contribution through their two great legal systems provided the major "private law analogies" that comprise so much of public international law; a conclusion Judge Hersch Lauterpacht recalled over fifty years ago in his now classic volume on the subject.

Perhaps the greatest difficulty for judge and practitioner in Canada, in dealing with international law questions, has been the concern for determining what "customs and principles" of public international law are part of the law of Canada. Treaties and other agreements present difficulties of a different order of magnitude as suggested above with the *Charter* and its relationship to international human rights law as set out in the 23 "Agreements" which Canada has already ratified. But as models of a major difficulty consider the problems of international environmental law, or international human rights law; in those areas there are as yet no neatly codifying instruments to define with precision the obligations involved. It will take demanding lawyering of high skill and judgment to determine the appropriate and applicable rules here that are binding on Canadian courts. Hence, if custom or "general principles" are being urged as determining an instant case, or when the ambiguities of a treaty must lead to a reliance upon the complexities of "travaux prépara-

toires'', both of these often are immensely complicated and ambiguous and whenever resorted to by Courts and Counsel, new levels of technical challenge will face Bench and Bar alike.

Difficult though these problems may be for the international lawyer they remain within the scope of traditional practitioner skills, although enhanced now by the demands of a more sophisticated research and definition process. But what of the great issues of our time that involve the very existence of the international order itself? What has the legal profession to say about the gross challenges to human well-being and survival that are raised by transboundary environmental damage, by brutal expulsions of vulnerable populations, by gross violations of human rights on a massive scale and by new theories of resource sharing which may or may not commend themselves to the principal owners of scarce resources?

The legal profession in Canada and the United States, remembering the pioneer doctrines of the *Trail Smelter Case*, are making determined efforts in the area of transboundary environmental issues as well as progressing towards more general Canada-U.S. dispute settlement mechanisms. The 1980 Report of a joint Canadian-American Bar Association Committee has made constructive proposals for a kind of common legal jurisdiction to deal with injuries in either country resulting from transboundary pollution. The litigants would have rights of access to the Courts of either country and with common principles applicable to both legal systems, as in the Nordic Treaty on the subject. At the same time Canadian lawyers and scholars are addressing themselves to some of the other grave international questions mentioned above as well.

Yet international lawyers generally are silent still on the one issue that must trouble every rational human being, namely, the lethal and irreversible character of nuclear weapons. It is not always easy to be both *pro patria* and *pro lege*, particularly when in the real world, the response of one side to its lawyers, and its public, may be different and less sensitive than in the other as Mr. Justice Dickson wisely observed yesterday. I make no judgment here on the technical merits of the present nuclear debate. It would be improper to me to do so even if I were well enough informed. I simply say that lawyers everywhere, whether they are practitioners of international law or not, must consider the question as to the legality of any form of human activity that may be potentially destructive of human survival itself. In short, if in 1925 states found it possible to agree upon a Convention prohibiting the use of Poison Gas and of Bacteriological Methods of Warfare, is there any reason why a similar prohibition about nuclear weapons should not be emerging as a general principle of law whether codified by treaty or not? To put it bluntly, can the law tolerate so final a threat both to the environment and to man's very survival without commenting upon the "lawfulness" of that situation?

Only the naive would suggest that such an evolving principle would today deter the major or other actors from continuing to manufacture their weapons and dispose, responsibly or otherwise, of poisonous wastes from these military preparations. But only those who are indifferent to the human condition would be deterred by the prospect of disappointment or disavowal from asserting the primacy of a legal norm where the subject matter to be prohibited by law would

render human existence increasingly problematical, should the search for a proscribing rule fail in our time.

International law has been described as the "cutting edge" of global legal systems because so often it touches areas not yet legally well-defined while its naked exposure of the relation of "law" to "power" renders its claims to jural effectiveness — compliance — debatable. Nevertheless there is much to be learned, practically and philosophically, from international law as a system because it reveals not only the actual or potential weaknesses of any legal system, but the nature of systemic development in the law everywhere. Here for certain *de minimis curat lex*.

Perhaps never before have Canadian lawyers had such an opportunity to be witnesses at, and participants in a period and a process of fundamental change. For they will be required to enlarge their perceptions and refine the tools of their profession through the challenge in Canada of universal human rights concepts now married to Canadian constitutional ideas and phrases. Through that mix of International and Municipal-Constitutional experience Canadian lawyers should now enter a generation 'ecumenical' in its significance for all, whether living and working for "bread and butter", or for the grace and obligation of a learned profession bearing local, national and global responsibilities.

