CJO Advisory Committee on Professionalism

London Colloquium (October 20, 2003)
Session delivered by the Hon. Robert K. Rae, Q.C.

Thank you very much Chief Justice McMurtry and Chief Justice Smith and Chief Justice Lennox and Justice Abella and Mr. Marrocco and my fellow panellists.

Ladies and gentlemen, it's a pleasure to be here. Many of you may be wondering why I'm here. Paul Perell is my wife's first cousin. These things have to work out somehow. I was delighted to get Paul's phone call and very much honoured to be part of this first colloquium.

When I returned to the practice of law after a 22-year hiatus in 1996, I did so with some trepidation, which I think continues to give me a lot in common with the articling students at Goodmans. And it's very nice to see Randy Graham again because he plays a role in our law firm of correcting all of our collective mistakes, which reminds me of the story of how the practice of law is changing. I was visiting my colleagues in Montreal when I first joined the firm and everybody was telling me all the things that they did, and I talked to one lawyer and said, "What do you do". And he said, "I actually practise law. I'm a lawyer in the firm." Anyway, I now do practise law and I have been given the subject of society and the rule of law for my talk. Judge Abella, who, you should know, has been a friend of mine for nearly 40 years—which is a terrifying thought because I am much, much younger than she is—was shocked by the fact that I actually had a prepared paper today, but it simply reflects the degree of nervousness which I feel in addressing this very distinguished audience. But for those of you who get the package, you will find to your amazement that what I have to say will not be exactly what is written down on the piece of paper.

Society and the rule of law is a rather daunting subject and I am particularly daunted in the face of not only so many lawyers, but also so many judges. But I wonder if we could talk about three things. I will try to keep it simple. The first is that if we look at

this issue historically, Canadians have long argued about the meaning of the phrase, “the rule of law”, and that it is not as simple as you might think when you first simply look at it.

My second point, and really it is going to be very brief, but it is something about which I feel very strongly, and that is, that reasonable access to the law and legal services is an essential element of the rule of law and is, in fact, seriously jeopardized in Canada at the present time.

And the third is that the commitment to the rule of law, I believe, will become an increasingly important part, not only of our domestic life, but also of Canada’s foreign policies. So, in my conclusion, I am going to be asking you to turn your eyes up to events around the world.

If there is a ground norm in Canadian political and constitutional life, it probably is the phrase “peace, order and good government”. It lies in contrast to life, liberty and the pursuit of happiness that passes from the language of the Declaration of Independence to the heart of the American constitutional experience. When the British Crown issued the Proclamation of 1763 when it negotiated treaties with a number of native groups across the country when it passed the Quebec Act of 1774, recognizing for the first time the distinctiveness of Quebec’s language and civil law and religious education, it was setting out important principles as to how power and rights would intersect in our society. The powers of the sovereign were limited and defined and I think this is one of the key elements of the phrase “the rule of law” in that it clearly implies that all elements of our society are equally subject to it and that no one, and even the legislature and indeed even the judges themselves, are immune from it or above it. Rights of citizens were set out and, in setting out rights of citizens, this is not a process that began with the *Charter of Rights and Freedoms*. It goes back much further in our collective life in that another feature of the rule of law in Canada is that group rights have consistently been seen as equally important or as important as those applying to individuals.

Arguments about the meaning of the rule of law have dominated our political and social debate in Canada. After 1837, for example, the victors—so called—had difficulty

accepting the notion that people who took part in the rebellion should somehow be compensated for their loss of property. Indeed, the victors felt so strongly about it that they rioted in Montreal, burned down the legislative buildings and threw stones at the Governor General. And that's not something that started with the National Post—it's been going on for some time.

Wilfred Laurier felt so strongly about the injustice of the Conservative government's treatment of the Métis in Western Canada that in a famous speech, that really made his career as leader of the opposition and as a future prime minister, said in the famous phrase that had he been born on the banks of the Saskatchewan, he would have taken up arms himself.

Debates about schools, about education, about language, about religion, about conscription, are all precursors to more recent divisions about patriation and the *Charter of Rights*. So, we may be a peaceful kingdom but this does not mean that we are actually without strong debate and even division.

As a Member of Parliament, I well remember how difficult the debate on patriation and the Charter was, and I suspect that the Chief Justice remembers those days very well as well, because he was the Attorney General at the time. And I think we could all recall—I mean, I can remember—a member of parliament grabbing the mace when closure was brought down on the debate. At one point, several Members of Parliament went over to the other side and suggested that perhaps members of the government would like to step outside and the issue could be settled once and for all. This would support, say, an evening debate which has now been discouraged in the House of Commons, reasons for which I think you would all understand.

But in fact, as emotional and difficult as these debates were—and certainly the debate around the Charter was a fascinating debate for those of us who care about these things and who, I hope, recognized that the debate was really about—it really was about what is the law, what should the law be and how should the law be determined. What should the relationship be between the legislature and the judiciary and where does the citizen fit into this context?

For some, including the leader of the government in Saskatchewan, the leader of the government in Manitoba, who both, from very different perspectives—one from the social democratic left, one from the relatively neo-Conservative right—the question was the sovereignty of parliament, the ability of legislatures to carry on their work without constantly having their work being overturned and affected by the views of conservative judges or, in the case of Mr. Lyon in Manitoba, it was an issue about the ability of legislatures to do their job and that the notion of a Charter was quite foreign from his perspective of the British common law constitutional tradition. And so, the rule of law was what the legislatures and parliament said it was.

For others, it was a much more complex mix of natural rights, the common law and statutes, with the courts playing a critical role as interpreters of the inevitable conflicts that arise between these different sources of the law.

Many of us in the room were very actively engaged in that debate, and for those students in the audience, you should really go back and have a look at how the Charter emerged because, like everything else, the Charter didn't just emerge out of whole cloth. It emerged very much from a very lively, very dynamic, significant debate about the nature of the rule of law in Canada and the nature of our constitutional life.

Canadian courts and the privy council in London, when it was the final Court of Appeal, have, of course, long been the subject of criticism ever since they began weighing in on the critical issues of the balance and the foundation. I think of Frank Scott's frequent forays into quite tough attacks on the Privy Council. Frank Scott eventually became Dean of the law school at McGill and he is often seen as one of the intellectual fathers of the Charter of Rights. But he took the view very strongly that in our constitutional life that this group of British imperialists really did not understand the nature of a Canadian constitution at all and they were substituting their own views for the realities of Canadian public life and they were preventing the parliament of Canada intervening in the economy and the way in which a progressive parliament ought to be able to intervene.

I think there are many of us now who look back on the decisions of the Privy Council and we see an effort to really try to keep the balance in the federation and the determination that the provinces were not simply the creatures of the federal government but, in fact, had their own vitality as sovereign bodies. So, the notion that the decision of judges should be the subject of public comment and public criticism—it should be part of a general political debate in the country—is not new.

With the passage of the Charter, the balance is not simply between the federal government and the provincial government. The balance is now between everybody. It is between citizens and government—it is between governments themselves—it is between groups of citizens and other citizens. And the courts are being put in the position of having to make these decisions and reach conclusions which attempt to find the balance.

And the importance of the rule of law has, of course, been very intense. I actually was hired as a mediator a couple of years ago because a civil dispute had broken out about the meaning of the Supreme Court decision in Burnt Church[1], and it definitely wasn't about the meaning of the Supreme Court decision. It was about the difference in the possible meaning of the original decision of the Supreme Court in the case involving fishing rights in Atlantic Canada and the clarification of that decision, which was not a clarification according to the Supreme Court.

The Chief Justice is not here yet, so no doubt she will hear about my comments on this, but all I can say is that it was quite fascinating, as the mediator, to be present at a discussion when groups were angrily—literally, there is no exaggeration—angrily holding up different documents and different versions of the Supreme Court decision as a justification for the position that they were taking. Both groups were adamant that they were upholding the rule of law and, of course, we came very close to a serious civil disturbance and even to a loss of life because of the nature of this discussion.

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[1] R. v. Marshall, [1999] 3 S.C.R. 456; [1999] 3 S.C.R. 533.

Well, what does the phrase imply? Well, several judges here and others will, no doubt, spend a lot of time on this and will as well in the future. But I think it is important for us to recognize that the phrase implies both a substance and a process. It has a substantive meaning in the sense that obviously you have laws which are duly passed by legislatures as well as constitutions which have, if you like, a supra-political effect and impact.

But it also goes deeper than that. And I think that if you look at court decisions as varied as the *Roncarelli* case[2], the *Padlock* case[3], the *Reference of Secession*,[4] the *Manitoba Language Reference*,[5] and the *Provincial Judges' Reference*,[6] the relatively recent decision of the Court of Appeal of Ontario with respect to the proposed closure of Montfort Hospital[7] in Ottawa, I think in each of these cases you can see how the courts have felt themselves obliged to make a very simple and direct point that the rule of law implies adherence to a set of values which are in fact quite complex and require a real sense of balance and cannot simply be put down on a sheet of paper as having a black and white conclusion.

Roncarelli—everyone knows the case—it's the story of a restaurant owner who was a Jehovah's Witness, who had a dispute with the provincial government about his liquor licence and in which he was basically told that he couldn't have a liquor licence because he was a Jehovah's Witness and the case went all the way to the Supreme Court of Canada. The conclusion of the Supreme Court was "Wait a minute, whether or not you're a Jehovah's Witness has nothing to do with whether or not you should have a liquor licence. And you're entitled to a requirement of fairness and of a requirement of appropriateness that is located directly in our sense of what is just and what, in fact, is "the rule of law". So, the argument of the government of Quebec is, "Well, no, actually,

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7 Lalonde v. Ontario, [2002]O.J. No. 388.

the rule of law is what we say it is and the argument of the Premier of Quebec is the rule of law is what I say it is and how I apply the administrative laws of Quebec". These arguments were effectively overturned by the Supreme Court of Canada.

In the *Reference of Secession*—which is a constitutional document which Canadians should know is now referred to in public discussions in federations and federating countries all over the world as perhaps the *locus classicus* of the discussion about how a federation worked and how majority and minority rights are to be worked out together—the court looked at a number of issues, including coming up with the notion that if there was a vote by a majority in the province that voted to secede on a clear question with a clear majority, there was a duty to negotiate on the part of federal government with respect to the meaning of that vote.

Where did that duty to negotiate come from? It's not written down anywhere. You won't find it in the British North America Act. You won't find it in any Canadian constitutional document. You won't find it written down anywhere. Where did it come from?

It came from the court's determination that the notion of the rule of law itself imply a level of stability and imply a willingness to "work things out" if you like. The critics of the judgment would say they invented it from whole cloth. I am not a critic to the judgment. I would say that it was a simple application of fundamental principles of fairness and stability as they relate to a political issue of great import in the country.

Look at the remarkable decision of the Supreme Court of Canada in the question of patriation where, interestingly enough, the court adopted the argument of the government of Saskatchewan that yes, legally, the federal government could simply go on the basis of its position and seek to patriate the Constitution with the Charter of Rights. Legally, they could do that. Constitutionally, however, they said they couldn't do it because the nature of the country is based on a level of stability and tradition and norms which go beyond what may or may not be written down.

In the *Provincial Judges' Reference*, you have the same notion. You have this court wrestling with the question of "What does judicial independence mean?" How can we have the rule of law without judicial independence, and if we have judicial independence, it must have some meaning. Of course, provincial treasurers and federal ministers of finance look to these judgments that someone has stretched, saying, "Well, can the judges write their own paycheques?" Well, how far does this go? The answer is, "We'll find a balance." We'll find a Canadian balance, but it will be a balance that will reflect this.

In the *Montfort Hospital* case, again, provincial governments saying we have a financial problem, we have to deal with it, we have a right to reorganize our hospitals. Bingo—we are going to close this hospital. The question then becomes, well, in fact, can you close the hospital when the whole tradition of the country and the whole tradition of the province has to do with recognizing the importance of minority language rights. Is it possible for a government to simply follow—is this provincial health legislation—or is the impact of this legislation so serious with respect to the rights of the subject and with respect to the rights of citizens that, in fact, it's appropriate for the court not to invoke some broader constitutional principle reflecting the value of the rule of law?

We are about to find out, I believe, in the next year or so, how far this principle of judicial review extends with respect to the tobacco legislation that is now being litigated in British Columbia and Newfoundland because, in both those cases, the governments have brought forward legislation that is retroactive in impact, that deals significantly with respect to the existing property rights of Canadian companies and that, in effect, creates a new duty, one could argue, and that, I think, will be a fascinating argument. So far, the trial division has sent the legislation back. The government has rewritten it. Trial division is coming forward again. The question, of course, will be "Well, to what extent is retroactivity simply not something that can be tolerated or accepted to this extent?" To what extent can existing property rights be affected by a legislature? To what extent does the health and safety of citizens give to the legislature a responsibility that extends beyond what have up to now been very important substantive principles?

Whatever the decisions may be—and I suspect that many of the judges here will be involved in some of these decisions—one can only say that these are very significant questions with respect to the balance to be struck between the rights of the legislature to make decisions as it determines best and the rights of citizens and of everyone to make sure that the legislatures are not above and beyond the rule of law, and that is really what the principle of judicial review is all about.

I don't have to tell this audience, and certainly not in the presence of the Chief Justice, how controversial the exercise of judicial review can sometimes be, but I do want to say something that the Chief Justice can't say and that is that Mr. Harper's recent comments about judges and the liberal government have taken the debate to a different, albeit much lower, level.

For those of you who don't follow the news because you are working so hard, either on your cases or on your studies, he, on television—on the television that I saw because I spend a lot of time watching TV these days—said that there's a kind of conspiracy between the liberal government's political agenda and the partisan affiliations of the Appellate Court judges. Since judges can't really respond, others should point out how unfair and unfounded these remarks really were.

Whenever I hear an allegation of a conspiracy of this kind, I could only say this—I know of no government that is capable of that much forethought. Whenever I'm asked—when friends of mine allege some vast conspiracy or some very thoughtful kind of game plan on the part of the government as to how something could have happened—I always respond that if you ever have to choose in explaining why something has gone so terribly wrong between a conspiracy or a screw-up, always use the screw-up explanation.

Judges in this case were appointed by both conservative and liberal governments. There is no evidence of deep-seated partisanship in these or other judicial appointments in this country. I think it's a hallmark of the way things have worked out and the judges reach their conclusions based on their understandings of the Charter.

A few months ago, when we discussed the rule of law, a number of provincial governments announced that they disagreed with the federal government's gun control policies so strongly that they intended to abstain from enforcing it in their jurisdictions. I happen to think that's a very dangerous trend with respect to provincial government society, on a systemic basis, which cases they're going to take and which cases they're not.

Now, the subject of prosecutorial discretion is one that would keep us here for hours at a time. Why crown attorneys and others decide in some cases to go ahead with a prosecution and in other cases don't is a very complex matter, but if we came to the conclusion that the reason some cases were not being tried and prosecuted was simply because of the political proclivities of the government in question, I think we have a serious problem.

There are, of course, many examples of individual citizens challenging the application of laws that they feel are unjust, and yet civil disobedience in its classic form does not in fact challenge the rule of law. In fact, you could argue that it upholds it because conscientious objectors accept that disobedience will have consequences that individuals will not be harmed and that in fact the authority of the civil power is maintained.

And again, where that isn't the case, where you have a flagrant and a systemic desire not only to simply break the law in order to make a point, but to break the law in order to further your own individual views as to what in fact should be the case, we think it is quite appropriate for the civil authority to invoke the rule of law and to take the appropriate action.

My point here, overall, is that the phrase, "the rule of law", does have meaning, but that its meaning itself is going to be subject to a considerable amount of debate and discussion. It is much more fragile and complex than it might first seem and yet that does not make its defence any less important.

What is encouraging about our society and encouraging about the kind of civil stability that we have been able to create in Canada is that the debate is about the rule of law and how that should be defined. It's not about whether or not the rule of law is important. Now this might seem kind of obvious to everybody, but all I would ask you to do is travel around the world and you will frequently encounter situations where the rule of law is not seen to be of very important value, and where, in fact, it's not seen as something which is worth debating very much about. And that while governments might try to cloak what they do as part of having some degree of legality, it's alarming when legality itself is not seen as a both substantive and procedural value. Governments that show contempt for laws they don't like are setting bad examples for citizens.

Judges cannot expect to be immune from comment or criticism, but if the tone and tenor of that criticism, such as from the leader of the opposition, extends to a generalized assault on the integrity of the judiciary as an institution, we have a broader problem, and we should call the people who do it. I was a little troubled by the lack of reaction to Mr. Harper's statements because I thought they were completely over the top in terms of what is an acceptable way of describing the issue. The rule of law doesn't mean the rule of judges any more than it means the rule of legislature or the rule of police officers.

The point here is that in a constitutional federal democracy like Canada, power is of necessity diffuse and sovereignty, we should all remember, does not lie in any one of us, but in the Constitution itself, and it's the Constitution that we serve. To suggest that the judiciary's role in interpreting and in reviewing the appropriateness of the acts of legislatures is somehow illegitimate is quite wrong, and as I have tried to show you by talking about the *Roncarelli* case, the notion that judges at Supreme Court had an obligation to review legislative and political activity did not start with the Charter. In fact, it's inherent in the notion of the relationship between the courts and the civil authority.

My second point is that accepting the premise of the rule of law should imply that citizens have reasonable access to legal services. Our problem today is that people and corporations that are rich can buy such services, and the people who are without any

means at all can usually be assured of some access, particularly if they are accused of a serious crime. Yet most people are neither very rich nor very poor nor, fortunately, are they accused of serious crimes and I believe that their ability to receive good services is today in Canada severely compromised. I also believe the governments will have to address this question, and I would predict that if they do not, the courts themselves will have to face up to it to which no doubt some will take exception.

But how can one speak coherently of the rule of law if most people see the law as an alien and expensive force in their lives?

I would make a further point from my observations after nearly eight years now in private practice that one of the central tensions in the modern law firm—and I am a member of a large law firm—is between the fact that law is a business and that law is also a profession and, I would argue, a public service. And I don't think there is a lawyer in the room who doesn't know what I am talking about. The pressures on students, the pressures on lawyers, the fact that we are in a business and that we operate as either small or relatively large business people, and the fact that we also have professional obligations and the fact that law is a public services is a serious tension and is not a tension that, frankly, gets a lot of attention in modern law firms because, of course, it makes all of us very uncomfortable.

Finally, my third point. We have just emerged from the most violent century in human history. The dream of a rule of law that extended beyond the boundaries of the nation state has been with us for centuries, certainly ever since the nation state increasingly insisted on its jurisdiction. The rule of the sword, the bomb, the gulag and the commissar have taken a bloody toll.

The rule of law seems somehow a weak and frail alternative, but Canada has quite rightly allied itself consistently with those who would seek to replace the arbitrary use of force with the exercise of legitimate international authority. That has led us to support the establishment of the International Court of Justice in the Hague, the League of Nations, the General Agreement on Tariffs and Trade, the World Trade Organization,

the Declaration of Human Rights, and most recently, the Landmines Treaty in International Criminal Court.

What's interesting is that Canada—I think Canadians accept as a fundamental premise of our citizenship—that we accept the fact that the nation state is not the be all and end all, that there are international norms and laws to which we should conform and that we expect others to conform.

And, again, saying things in a Canadian law school or in front of a Canadian audience seems a very modest and kind of obvious thing to say, but if you were to drive 200 miles south of here and make the same point about American law and American governments being subject to international norms, standards and laws, you would get yourself into a major political debate. Together with Somalia, the United States has not ratified the Convention of the Child. The United States has not signed the Landmines Treaty. The United States is not a signatory to the International Criminal Court. The United States never joined the League of Nations and the United States has made it very clear that it does not believe that its laws and powers can, in fact, be legitimately subjected to the application of international law in a great may cases.

I am not here singling out one country for *opprobrium*, but I am saying that as we extend this debate and make it more international, it's going to have a very intense consequence. Canadian lawyers have long been at the forefront of these efforts that I have described. John Humphrey, for example, was the main drafter of the Universal Declaration of Human Rights and I am delighted that his efforts and work received the appropriate accolades that it did on the 50th anniversary of the Declaration, and these efforts are rightly seen as a cornerstone of our foreign policy, as well as a standard for our domestic policy, for example, in the way in which the courts have interpreted our own treatment and obligations towards refugees.

Canadian law here stands out. It would be a pity if this ceased to be the case, mind you, but it is something that we should be very proud of in terms of our willingness to accept international standards. This is not, as some critics have contended, simply well-meaning moralism on our part. We could have another discussion about what other

elements of Canadian foreign policy and defence policy need to change. But subjecting the exercise of power to the standards of legitimate authority is a hallmark of the extension of civilization itself.

I would just conclude by saying that one of the interesting parts of my own practice at the moment is in trying to apply the logic of federalism to a number of disputes in other places where countries have finally decided that they better stop killing each other simply because of the costs and consequences of those decisions.

In the last 40 years, the major disputes in the world have not been between countries, but rather within countries. And it's because of the extent and violence of those encounters that I think people are beginning to ask themselves whether there isn't a better way of governing themselves internally that would prevent the exercise of this kind of horror on their populations.

The numbers are really quite extraordinary. Four million people have died in the Sudan in the last 20 years; seventy thousand people in Sri Lanka in the last 30 years. Over two hundred thousand refugees were created in Sri Lanka in the last 15 years, whole populations moving out from one place to another. In large parts of Africa there continue to be enormous movements of population, numbers of people in refugee camps, simply by virtue of the fact that they don't feel safe living in places where majorities have different views.

The picture of Canadians descending from airplanes with their briefcases full of constitutions and discussions about federalism may seen ironic, but the federal conversation has been an extensive part of our own civil discourse for the last 150 years. This conversation is no longer a purely domestic affair, and it is one to which I think many people are starting to look for guidance and discussion.

And I believe that Canada—without being a missionary—Canada has a role to play in this regard as we talked about the meaning of how it is difficult to imagine—in fact, it's impossible to imagine societies functioning with the rule of law.

Thank you very much.

PMP: 719245.1