CHANGING TO A RIGHTS CULTURE

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"Rights" is a subject about which the public has many opinions. There is a story about the eminent New York intellectuals Diana and Lionel Trilling. Someone asked a friend of theirs if they had a view of the river in their apartment near Columbia University. "Of course," came the reply, "the Trillings have a view about everything." As does the public about rights and the way they are delivered by the courts.

And what the justice system delivers to that public when it delivers rights is necessarily so controversial that sometimes to earn the public's trust and confidence, we have to have the courage to be unpopular. The independent and impartial enforcement or rights is a mark of a secure and mature democracy, as are the controversies surrounding them. Rights are works in progress, but there can be no progress without the courts.

I think it is fair to say that prior to the constitutionalization of rights with the Canadian *Charter* in 1982, and based in no small measure on the unspectacular judicial response to the 1960 Canadian Bill of Rights, those who felt that legislatures were better protectors of rights than courts had a solid evidentiary foundation for their views.

Then along came the *Charter* entrenchment and the serendipitous presence on the Supreme Court of Brian Dickson and Bertha Wilson, the Fred & Ginger of the *Charter*, who choreographed some dazzling new routines and consistently brought the house down. In that first decade, when the *Charter* was young and almost universally

adored in English Canada, it seemed that it would deliver on every nation-building promise that had inspired it. It was the noble risk that had paid off.

In the second decade, however, when the *Charter* was in its teens, parts of the nation started to rebel. Almost imperceptibly at first, when the *Charter* became an adolescent, public pride in its grasp seemed to turn into strident fear over its reach. That is when we got the panic attacks about the fate of democracy. What had always been seen as a complementary relationship between the legislature and the judiciary, was recast as a competitive one. Nonetheless, the courts plowed ahead, endorsing affirmative action, protecting sexual orientation, promoting pay equity, decrying domestic violence and sexual assault, and generally riding the rights current with confidence, notwithstanding public criticism.

But the irony of where we in Canada find ourselves today is that we spent the last decade listening to a chorus moaning, through the media, over the fate of a majority whose legislatively endorsed wishes could theoretically be superceded by those of judges, only to learn recently in poll after poll that an overwhelming majority of that majority is happy, proud and grateful to live in a country that puts its views in perspective rather than in cruise control; who prefers to see judicial rights protection as a reflection of judicial integrity or independence rather than of judicial trespass or activism; and who understands that the plea for judicial deference may be nothing more than a prescription for judicial rigor mortis.

How did the judges come out of the backlash? By spending a lot of time trying to figure out what their proper role was in a newly assertive rights culture. And this is what I propose to discuss in the first part of my talk.

In the second part, I want to talk about what I see as part of what had held us back in Canada in properly understanding the enforcement of rights, and that was our unwillingness to appreciate that there are two distinct sets of rights philosophies – human rights and civil liberties, concepts we tended to use interchangeably. But unless human rights is untethered from civil liberties, there can be no progress for women or minorities.

First, the judicial enforcement of rights. The *Charter* has had a profound effect on the judiciary or, more particularly, on how the judiciary's role is perceived. As those who are disadvantaged came more and more to rely on an independent judiciary for the enforcement of their rights, those whose traditions or entitlements are at risk from these claims flailed rhetorically at the judicial enforcers.

It has, to say the least, been somewhat unsettling to watch this past decade's demonization of the judiciary in Canada, not because judges should not be criticized, but because what was really going on was a political struggle by the 'right' for the hearts and minds of the 'middle', with judicial decisions on human rights being caught in the cross-fire.

Some judicial myths about the role of the courts came out of the closet, were dusted off, and paraded in public even though the styles no longer fit. The primary

magnetic myths to which the public seemed to have become attracted, were those which held that judges should only interpret, not make law; that "biased" means having opinions; that the courts have become politicized; and that the courts should defer to public opinion. Let me offer some judicial realities to counter these public myths.

1. It is, with respect, unrealistic to say that judges should not impose their values or make law, they should only interpret it. Almost every time judges interpret, they make law and, implicitly, weigh competing values. They just never admitted it. Long before we had a *Charter*, we had judges saying they were not making law or trespassing on legislative territory or taking values into account when they interpreted statutes or phrases or legal entitlements. But consider the following examples, and you will see how difficult it is to say that these judges were not reaching legal conclusions based on their understanding of, or sympathy or antipathy for, current social values:

The judge who in 1873 said "the paramount destiny and mission of women are to fulfil the noble and benign office of wife and mother"; the judge who in 1915 thought admitting women to the legal profession would be a "manifest violation of the law of … public decency"; the judge who said in 1905 that fault-based support laws were desirable because wives "ought to be preserved from imminent temptation"; the House of Lords who said in 1959 that privative clauses ousting the jurisdiction of the courts were to be disregarded; the court that said in 1975 that property rights take precedence over peaceful picketing; the courts that said in 1949 that sanctity of the contract and restrictive covenants took precedence over the rights of Jews to purchase

property; and the court that said in 1939 that freedom of commerce took precedence over the rights of Blacks to be served beer; not to mention the entire history of common law.

That was all lawmaking, it was all weighing and applying values and policy, and it was all before we had a *Charter of Rights and Freedoms*. So what the *Charter* did was not create a new judicial role; rather, like Dorothy in the Wizard of Oz, it pulled the curtain aside to dispel the myths and reveal the truth.

2. Weighing values and taking public policy into account does not impair judicial neutrality or impartiality. Pretending we do *not* take them into account, and refusing to confront our personal views and be open in spite of them, may be the bigger risk to impartiality. Walter Lippmann said in his brilliant 1920 book *Public Opinion* that:

> The image most people have of the world is reflected through the prism of their emotions, habits and prejudices. One person can look in a Venetian canal and see rainbows, another only garbage. People see what they are looking for and what their education and experience have trained them to see.

It is fundamental that judges be free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open mind. But neutrality and impartiality do not and cannot mean that the judge has no prior conceptions, opinions or sensibilities about society's values. It means only that those preconceptions ought not to close his or her mind to the evidence and arguments presented. We must be prepared, when the situation warrants, to experience what Herbert Spencer called The Tragedy of the Murder of a Beautiful Theory by a Gang of Brutal Facts.

In other words, there is a critical difference between an open mind and an empty one.

3. Values and social realities change over time. In 1633, Galileo was forced to apologize publicly for spreading news of the evidence revealed by his telescope – that the earth revolved around the sun, not the other way around as the Church had taught for centuries. And, in 1938, the then editor of Saturday Night magazine, said "The business of women is to keep house and keep quiet." Truths change over time, and judges should not be hesitant to acknowledge these changes.

4. The use of labels or epithets instead of analysis is not particularly enlightening. Provocative phrases may all too easily become shorthand ways to avoid thinking. The phrase "political correctness" may, for example, replace the need to think about disadvantage; the phrase "special interest groups" may replace the need to entertain valid grievances; the phrase "reverse discrimination" may replace the need to open the competition and to actually try to reverse discrimination; and the phrase "the merit principle" may replace the need to discuss whether we have it.

One of the labels which is least helpful and the most inappropriately inhibiting, is that the courts, with the *Charter*, were 'politicized," or "activist". The courts were not politicized. They became nothing they have not always been: reviewers and interpreters of the rules to which society, through the legislature, has proclaimed itself subject. The *Charter* was the klieg light that exposed this judicial reality, it was not the instrument of a new judicial norm. The relationship between

courts and legislatures in the interpretation of public values has not fundamentally changed with the *Charter*, only the public's interest has. In the 19th century, for example, the British Prime Minister, Lord Salisbury, felt sufficiently moved to rebuke Lord Halsbury as follows for the House of Lords' routine declawing of social welfare and labour legislation: "The Judicial Salad, he said requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed."

And in the 1930s, President Roosevelt was so incensed by the U.S. Supreme Court's striking down of his New Deal legislation that in 1937, just two weeks after his second inaugural, he introduced his court-packing Judicial Reform Bill, only to withdraw it discreetly six weeks later when Justice Owen Roberts switched sides to help form a pro-New-Deal Majority.

But courts *preventing* rights like those in the era of Lord Halsbury, or in the pre-court-packing plan era of the American Supreme Court, were rarely dismissed as being politicized or activist. If it is appropriate for courts to deal with the interpretation of rights, and it clearly is, one wonders why they are deemed to be "politicized" or "activist" only when they interpret them expansively.

5. The truth is that while both courts and legislatures are entitled to enforce rights, only the courts have the institutional characteristic that best offers the possibility of responsiveness to minority concerns in the face of majoritarion pressures, namely, independence. Only courts have the independence from electoral judgment to risk controversy in enforcing rights.

And here we come to the role of public opinion. Society is horizontal and it is vertical, and it is practically impossible to know at which point a consensus emerges. Until we know who the public is and how it forms opinions, courts deciding cases are entitled scrupulously to regard public opinion as the responsibility of the legislature and generally as immaterial to judicial determination. In Edith Wharton's *The Age of Innocence*, the van der Luydens and Mrs. Manson Mingott were the custodians and interpreters of social norms in old New York. They were the self-appointed and accepted arbiters of what passed for public opinion at the time. Judges have no such omniscient oracles of prevailing social opinions. Nor should they.

Part of the task, in fact, may be to reach a conclusion *despite* the perceived, prevailing public opinions. When we speak of an independent judiciary, we are talking about a judiciary free from precisely this kind of influence. As Lillian Hellman once said: "I will not cut my conscience to fit this year's fashions".

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion, susceptible to wild mood swings, and reliably unreliable. In framing its opinions, the public is not expected to weigh all relevant information, or to be impartial, or to be right. The same cannot be said of judges.

But although judges are not accountable to the public in the same way as are elected officials, this does not mean that they are not accountable. While they may not be accountable to public *opinion*, they are nonetheless accountable to the public *interest* for independent decision-making based on discernable principles rooted in

integrity. Performing the task properly may mean controversy and criticism. But better to court controversy than to court irrelevance, and better to court criticism than to court injustice.

And this brings me to the second part of my lecture, the intellectual issue I consider to be key to the ongoing protection of human rights in Canada and elsewhere: unless we unravel the human rights conversation from the one on civil liberties, we will not be able to keep the images in the social justice and human rights picture in clear focus.

Anyone like me who was born right after World War II has, in her or his lifetime, watched a breathtaking array of legislative and jurisprudential generosity in North America towards those previously excluded. The pressing human rights issue we now confront is how and why a concept like human rights has appeared to move from its early confident primacy in the justice picture, to the current defensive margins of the canvas. Why are we so afraid of opening the competition when we are so firmly committed to its fairness? Why, in short, has pursuing the justice ideal of human rights for minorities, been so frequently characterized politically as an affront to the justice ideals of the majority?

There are, I think, two answers:

(a) We are confused over definition, scope and therefore entitlement when discussing human rights, the result of an historic reliance on civil rather than human rights as the operative analytic framework.

(b) We have increasingly realized that expanding human rights has transformed social relations in a way we could not have anticipated. While the changes are welcomed by those newly admitted to mainstream membership, they are less enthusiastically observed by those fearful of how that new membership will affect their own traditional access and mobility within that mainstream.

Civil liberties is a concept of rights that requires the state *not* to interfere with our liberties; human rights, on the other hand, cannot be realized *without* the state's intervention. Civil liberties is about treating everyone the same; human rights is about acknowledging people's differences so they can be treated as equals. Civil liberties is only about the individual; human rights is about how individuals are treated because they are members of a group.

The fact is that unlike the United States, in Canada we were never concerned only with the rights of individuals. Our historical roots involved as well a constitutional appreciation that two groups, the French and the English, could remain distinct and unassimilated, and yet theoretically of equal worth and entitlement. That is, unlike the United States, whose individualism promoted assimilation, we in Canada have always conceded that the right to integrate, based on differences, has as much legal and political integrity as the right to assimilate. A melting pot if necessary, but not necessarily a melting pot.

But we have to start at the beginning of the story. The human rights story in North America, like many of our legal stories, started in England. The rampant

religious, feudal and monarchical repression in the 17th century England inspired new political philosophies like those of Hobbes, Locke, and eventually John Stuart Mill, philosophies protecting individuals from having their freedoms interfered with by governments. These were the theories of civil liberties which came to dominate the rights discussion for the next 300 years. They were also the theories which journeyed across the Atlantic Ocean and found themselves firmly planted in American soil.

Watered by colonial discontent and the persuasive polemics of pamphleteers like John Adams and Thomas Paine, the roots took permanent hold in the American Revolution and blossomed into the language of the Declaration of Independence. The words confirmed that every man enjoyed the right to life, liberty and the pursuit of happiness and that government existed only to bring about the best conditions for the preservation of those rights. Thus was born the essence of social justice for Americans - - the belief that every American had the same right as every other American to be free from government intervention. To be equal was to have this same right. No differences. It was an atomized and atomizing political philosophy, and it venerated the individual over the community.

The Declaration's rhetoric was elegant and inspiring. It offered to all men the promise of an equal right to be treated with the same respect for his liberty from government, and thereby introduced egalitarian language to an unequal society, since these resoundingly noble rights were available neither to women nor to the slaves many of the Framers of the Declaration of Independence owned. This illusion of equality soon became what a respected British historian designated as "one of America's most vital forces for hope and for disappointment."

Regardless, however, of the historical realities, it is nonetheless the case that the individualism at the core of the political philosophy of rights articulated in the American constitution ascribing equal civil, political, and legal rights to every individual regardless of differences, became America's most significant international export and the exclusive rights barometer for countries in the Western world. Equality meant sameness. It was formal equality, it was Diceyan, it ignored group identities and realities, and indeed regarded collective interests as subversive of true rights. It stood for the proposition that, as Antole France ironically observed, both the rich and the poor have the same right to sleep under bridges.

Concern for the rights of the individual monopolized the remedial endeavours of the pursuers of justice all over the world, and it was not until 1945 that we came to the realization that having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different and at least equally intolerable kind, namely, the rights of individuals in different groups to retain their different identities and have those differences respected and accommodated - without fear of the loss of life, liberty or the pursuit of happiness. This is what we have come to understand true equality and human rights means.

There is no doubt that in our evolutionary relationship with rights theories, the drama of socio-economic disparities during the Depression coaxed western governments into a newly activist and redistributive role, which the public came to see as a necessary and reasonable limit on the historic right to be free from government intervention. But it was the Second World War which jolted us

permanently from our complacent belief that the only way to protect rights was to keep government at a distance and protect each individual individually.

What jolted us was the horrifying spectacle of group destruction, a spectacle so far removed from what we thought were the limits of rights violations in civilized societies, that we found our entire vocabulary and remedial arsenal inadequate. We had to shift focus from the civil libertarian remedies for individual harm to a search for human rights remedies for collective harm. We were left with no moral alternative but to acknowledge that individuals could be denied rights not in spite of, but because of their differences, and started to formulate ways to protect the rights of the group.

We had, in short, come to see the brutal role of discrimination, a word we had never and could never use with a concept like civil rights that permitted no different treatment, and we invented the term "human rights" to confront it. We clothed governments with the authority to devise remedies to prevent arbitrary harm based on race or religion or gender or ethnicity, and we respected government's new right to treat us differently to redress abuses our differences attracted. We saw how the neutral purpose of civil libertarian individual rights had unequal impact on the opportunities of many individuals, and eventually we saw that all the goodwill in the world could not protect us from our own prejudices and stereotypes, or from restrictively designing systems and institutions accordingly. So we blasted away at the conceptual wall that had kept us from understanding the inhibiting role group differences played, and extended the prospect of full socio-economic participation to women, non-whites, aboriginal people, persons with disabilities, the elderly, and those with different sexual preferences. And, most significantly, we offered this full

participation and accommodation based on, and notwithstanding, group differences. And this brought us squarely into the headwinds of public controversy, and into public opinion declaring that all rights are created equal.

The truth is, not all rights are created equal. Some are more equal than others. Treating everyone the same may be the essence of civil libertarian rights, but it can result in obliterating human rights for those who are different. We should not be embarrassed to admit that yelling "fire" in a crowded theatre is fundamentally different from yelling "theatre" in a crowded fire hall; or that teaching holocaust denial is different from teaching about the holocaust; or that promoting racist ideas is different from promoting race. Intellectual pluralism does not and cannot mean the right to expect that racism or sexism will be given the same deference as tolerance. Adding layers of tolerance is good for everyone, not just women and minorities. But preventing tolerance is bad for everyone, especially women and minorities.

The reality is that there are still built-in headwinds for those who are different, who are thwarted in their conscious choices by stereotypes unconsciously assigned, and who cannot be expected to understand why the evolutionary knowledge we came to call human rights appears to have stopped at their door. We cannot forget the courage our outrage after the Second World War gave us to expand our understanding into a recognition that indifference is injustice's incubator.

Let me close with a story that shows the indispensable link between our understanding and justice more poetically and poignantly than anything I have read in a long time.

This story is taken from a book called *Fragments*. It was written several years ago by Binjamin Wilkomorski, a man then in his mid-fifties, living in Switzerland. The book is now mired in controversy over its authenticity, but the language and imagery remain compelling. The title of the book comes from the fragments of memories the author said he recovered in recent years, memories relating to the years he spent, from the age of 4 or 5, in Polish concentration camps. After the war, when the young boy was 10 or 11, he was placed in a foster home in Switzerland. The horror and brutality of the only life the child had really known left him totally unprepared for the civility of his new surroundings. School in particular was utterly bewildering. And hence this story about the day he was totally humiliated by his teacher in front of a giggling classroom when he was asked to identify a coloured poster of the Swiss hero, William Tell, of whom, of course, he had never heard:

> "What do you see here?" [the teacher] asks.
>
> "Tell! William Tell! The arrow!" they're calling from all the benches.
>
> "So -- what do you see? Describe the picture", says the teacher, who's still turned toward me.
>
> I stare in horror at the picture, at this man called Tell, who's obviously a hero, and he's holding a strange weapon and aiming it, and he's aiming it at a child, and the child's just standing there, not knowing what's coming.
>
> I turn away, .. Why is she showing me this terrible picture? Here in this country, where everyone keeps saying I'm to forget, and that it never happened, I only dreamed it. But they know all about it!
>
> "You're supposed to be looking at the picture -- what do you see?" she asks impatiently, and I make myself look at the picture again.

"I see -- I see an SS man," I say hesitantly, "and he's shooting at children," I add quickly.

A gale of laughter in the classroom.

"Quiet," barks the teacher, then turns back to me.

"I'm sorry -- what did you say?" and I can see that she's getting angry.
"The hero's shooting the children, but ..."

"But what?" the teacher says fiercely. - "What do you mean?" Her face is turning red.

But ... but it's not normal," I say, trying not to cry.

"Who or what isn't normal here?" Now she's beside herself, and shouting. I force down the lump in my throat and try to concentrate. But I can't interpret what's going on. What's this about?

...

"It's not normal, bec -- because .. " I'm stuttering again.

"Because why?" she says loudly.

"Because our block warden said, 'Bullets are too good for children,' and bec - bec - because only grown-ups get shot .. or they go into the gas. The children get thrown into the fire, or killed by hand -- mostly, that is."

... She screeches, losing her composure.

. . . .

"Sit down and stop talking drivel." ...

I look over at the teacher, standing there shaking with anger, standing there in front of the big blackboard, her hands still on her hips. My eyes begin to smart, and the big blackboard turns watery, gets bigger and bigger until it surrounds the whole classroom and turns into a black sky.

This is a story about a child who interprets the world based on what he knows, and a teacher who judges his answers based on what she does not know.

We are each limited by what we do not know and we are each limited by what others do not know. With knowledge comes understanding, with understanding comes wisdom, and with wisdom comes the capacity to deliver justice fairly.

And to deliver justice fairly, we must never forget how the world looks to those who are vulnerable. This, in the end, is what the public has entrusted the justice system to give them, and this, in the end, is what the public is entitled to get.