KEYNOTE SPEECH

Judicial Authority, Institutional Capacity, Legitimacy

Remarks of the Honourable Justice Malcolm Rowe*

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I. Five Challenges to the Proper Role of the Courts

My purpose is not to address decision-making in any given area of law. Rather, it is to consider the implications if Canada's courts take on an ever-increasing role in policy making. We need to reflect thoughtfully now so that we do not wake up years hence and ask, "How did we get here?"

II. The *Charter* and the Courts

The traditional "bumper sticker" version of the role of courts is that the legislature makes laws, the executive gives effect to those laws and courts adjudicate disputes regarding the application of those laws. Things were always more complicated than that, but it will do as a starting point.

The *Constitution Act, 1982* changed the role of courts vis-à-vis the legislature and the executive in two main respects. First, the *Charter* empowered courts to invalidate laws and governmental actions that infringed *Charter* rights. Second, s. 35(1) constitutionally protected Aboriginal and treaty rights, setting the stage for their more complete recognition by the courts. I will focus on the *Charter*. Section 35(1) is a topic for another day; it engages different principles.

Let me underline the paradigm shift between judging as adjudication versus judging as statecraft. When judges decide a dispute between parties as to the application of legal rights, judges act as adjudicators. But, when judges decide governmental type issues, they engage in statecraft. The business of conducting affairs of state differs fundamentally from the determination of a particular dispute by means of hearing evidence, finding facts, and applying settled law. Yet lawyers, jurists, and scholars tend to see adjudication

and judicial statecraft as similar, whereas they constitute two profoundly dis-similar functions.

While the *Charter* significantly expanded the courts' role, decisions from the formative period of *Charter* jurisprudence established significant limitations on this role. These limitations have endured for several decades, creating a degree of stability. But, increasingly, foundational jurisprudence is being challenged. This has profound implications. I will deal with five ways in which the foundational jurisprudence is being challenged and the possible effects.

A. "Positive" vs "Negative" Rights

The foundational jurisprudence treated *Charter* rights as largely "negative" in that they prohibit the state from interfering with individual liberties, e.g., freedom of religion or to be free from arrest without lawful authority. Two exceptions are the right to vote (s. 3) and official language education (s. 23), where state action is needed to give effect to the rights. This differs from countries where the constitutions set out "positive" rights, e.g., to public health care.

That said, giving effect to "negative" rights can lead to extensions of state activity. For example, courts have ordered that: sexual orientation be added as a protected ground in human rights legislation;[1] sign language interpreters be provided under public health insurance;[2] and employees can bargain collectively.[3] Nonetheless, the rights remain seen as "negative," which is fundamental as to their scope and to the separation of powers with the legislature and executive.

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1 *Vriend v Alberta*, 1998 CanLII 816, [1998] 1 SCR 493.

2 *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327, [1997] 3 SCR 624.

3 *Ontario (Attorney General) v Fraser*, 2011 SCC 20.

B. Unwritten Constitutional Principles

A second limitation relates to unwritten constitutional principles. Where it is unclear which institution of the state has authority to deal with a given issue, the courts have had recourse to underlying constitutional principles, as in the *Secession Reference*[4] where the Supreme Court relied on such principles to determine the circumstances in which a province could secede. In the *PEI Judges Reference*[5] the Court used underlying principles to interpret s. 96 of the *Constitution Act, 1867* to structure the legislature's authority to set judges' salaries. And, in the *Manitoba Language Rights Reference*[6] the Court relied on such principles to order that invalid provincial laws, temporarily, continue to be given effect (a suspended declaration of invalidity).

In each instance, underlying principles were used to define relationships among the institutions of the state, either to answer a question for which the text of the constitution provides no answer (as in the *Secession Reference*) or to interpret the text of the constitution (as in the *PEI Judges Reference*). In no instance have such principles been seen as a source of additional rights.[7]

C. *Charter* Rights are Distinct

A third limitation is that each *Charter* provision has been interpreted as creating a distinct right. This has several implications, including

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4 *Reference re Secession of Quebec*, 1998 CanLII 793, [1998] 2 SCR 217.

5 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, 1997 CanLII 317, [1997] 3 SCR 3.

6 *Reference Re Manitoba Language Rights*, 1997 CanLII 317, [1985] 1 SCR 721.

7 See in particular *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

methodological. There is an analytical framework for freedom of religion under s. 2(a), another for the right to vote under s. 3, and another for equality under s. 15(1). Each *Charter* claim must be brought under a specific provision, rather than some combination of rights as occurs in American jurisprudence.[8] When more than one *Charter* right is in issue, the Court analyzes each right individually, rather than fusing two or more rights into a hybrid right with a new scope and a new analytical framework.

Not only have *Charter* rights been interpreted as distinct, but in most instances they do not overlap. For example, freedom of religion has not been recognized as a principle of fundamental justice under s. 7; all freedom of religion claims have been analyzed under s. 2(a).[9] An exception is that rights relating to the administration of criminal justice (s. 7 to s. 14) do overlap. For example, s. 7 protects a "principle against self-incrimination" that overlaps with, but is broader than, the right to silence under s. 11(d).[10]

D. International & Comparative Law

A fourth limitation relates to international law and comparative law. To recall, international law is the law between countries, while comparative law relates to law in other countries. Counsel tend to conflate the two, referring to both as international law. For example, from the perspective of Canada, decisions of the European Court of Human Rights ("ECHR") are comparative law but have been referred

8 See e.g., the American right to privacy: *Griswold v Connecticut*, 14 L Ed 2d 510, 381 US 479 (1965).

9 This issue was discussed to some extent by Rt Hon A. Lamer, concurring, in *B. (R.) v Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115, [1995] 1 SCR 315 at pp 345-347.

10 See e.g., N. R. Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013) 63:1 *Supreme Court Law Review* at pp 343-361.

to as if they were international law. Another example is the Inter-American Court of Human Rights ("IACHR") that adjudicates matters under the American Convention on Human Rights. As Canada is not a party to either the European Convention on Human Rights or the American Convention on Human Rights, the decisions of the ECHR and the IACHR, to the extent they are relevant at all to Canada, are so as comparative law, not international law.

As well, one needs to bear in mind three key points. First, when the federal Cabinet ratifies a treaty, that creates an obligation vis-à-vis other states that have also ratified the treaty, but it does not change Canadian domestic law. The division of powers between the federal and provincial governments is not affected by treaties. This has been settled law for almost a century.[11] Second, customary international law arises not from treaties, but from the conduct of sovereign states. Customary international law, to the extent that it is relevant to domestic law (which ordinarily it is not) becomes operative in Canada as part of the common law. As such, it is subject to statute law. Finally, while international law has a role in *Charter* interpretation, that role is circumscribed. For example, international law that developed after the adoption of the *Charter* has limited impact on its interpretation. [12]

E. Remedies & Judicial Discretion

A fifth limitation relates to remedies for infringement of the *Charter*. Section 52(1) is a source of authority for courts to declare laws to be invalid to the extent they are inconsistent with the constitution. I do not wish to focus on remedies under s. 52(1), important as they are.

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11 See e.g., Labour Conventions case, *Canada (AG) v Ontario (AG)*, [1937] 1 DLR 673, [1937] UKPC 6.

12 See e.g., *AG Que v 9147-0732 Québec Inc*, 2020 SCC 32.

Rather, my focus is s. 24(1), which confers authority to grant "such remedy as the court considers appropriate and just in the circumstances." This broad remedial authority has been circumscribed in practice. While courts have made orders, issued declarations, and awarded damages, they have not exercised on-going supervisory control over other institutions of the state. As well, the remedies that have been granted are structured by rules and criteria in ways that parallel the granting of remedies in other (non-constitutional) areas of the law.

I would contrast this with governmental authority, which is not structured by such rules and criteria. One can say that a government policy is wise or ill-advised. But, given the absence of rules and criteria, one cannot properly say that government was correct or that it acted in error. Those terms simply don't work for decision-making by governments. They do work for courts, to the extent there is a meaningful framework for the exercise of discretion in *Charter* remedies. Were such a framework absent, courts would exercise wider discretion, more like governments.

III. Reconceiving the Constitution

Increasingly, there are demands, notably by academics, for profound changes to constitutional law. The goal is the transformation of society. Liberal democracy provides means to advance change through free expression and electoral mandates. But, where democratic institutions do not yield results that some desire, increasingly they seek to achieve their goals through the courts.

In the absence of an appetite for constitutional amendment, such change is sought by giving quite different meaning to existing constitutional provisions. This goes beyond "living tree" interpretation. Rather, it is a re-conception of the constitution, one

that replaces rights conceived of in a traditional liberal way with rights conceived of as a means to societal transformation.

A far greater role for courts in governmental type decisions would involve some combination of five major components, each the flip side of the limitations that I have just described: first, to redefine rights as positive and to include social and economic policy; second, to add to the constitution through unwritten principles with substantive policy content; third, to combine rights so as to create new hybrid rights; fourth, to require that domestic law conform with international and comparative law; and, fifth, to exercise wider discretion in remedies. Each of these would be a major change; combined, the changes would transform the role of courts in society.

A. Positive Social and Economic Rights

First, a redefinition or re-conception of rights is being advanced, whereby what have been seen as negative rights, i.e., the protection of liberties from encroachment by government, into positive rights that call on government to act. Looking to s. 15 and s. 7, courts are being called on to direct government to create a given state of affairs in society.[13] This would involve courts taking decisions that until now have been taken by the legislature or the executive, both as to the content of laws and also the allocation of public resources. This would be a profound change.

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13 For instance, the Climate Justice factum, file no 38663 at para 16, suggests that s. 7 imposes "a positive obligation on governments to act in mitigating climate change. The source of this obligation, as discussed below, arises from international norms, international treaties to which Canada is a signatory, and the jurisprudential requirement that Canadians be protected by the *Charter* in accordance with treaties to which Canada is a signatory."

B. Unwritten Constitutional Principles with Substantive Policy Content

Second, there is increasing advocacy for the recognition of new unwritten constitutional principles. These new principles urged on the courts deal with substantive policy, for example protection of the environment.[14] This is fundamentally different from the unwritten principles that make up parts of our constitutional arrangements that deal with how the institutions of the state relate to one another. An example of this is the constitutional convention that the Cabinet must resign or call an election if it is defeated in the legislature on a matter of confidence.

Unwritten principles recognized to date relate to who gets to decide what. By contrast, unwritten principles now urged on the courts relate to what gets decided. It is as if the *Charter* contained an additional part establishing a positive right to housing, education, health care and the like, along with authority for courts to enforce this. To the extent that such new unwritten principles with substantive policy content are recognized, this would empower, indeed require, courts to exercise governmental functions by giving direction to the legislature and the executive.

The common law is, of course, judge-made law; but it is subject to legislation. By contrast, new unwritten constitutional principles with

14 For instance, Ecojustice factum, Transmountain Pipeline case, file no 38682 at para 18, makes this argument, citing Rt Hon B. McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4 *New Zealand Journal of Public & International Law* at p 149; L.M. Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* at p 539.

substantive policy content would be superior to legislation. The effect of this would be that more and more governmental-type decisions would be taken by courts. And, as the recognition of such new unwritten constitutional principles would be decided by courts, it would be open to judges to augment their authority at will. Would the appetite for such authority grow ever greater by its feeding?

C. "Compound" Rights

Third, it has been suggested that *Charter* rights have the potential to be augmented in combination, either with other *Charter* rights or with unwritten constitutional principles. I call these "compound" rights, as in combination they would be more than the sum of their parts. For example, it has been suggested that substantive equality be recognized as a principle of fundamental justice under s. 7, overlapping with and extending beyond the reach of s. 15, so that Canadians have "positive rights to fundamental services such as social welfare, health care, and housing." [15] Compound rights conceived in this way would engage the courts in deciding major components of public policy and, ultimately, major questions of public finance.

D. International & Comparative Law

There are on-going efforts to "constitutionalize" international law. This involves sweeping aside constraints that I have already

15 S. Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the *Charter*" (2020) *Appeal* at p 58. See similarly K.A. Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42:3 *Ottawa Law Review* at p 411; D. Wiseman, "The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?" (2015) 71 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*.

mentioned. It also involves the conflation of international law and comparative law, to which I have referred. And, there is the failure to distinguish conventional international law … established by treaties and relevant to Canada only if we have ratified the treaty in question … from customary international law, which arises from established practices in the conduct of states in their dealings with one another.

It is suggested that we depart from these limitations in several fundamental ways. First, that ratification by the federal Cabinet of a treaty should bind Parliament and provincial legislatures to implement it. Second, ratification by the federal Cabinet should empower Parliament to act even in areas of exclusive provincial jurisdiction. Third, customary international law, to the extent that it is relevant to Canadian domestic law, would be given constitutional status. Finally, Supreme Court jurisprudence as to the limited use that international law can have as an interpretive tool vis-à-vis the constitution would be reversed, such that the meaning of Canada's constitution would change with changes in international law, loosely defined. This goes beyond the constitution as a "living tree, capable of growth and development within its natural limits."

E. Expanded Discretion

Courts are not only urged to take more governmental-type decisions; they are also urged to exercising greater discretion in doing so. This engages several doctrinal and methodological questions. One relates to the scope of *Charter* rights; the broader the scope, the greater the range of state action (or failure to act) that would constitute an infringement. Where there is an infringement, a justification analysis under s. 1 follows. The critical point in such analyses is often the balancing of "deleterious and salutary effects." In this, courts most clearly make policy decisions. Where an infringement is found in the administrative law context, the "balancing" involves "values," a

concept providing even greater scope for ad hoc decision-making by courts.

When what is being considered is "balancing" and "values," it becomes difficult to say in any meaningful way that a court decision was correct or in error, except in a conclusory way. By reference to what is it said to be so? In effect, appellate review comes close to saying no more than the discretion was exercised in a manner that appellate judges approve or disapprove of, depending on one's preferences. That is where we have always been with governments. And, increasingly, that's where we will be with judges, if courts accord themselves more and more authority to take governmental-type decisions and if this authority becomes less and less constrained in its exercise by coherent doctrinal structure and clear, consistent methodology.

IV. Concerns with an Expanded Role

Several objections can be made to an expanded governmental-type role for the courts. First, the exercise of such authority by an institution that is not elected lacks democratic legitimacy. Second, in a liberal democracy, checks and balances on the exercise of governmental authority are fundamental. Yet, no such checks and balances constrain governmental-type decisions taken by courts. A third concern relates to the lack of institutional capacity on the part of courts to properly take governmental-type decisions. I will begin with this third concern.

A. Institutional Capacity

From serving as an officer of the legislature and later as Secretary to Cabinet in Newfoundland, as well as extensive experience relating to the federal government, I understand how decisions are taken to

decide policy and to allocate finances. Those decisions involve complex inter-locking processes engaging senior decision-makers, advised by numerous experts, and subject to searching oversight, by elected officials, by central agencies (like the Department of Finance), by institutions that assist Parliament (like the Auditor-General), by questioning in the legislature, and by commentary and criticism publicly. Major decisions engage considerable institutional capacity, relying on a broad base of expertise, with varied and probing oversight.

Contrast this with the courts. Few judges have any experience or meaningful understanding of government. Counsel are often similarly lacking. There is a reason for this. Lawyers are trained in the resolution of particular legal disputes. But, increasingly, lawyers are calling on judges to make decisions that are governmental in nature. But none of these actors have anything akin to the institutional capacity possessed by government.

Decisions relating to policy, program design, and finances tend to be grid-like, rather than linear. Varying one factor often gives rise to multiple, difficult to ascertain consequences. Do lawyers and judges understand this? With few exceptions, they do not. Yet their confidence abounds.

When what is being considered is a single legislative provision or a specific component of a government program, there is a reasonable prospect that counsel and judges will grasp the implications of what is at issue. But, to have courts reformulate policies, redesign programs and direct public finance would be to have them do something that they are not equipped to do.

An example from the Supreme Court of India is instructive. Because the level of air pollution in Delhi threatened public health, the Court asserted jurisdiction to regulate air pollutants from vehicles

and industries in the city. The Court ended up regulating many aspects of municipal transport. For example, it ordered all public transit vehicles to convert to compressed natural gas.[16] The court also ended up regulating urban planning and which industries were permitted within the city, leading it to order the relocation of tens of the thousands of residents and many businesses.[17] While a dramatic example, this is not an isolated undertaking for the Indian Supreme Court.[18] Is this where courts in Canada should be heading?

Beyond policy and program design, there are financial implications. The courts have taken a narrow view of when financial consequences are to be considered in analyses under s. 1. This is understandable as long as the cost of complying with the courts' orders represent no more than a small fraction of overall expenditures. However, if courts make more governmental-type decisions, the financial implications of those decisions will correspondingly increase. At a certain point, financial trade-offs between competing demands become inevitable. Are not those decisions that should be made by elected officials who can be replaced if the public is unhappy?

And what if the courts direct government to bring about a state of affairs, but government says this cannot be practically achieved? Would courts then assume on-going oversight of governmental

16 A. Bhuwania, "The Case that Felled a City: Examining the Politics of Indian Public Interest Litigation through One Case" (2018) 17 *South Asia Multisdiciplinary Academic Journal* at paras 5-16.

17 Bhuwania at paras 17-45.

18 See e.g., *Board of Control for Cricket v Cricket Association of Bihar and others*, [2015] INSC 61, in which the court reorganized the institutions regulating cricket in India; *The State of Tamil Nadu v K Balu and another*, Civil Appeal Nos. 12164-12166 of 2016, in which it regulated the sale of liquor.

operations to ensure their orders are given effect? These are deep waters.

B. Checks & Balances

Beyond concerns as to institutional capacity, what of checks & balances? Good government is one that is subject to a thorough and well-integrated set of checks and balances on the exercise of its authority. The executive is accountable to the legislature, and the legislature is accountable to the public, who can replace political leaders in the next election.

For profoundly important reasons, judges in Canada are not elected. We have security of tenure. This makes eminently good sense when courts adjudicate particular disputes. But, what if courts make governmental-type decisions? The courts' power to decide is not limited by the checks and balances that apply to the executive and the legislature. Courts decide without such limits, save as they exercise self-restraint. In such circumstances, how judges see their role is critical.

C. Legitimacy

This leads to a third concern, legitimacy. The legitimate exercise of authority by the legislature and the executive is based on electoral mandates. As Lord Reed, President of the UK Supreme Court, wrote in *R (SC) v Secretary of State for Work and Pensions*, politics involves a very different process to adjudication, in that it concerns "the management of political disagreements ... so as to arrive, through negotiation and compromise, and the use of the party political power obtained at democratic elections, at decisions whose legitimacy is accepted not because of the quality or transparency of the reasoning

involved, but because of the democratic credentials of those by whom the decisions are taken."[19]

The legitimate exercise of judicial authority rests on a separate basis. It is based on courts exercising their authority in accordance with settled principles and sound legal methodology. As Neil MacCormick wrote in "Legal Reasoning and Legal Theory," "Judges are to do justice according to law, not to legislate for what seems to them an ideally just form of society."[20]

V. The Courts' Proposed Expanded Role

A key question as to such an expanded role for the courts is whether the *Constitution Act, 1982* was intended to bring this about. I have not addressed that foundational question. Rather, I have focused on three questions. First, do courts have the institutional capacity to properly take governmental-type decisions? Second, is it warranted to have courts take such decisions outside the framework of checks and balances that apply to governments? Finally, can courts legitimately take these types of decisions as opposed to those who have an electoral mandate?

Such concerns are rarely discussed. Why? I see two main reasons. First, to raise these concerns is to make yourself the target of criticism that you oppose societal progress. And second, raising such concerns challenges the cherished belief in a special mission for the legal profession. Neither of these is well-founded. First, maintaining proper institutional roles is a separate question from the content of

19 *R (SC) v Secretary of State for Work and Pensions*, [2021] UKSC 26 at para 169.

20 N. MacCormick, *Legal Reasoning and Legal Theory*, (Oxford University Press, 1978) at p 107.

public policy. Liberal democracy provides broad avenues for societal progress through political institutions. Second, it is both myopic and self-serving to see the legal profession as endowed with moral and intellectual superiority. But, to accept a less heroic role for the legal profession requires a seemly modesty little in evidence today.

VI. Conclusion

With the adoption of the *Charter*, courts took on an additional role, one that to a degree inevitably engages them in statecraft. In fulfilling this additional role, courts should bear closely in mind three considerations: first, the limitations of their institutional capacity; second, the absence of checks and balances that are proper to governmental-type decision-making; and third, whether the legitimacy for taking such decisions needs to be linked to an electoral mandate. Being mindful of these considerations, courts should exhibit the virtue of judicial restraint. Such restraint must be self-imposed, as the judicial role now includes defining its own role.

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