

THE ROLE OF THE JUDICIARY IN TIMES OF CRISIS

I. Introduction

The impact of September 11 was eloquently expressed by Mr. Eric Rice, President of the Canadian Bar Association, in a letter of condolence to U.S. Ambassador Paul Cellucci.

Freedom, democracy and the rule of law are tested at moments like these. But we must never allow those who pursue unlawful and violent means to subvert our way of life.¹

The societal values which are reflected in the *Canadian Charter of Rights and Freedoms* have not changed; Canadians continue to value those rights and freedoms which are necessary in a free and democratic society.

The judiciary's role is to protect the rule of law, the Constitution and the *Charter*. In the Reference Re Secession of Quebec, the Supreme Court of Canada underlined that constitutionalism and the rule of law is one of the fundamental and organizing principles of the Constitution of Canada.

The challenge now confronting the judiciary, indeed the legal community as a whole, is to achieve a new equilibrium between the dictates of security and our cherished civil rights and liberties. While September 11 may have shifted the

¹ Letter dated September 12, 2001; www.cba.org

balance, the protection of those three cornerstones of our society - freedom, democracy and the rule of law - continue to be the priority of all judges.

In *Suresh v. Canada*² rendered on January 11, 2002, the Supreme Court of Canada recognized that Canada has a legitimate and compelling interest in combatting terrorism. It added, however, that Canada is also committed to fundamental justice.

In an interview with the Lawyers Weekly on January 2, 2002, Chief Justice McLachlin said that the task of the law is to find ways to maintain our freedom, our democracy and the rule of law, while maintaining security.

² 2002 SCC 1

The role of the judiciary as “resolver of disputes, interpreter of the law and defender of the Constitution”³ remains unchanged in times of crisis. What must change however, are the tools and resources which judges draw upon when they are interpreting and applying the law. The events of September 11 and the response of the world, including the enactment of anti-terrorism legislation by various governments such as Canada’s *Anti-terrorism Act*, have created a new environment for judicial decision-making. Within this new climate judges must adopt a global perspective in performing their role. The judiciary must be aware of and take into account the various declarations, resolutions and conventions made by non-adjudicative bodies with international standing, as well as the decisions of international tribunals. As recently stated by the Supreme Court of Canada in *Suresh v. Canada*, a complete understanding of the legislation under review and the *Charter* requires consideration of the international perspective.

II. The Legislative Response to the Crisis

In Canada, terrorist activities have always been treated as a criminal offence. The *Criminal Code* allows for the investigation of terrorism and the prosecution of those individuals who have engaged in various specific activities generally associated with terrorism, including hijacking, murder and sabotage. Under these laws the government is able to convict terrorists who actually engage

³ *Beauregard v. Canada*, [1986] 2 S.C.R. 56, per Dickson, C.J.

in acts of violence if it is able to identify and apprehend them once the acts have been committed.

After September 11, the threat posed by terrorism, and the need for countries to work together and to strengthen their laws by focussing on preventative measures to disable terrorist organizations was widely recognized and acted upon. In resolutions passed soon after the events, the United Nations Security Council and the General Assembly clearly stressed the need for concerted and multilateral action.⁴ The Security Council called upon all States to work together urgently and to redouble their efforts to prevent and suppress terrorist acts, including by increased cooperation. In turn, the Council expressed its readiness to take all necessary steps to respond to the terrorist act in accordance with its responsibilities under the Charter of the United Nations.

In response to its international obligations, Canada enacted the *Anti-*

⁴ UN Security Council: Resolution 1368 (On Threats to International Peace and Security Caused by Terrorist Acts), S/RES/1368 September 12, 2001 (operative paras. 3, 4 & 5).

U.N. General Assembly: Resolution 56/1 (Condemnation of Terrorist Attacks in the United States of America), A/RES/56/1 (September 18, 2001). The General Assembly in paras 3 and 4 of Resolution 56/1 urgently called for “international cooperation” to bring to justice the culprits and “to prevent and eradicate acts of terrorism.”

terrorism Act which came into force on December 24, 2001. Prior to its enactment, Canada had signed all twelve United Nations Conventions and Protocols relating to terrorism and had ratified ten of them. These ten included those that protect aircraft, civil aviation and airports, international shipping, internationally protected persons and diplomats, the safety of nuclear material, and the prevention of taking of hostages and terrorist bombings.

With the passage of the Act, Canada ratified the remaining two U.N. Conventions and Protocols. *The Suppression of Terrorist Financing Convention* relates to the freezing of terrorist property by prohibiting the dealing in any property of a person engaged in terrorist activities and prohibits the making available of funds and financial or other related services to terrorists. In this regard, the *Anti-terrorism Act* allows the Attorney General to make an *ex parte* application to a judge of the Federal Court for an order of forfeiture in respect of property owned or controlled by or on behalf of a terrorist group or property that has been or will be used to facilitate or carry out a terrorist activity.⁵

Canada also ratified *The Suppression of Terrorist Bombings Convention* which contains provisions relating to the targeting of public places, government or

⁵ Section 4 *Anti-terrorism Act* amending the *Criminal Code* by adding section 83.13, 83.14 and 83.15

infrastructure facilities and transportation systems with explosives or other lethal devices, including chemical or biological agents.

The *Anti-terrorism Act* contains provisions aimed at immobilizing and dismantling the activities of terrorist groups and those who support them. It creates measures which are designed to identify, prosecute, convict and punish terrorists before they engage in acts of violence and to that end, provides law enforcement and national security agencies with new investigative tools to assist in gathering information about terrorists and terrorist groups.

The Act amends a number of statutes including the *Criminal Code*, the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering Act)*, the *Access to Information Act*, the *Canadian Human Rights Act*, the *Immigration Act*, the *Canadian Security Intelligence Service Act*, the *National Defence Act*, and the *Privacy Act*, to name but a few.

Among its provisions, the *Anti-terrorism Act* defines and designates terrorist groups and activities; makes it an offence to knowingly participate in, contribute to or facilitate the activities of a terrorist group; and, makes it an offence to knowingly harbour a terrorist. The legislation makes it a crime to knowingly collect or give funds in order to carry out terrorism. It creates new offences targeting unlawful disclosure of certain information of national interest and amends the *Canada*

Evidence Act to guard certain information of national interest from disclosure during courtroom or other judicial proceedings. Certificates can be issued under the *Canada Evidence Act*, the *Access to Information Act*, the *Privacy Act* and other Acts in order to prohibit disclosure of sensitive information relating to international relations, national defence or security.

The Act provides for the arrest and detention of suspected terrorists and requires individuals who have information relating to a terrorist group or offence to appear before a judge to provide that information. It also provides new investigative tools to allow security, intelligence and law enforcement agencies to gather knowledge about terrorist groups. Under the investigative hearing provisions of the Act, a judge may order the examination of a material witness. In order for an investigative hearing to occur, the judge must be satisfied that the consent of the Attorney General has been obtained and that there are reasonable grounds to believe a terrorist offence has been or will be committed.

Various review mechanisms already established under the law apply to the exercise of powers under the Act. These would include, for example, the various complaint and review mechanisms that apply with respect to police forces under provincial jurisdiction and to the RCMP. In addition, significant powers under the Act are subject to judicial supervision and, in some cases, this is in addition to

explicit ministerial review and supervision powers. For example, the preventive arrest provisions allow a police officer to arrest and bring a person before a judge to impose supervisory conditions if there are reasonable grounds to suspect that the person is about to commit a terrorist activity. Except for emergency circumstances, this substantial power can only be invoked with the consent of the Attorney General and a judicial hearing is to be held within twenty-four hours. There is, in addition, judicial supervision of the recognizance process and the individual affected may seek to vary a recognizance.

Parliament has recognized the proven experience of the Federal Court of Canada in dealing with sensitive questions of national security. It has selected our Court, a national court, to judicially review matters of public interest arising under the legislation.

While the underlying purpose of anti-terrorism laws of various countries is similar, the laws of each country will be tailored to their specific needs and their legal system. For example, some elements of Canada's *Anti-terrorism Act*, such as the range of offences relating to participation, facilitation, instruction and financing of terrorists, may not exist under the laws of other nations.

However, there are similarities between Canada's Act and those of the

United States and the United Kingdom⁶. All three jurisdictions define either terrorism or terrorist acts; all three countries may designate groups and organisations as terrorist group; all have the ability to prosecute accused terrorists found in their jurisdictions for terrorist crimes perpetrated in other countries; Canada, the United States and the United Kingdom all have the ability to impose a form of preventative arrest of suspected terrorists; Canada and the United States have some form of investigative hearing before a judge in order to obtain evidence from material witnesses; and, all three countries have the ability to provide for greater border security.⁷

III. The Role of the Judiciary

In addressing the issues raised by the *Anti-terrorism Act*, the judiciary's primary role is, as always, to safeguard the rule of law, the Constitution and the *Charter*. The primary tools of the judicial trade will continue to be the well-established common law principles of natural justice and the duty of fairness together with the principles of fundamental justice developed under the *Charter*.

The principles of natural justice and the duty of fairness which have been

⁶ *U.S.A. Patriotism Act*, enacted October 26, 2001; *U.K. Terrorism Act 2000*, enacted February 19, 2001.

⁷ *Canada's Proposed Anti-Terrorism Act Working with Our International Partners*, Department of Justice Canada, <http://canada.justice.gc.ca>

established by the courts through judicial review focus on the pivotal issue of whether, in all the circumstances, the procedure followed in a particular case was fair. Although the content of the rules is flexible and must be tailored to the unique and particular facts of each case, natural justice and procedural fairness are presumed by the common law to be implied limitations on the exercise of any delegated power.

The courts' insistence on fair procedure is an extremely important avenue for sustaining uniformity and integrity within our justice system. The two objectives of natural justice, that no individual shall be adversely affected without a hearing, and that the decision will be made by an impartial and unbiased decision-maker, shape and define the procedural propriety of government action. The open processes and the transparency of decision-making which have been structured through judicial review are one of the primary safeguards in achieving an acceptable balance between the country's need for security and its citizen's human rights and freedoms.

The *Charter* has proven to be a worthy and distinguished instrument in preventing government transgression of our civil rights and liberties. Canada's declaration that the Constitution is our supreme law has replaced the tradition of Parliamentary democracy with constitutional democracy. It has conferred upon

the courts the responsibility of ensuring that every exercise of state power can be reconciled with the *Charter's* guarantee of those freedoms and rights which are essential for the protection of individual human dignity.

And it has tested the resolve of the judiciary to make unpopular decisions according to the law and the evidence regardless of media or public disapproval. As a result, judgments have sometimes conflicted with public expectations and controversy has arisen. But controversial decisions are neither illegitimate nor undemocratic; rather, they are a reflection of democracy at work.⁸ In applying and interpreting the provisions of the *Anti-terrorism Act*, judges will continue to hold Parliament accountable to the high standards embodied in the *Charter* - the right to life, liberty and security of the person, freedoms of religion, association and expression, the right to counsel and equality.

The interpretation and application of the Act will also require the judiciary to come to terms with the more frequent introduction of other sources of law into our jurisprudence, particularly the increased use of international and comparative law. The legislative changes brought about by the *Anti-terrorism Act* will result in more and more issues coming before Canadian courts involving international

⁸ The Honourable Justice Rosalie Silberman Abella, *The Judicial Role in a Democratic State*, (2001) 26 Queen's L.J. 573 at 580-1.

agreements and customary law.

The concept of using international law as guidance in the interpretation of our domestic laws is certainly not new. The Supreme Court of Canada has accepted that international law may play a role in interpreting the Constitution, statutes and even the common law.⁹ But the enactment of the *Charter*, with its many underlying human rights issues, has engaged the courts more often and more intensely in the process. Former Justice La Forest has observed that human rights principles “are applied consistently, with an international vision and on the basis of international experience. Thus our courts - and many other national courts - are truly becoming international courts in many areas involving the rule of law.”¹⁰

While the judiciary recognizes that there is an important role for international law in the interpretation of legislative enactments such as the *Anti-*

⁹ The Honourable Mr. Justice Michel Bastarache, *The Interpretation of Human Rights: The Challenge*, (2001) 50 U.N.B.L.J 3 at pp. 9 - 10. See also *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 349-50, wherein Dickson, C.J.C. states that the norms of international law “provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada’s international obligations under human rights conventions.”

¹⁰G.V. La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issue” (1996) 34 Can. Y.B.I.L. 89 at 100.

terrorism Act, the challenge has been to define more precisely the relationship between international law and domestic law. The complexity of international law means that this will be an intricate and demanding process, beset perhaps in its initial phase with a characteristic lack of precision. However, the Supreme Court of Canada has articulated some important guiding principles.

In *Pushpanathan v. Canada*¹¹, one of the issues before the Court was how the rules of treaty interpretation applied in determining the meaning of Article 1F(c) of the United Nations Convention Relating to the Status of Refugees, incorporated into Canadian law by subsection 2(1) of the *Immigration Act*. The majority held that since the purpose of the Act incorporating Article 1F(c) was to implement the underlying Convention, an interpretation consistent with Canada's obligation under the Convention must be adopted. The wording of the Convention and the rules of treaty interpretation were therefore applicable in determining the meaning of Article 1F(c) in domestic law. Of significance was the Court's finding that the purpose and context of the Convention as a whole, as well as the purpose of the individual provision in question as suggested by the travaux préparatoires, which had been rejected by lower courts as ambiguous and unclear, were to be used as helpful interpretative guidelines.

¹¹ [1998] 1 S.C.R. 982

The Court's decision in *Baker v. Canada*¹² was of tremendous import for administrative law. Ms. Baker was an illegal immigrant who had lived in Canada since 1981. She had given birth to four children all of whom were Canadian citizens. In order to prevent her deportation and the resulting separation from her Canadian children, she requested an exemption on humanitarian and compassionate grounds from the rule that one must apply for permanent residency from outside Canada. The application was denied.

Of particular note was the Supreme Court's finding that although Canada has never adopted the *Convention on the Rights of the Child*¹³ into domestic law, an immigration official exercising discretion is nevertheless bound to consider the "values" expressed in that Convention. The prominence of "the best interests of the child" underlying the *Convention*, the Court held, should have weighed heavily in considering Ms. Baker's application. The majority was of the view that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."¹⁴

¹² [1999] 2 S.C.R. 817.

¹³ *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3.

¹⁴ *Baker*, *supra* note 12, at para. 70.

The Supreme Court more recently contemplated the impact of international law in *Suresh v. Canada*¹⁵. Although the appeal was heard by the Court prior to September 11, the decision was rendered subsequent to those events and after the coming into force of the *Anti-terrorism Act*. The judgment is instructional with respect to how international law guides the interpretation and application of Canadian law.

Among the issues to be decided by the Court in *Suresh* were whether the *Charter* precludes deportation to a country where a refugee faces torture or death; whether deportation on the basis of membership in an alleged terrorist organization infringes the *Charter*; and, whether the terms terrorism and danger to the security of Canada are unconstitutionally vague. The Court described the task before it in the following words:

The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

¹⁵ 2002 S.C.J.No. 3

On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society - liberty, the rule of law, and the principles of fundamental justice - values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.¹⁶

In determining whether Parliament has succeeded in meeting this challenge, the Court held that consideration must be given not only to Canadian experience and jurisprudence, but also to international law. This takes into account our international obligations and values as expressed in the various sources of international human rights law such as declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals and customary norms. The principles of fundamental justice in section 7 of the *Charter* and the limits on rights that may be justified under section 1 cannot be considered in isolation from the international norms which they reflect. A complete understanding of the legislation under review and the *Charter* requires reflection on the international perspective.

¹⁶ *Ibid.*, at p. 7 (paras 3 & 4)

In *Suresh*, the Supreme Court recognized the dilemma facing the judiciary in bringing to bear international treaty norms which are not binding in Canada because they have not been incorporated into Canadian law by enactment. As the Court points out however, “in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada’s international obligations qua obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.”¹⁷

¹⁷ *Ibid.*, at p. 19 (para. 60)

The weight to be afforded to international norms that have not been incorporated by statute into Canadian law will of course depend on all of the circumstances of a particular case, including the authoritativeness of their legal source, their specificity and, in the case of customary international law, the uniformity of state practice.¹⁸

The affirmation of the Supreme Court of Canada in *Pushpanathan, Baker* and *Suresh* that international law has a substantial impact on our domestic law is timely and welcome. The interpretation of the *Anti-terrorism Act* will require judges to be open to the influence of collective international legal values articulated in varying and numerous multilateral instruments. In keeping with global judicial

¹⁸ *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 302 (F.C.A.). Evans, J.A. further stated at para. 36: “Moreover, although subject to the restraints imposed by the Constitution Acts 1867 to 1982, including the Charter, Parliament is the ultimate source of law in our system of law and government. Hence, effect cannot be given to unincorporated international norms that are inconsistent with the clear provisions of an Act of Parliament. Were it otherwise, the principle that treaties and other international norms only become part of the domestic law of Canada if enacted by Parliament would be undermined.”

developments, our judgments must reflect increasing interest and knowledge of international law, both as a formal instrument of interpretation and also as a broader underlying consideration which may not be binding but is nevertheless appropriately influential.¹⁹

¹⁹ Stephen J. Troope, *The Uses of Metaphor: International Law and the Supreme Court of Canada*, (2001) 80 Can. Bar Rev. 534 at 535..

IV. Conclusion

The role of the judiciary has not changed since September 11. However, the environment in which cases are heard and decisions are rendered and the tools of the judicial trade have taken on a more global perspective. In interpreting and applying the *Anti-terrorism Act*, the judiciary will face questions which are new and unfamiliar and which are characterized by complex social and moral issues of considerable import to society.

Invariably judges will rely upon the insights and wisdom of the esteemed members of the Canadian bar to assist them. Judicial curiosity, kindled by the knowledge and creativity of counsel, will foster the growth and development of sound and rational principles under the new legislation. Together, judges and lawyers must strive to achieve a complex and intricate balance.

In meeting this challenge it would serve us well to bear in mind the following statement of Mr. Simon Potter, First Vice-President of the Canadian Bar

Association:

Our response to the terrorist attacks must strike delicate balances between collective security and individual liberties in the context of an existing legal and democratic framework that has served us well.

In our eagerness to fight terror and the fear it creates, we must caution ourselves. In our conviction and our urgency to address the evils which became undeniable on September 11, we

must ensure that we protect the very values which were, in fact, the real target of the terror - freedom, justice and the rule of law.²⁰

²⁰ Addressing the House of Commons Committee on Justice and Human Rights, Wednesday, October 31, 2001, Ottawa, Ontario; www.cba.org

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