

Remarks of the Right Honourable Beverley McLachlin, P.C.
Judging in a Democratic State
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The role of the judge in a democracy is simply stated: to resolve the legal disputes that arise between citizens, and governments. In a democracy, everyone from the simplest citizen to the highest politician, must conduct themselves in accordance with the law. This means that there must be an institution to resolve what the law requires when disputes arise. That institution, quite simply, is the courts.

The role of judges is simply stated. Describing how judges actually go about discharging their duties, however, is more difficult. Over the years, myths have grown up – myths that obscure the true nature and challenge of judging, and the true nature of the judge’s role in a modern democracy.

There are those who say that the old myths about judges have been dispelled. Lawyer and writer John Mortimer writes:

Many years ago, when I first took up the law, proceedings in court were shrouded in myth. In those days the country at large believed that trials invariably came to the right conclusion, that police officers told nothing but the truth, and that judges were miraculously conceived and were born unencumbered with the usual human luggage of preconceived ideas, knee-jerk reactions, prejudice, failure of the imagination, inability to admit mistakes or pure bloody mindedness.

These myths have now, no doubt to the regret of many members all the legal profession, gone the way of witchcraft and the Flat Earth Society. Trials have, despite energetic whitewashing by appeal tribunals, been shown to have gone horribly wrong. Police evidence is now taken by juries with large helpings of salt. And the pronouncements of some judges, before and since retirement, have gone beyond endearing eccentricity to give some cause for alarm.¹

So judging has been demystified, we are told. But has it? In fact while many misconceptions have been banished, myths still linger about what judges do, and the public continues to labour under misconceptions about the work of the judiciary and its role in a democratic society. It is important that these myths be clarified. As Alexander Pope warned in his *Essay on Criticism*, “A little learning is a dangerous thing. Drink deep, or taste not the Pierian spring.” It were better

that judging had never been demystified, than that half truths and misconceptions about it prevail.

Tonight, I will consider a series of myths that still linger about judging: the myth of legal certainty; the myth of factual certainty; the myth of the blank mind; and the myth of the living Oracle. Only if we understand the vacuity of these myths can we comprehend the role of the judge in a democratic society.

The Myth of Legal Certainty

The myth of legal certainty is the myth that if the judge looks hard enough and long enough and wisely enough, the judge will find in the law the single clear answer to the question before her. The law is like a giant complex computer, which will spit out the right answer if only the judge pushes the right buttons. In reality, the picture is much more complex.

The law is a complicated mix of rules, practices and values. Some of the rules are straightforward commands, like “You must not steal another’s property.” Other rules, what H. L. A. Hart called secondary rules, are rules about how we make rules or set up new relationships, like contract or marriage.² Some rules are difficult to state in precise form, and are gleaned only through studying what has been decided or done in similar cases in the past; we refer to this as the law of precedent. In still other cases, the answer to the legal question before the judge will require the judge to choose between or balance values; this is the case, for example, where a judge is asked to choose between a narrow and a broad conception of *Charter* values like freedom of religion, liberty or equality.

This complex mix of rules, practices and values that we call the law does not always provide a single clear answer to the legal problem before the judge. Don’t misunderstand me. In many cases – indeed in most – the law does provide fairly clear answers. To put it in the theoretical terms of H. L. A. Hart, the set of rules and practices that we call the law has a solid core of well-defined meaning. As a result, lawyers, tribunals and trial judges readily find and agree on the answers to most of the disputes before them. In short, the law possesses a solid core of certainty.

However, this is not the whole story. It is impossible in writing the law or pronouncing a judgment to envision all the situations which may arise in the future. When a new and unforeseen situation arises, it brings with it questions. Does a particular legal rule apply to the new situation? Or, which of two

conflicting rules should be applied? Or, if a certain rule appears to apply, does it need to be modified to do justice in the new situation? Hart calls this the penumbra of uncertainty that marks the outer bounds of legal rules.

So we see that legal and constitutional rules sometimes do not produce determinate answers to concrete controversies. Scholars call this the problem of indeterminacy in the law. Indeterminacy opens the way to judicial discretion. Instead of being presented with one single certain answer, judges must choose between different answers, each of which may be argued to be “correct”.

The judge must choose an answer. That is the judge’s job. Judges are obliged to do for a living what the vast majority of mankind spends its life studiously avoiding – making decisions. Judges cannot say, “I am not certain what the right answer is, so I will not decide this case.” They must decide it. This can be difficult.

The first difficulty is the intellectual and moral effort of struggling to find the best answer. The judge must not only evaluate the legal options but understand the implications of doing so. These may be complex and polycentric. Changing one rule may impact in myriad ways on other rules and legal values. Legal philosopher Lon Fuller likened the judge’s task to pulling on one strand of a spider’s web; in doing so she changes not only the strand on which she is pulling, but rearranges all the other strands as well.³ It is thus not surprising that judges may agonize long and hard in arriving at their ultimate conclusions on the law.

A second difficulty – and one that compounds the first difficulty – is the knowledge that whatever the judge decides, some people will say that the judge decided wrongly. This leads to a third difficulty – one often raised by the press and academia – the problem of legitimacy. Is not the law supposed to provide a guide to conduct? How then can we admit that it does not provide a single clear answer? Is not the law supposed to be the master of the judge? How then can it be the servant of the judge’s caprice? From here it is but a short step to the charge of judicial activism – the charge that the judge, instead of applying the law, has created it.

Behind the charge of judicial activism which we hear so often of late, lies the myth of certainty – the myth that if the judge looks long enough and hard enough the law will always provide a clear, indisputable answer upon which all will agree. For many cases – indeed most – this is true. But for others – the ones

lawyers and judges call hard cases – there are no certain answers. Judges have no choice but to give the answer that in the end, after deep reflection and consideration of all relevant facts and rules, they conclude is best.

No matter how restrained a judge attempts to be, a degree of judicial law-making is inevitable. Indeed, it is the hallmark of the common law legal method, where laws develop through successive decisions called precedent. As English scholar David Pannick puts it: “Eager or not, qualified or not, the judge cannot avoid acting as legislator in exceptional cases at the appellate level.”⁴

This does not undermine the law’s validity. The degree of indeterminacy is limited, and serves the important purpose of allowing the law to respond to changing circumstances. Viscount Sanky in the *Person’s Case*⁵ famously likened the Constitution to “a living tree, capable of growth and expansion”. The metaphor describes not only the Constitution, but the law itself. The tree of the law is rooted firmly in the traditions of the past that have made it what it is and continue to nourish it. Its branches remain firm, decade after decade. Occasionally, it is necessary to top off a dead branch; occasionally new twigs emerge – twigs, that if viable may be nurtured until they themselves are branches, bearing new fruit. Occasional uncertainty and the concomitant potential for growth are inherent features of our legal system, not aberrations. To assert otherwise is to fall victim to the myth of legal certainty.

The Myth of Factual Certainty

If the first myth is the myth of certainty of law, the second myth is the myth of certainty of facts. The myth of certainty of facts is the myth that the judge can always arrive the whole truth and nothing but the truth through the witnesses and documents presented in court.

Like the myth of certainty of law, there is a solid core of validity to the myth of certainty of facts. By and large, our court system succeeds in getting at the truth. Each party presents evidence through witnesses and documents. The evidence is tested through the engine of cross-examination. Expert witnesses testify on matters that are beyond ordinary knowledge. The judge or jury considers and weighs the evidence and determines where the truth lies. In a civil case the judge must be satisfied of the truth on the balance of probabilities. In a criminal case she must be satisfied of the accused person’s guilt beyond a reasonable doubt before she can convict. Lawyers and judges who spend their lives working in the

system are generally satisfied that in the vast majority of cases the judge or jury reaches the right conclusion on the facts.

But as with the myth of certainty of law, the ability of judge or juror to find the truth on the facts is not absolute. Occasionally, to use Mortimer's phrase, we discover that trials have gone "horribly wrong". We discover, on the basis of incontrovertible evidence or objective scientific testing, that a person has been wrongly convicted. In seeking the reasons, we often discover overzealous police work or fabricating witnesses. We are horrified and we offer compensation. But nothing the system can do can compensate for the years lost in prison. We ask ourselves the obvious question: why has the system failed?

The answer is that our system for finding the truth through the trial process is a good system, but for all that a human system. It may fail under the stress of fabrication, manipulation, bad faith, or simple error. Judges know this. They are constantly on the look out for it. They use the rules of evidence to achieve maximum reliability, and they examine their own minds and warn jurors against attitudes and preconceptions that may lead them to undervalue, overvalue or misinterpret conduct in testimony. Appeal courts, while they accept facts validly found, examine the record to ensure that the rules of evidence were properly applied in that the evidence taken as a whole supports the factual conclusion or verdict. Despite all these measures, judges and juries occasionally arrive at the wrong conclusion. When this happens we must do our best to find out why and to ensure that it does not happen again. But we should not condemn the entire system as unjust.

To be sure that the judge or jury gets at the truth has been the prime concern of the justice system for centuries. However, the task is more difficult today than ever before. The situations that courts are called upon to examine and pronounce on grow ever more complex. Finding the truth is more and more a matter of understanding technical and scientific evidence. The judge must grasp the scientific evidence and understand the complex ramifications of the situation if he or she is to have a hope of ascertaining which of the disputing parties is telling the truth.

The judge is aided in this task by expert witnesses. Without them the judge could not hope to understand the evidence and determine where the truth lies. Yet expert evidence presents its own hazards.

The first problem is that the experts themselves may not agree. The phenomenon of the “hired gun” expert is well-known to judges and lawyers. Particular experts become associated with certain positions and accordingly are called by the parties seeking to establish that position. Opposing experts are called by the opposing parties. But which expert is the judge to believe?

A second problem is that the expert witness may become the real decision maker, the surrogate judge. Lawyers call this the “ultimate issue” problem. Care must be taken to ensure that the expert witness does not usurp the judge’s task of reviewing all the relevant evidence and determining where the truth lies. Our rules of evidence guard against this danger in its most blatant form. However, the danger of expert evidence replacing judicial truth finding in more subtle ways remains ever-present. There is the danger that the judge may not completely appreciate all the dimensions of expert testimony and hence not evaluate it as critically as she should; and that experts may stray beyond the scientific facts and inferences that are the proper domain of expert evidence, into the weighing and balancing of conflicting values and options that is the exclusive domain of the judge.

The travesties of wrongful convictions and the difficulties of dealing with complex and technical disputes dramatically emphasize the challenges inherent in judicial fact-finding. But they do not tell the whole story. More typically and less dramatically, the judge is faced with ordinary people telling equally plausible or implausible versions of the truth. The judge is left to time-honoured techniques for deciding, as she must, where the truth lies: the internal consistency of the witness’s evidence; demeanor; how the witness responded to questions in cross-examination. Empathy and an understanding of human nature are essential to this task. But at the same time, the judge must beware of preconceptions that may lead her astray. For example, it is common to assume that answering questions with eyes downcast and refusing to look the questioning lawyer or the judge in the eye is a sign of evasiveness. However, in some cultures, including certain aboriginal cultures, this is a sign of respect.⁶

Fact-finding, it emerges, is a complicated and challenging business. The judges’ burden is increased by the not infrequent experience of witnesses who, whether deliberately or inadvertently, put their own self-serving gloss on the facts. One can understand how Lord Campbell, who sat as Lord Chief Justice of England from 1850 to 1859 and as Lord Chancellor from 1859 to 1861, could say: “[M]y spirit almost dies away when I think I am to pass the remainder of my days in hearing witnesses swear that the house was all secure when they went to bed,

and next morning they discovered that the window had been broken and their bacon was gone.”⁷

In speaking of legal certainty I said that it is wrong to think of the law as something which we can always discover if we but look hard enough. The same goes for the facts. The truth is not out there, waiting to be discovered like a gift under the justice tree. The truth is rather a process – a process of searching, sifting, listening and critically reflecting. When we understand this we are in a better position to appreciate the enormous strengths of our judicial system and to rectify its occasional failings.

The Myth of the Blank Mind

The philosopher John Locke expounded the view that the mind was a blank slate, or *tabula rasa*, upon which ideas made impressions. Perception and thought were seen as mechanical activities. The mind was passive, its activity confined to recording impressions, as paper takes up the impressions of ink.

This view of the mind has long been rejected. We now know that the human mind plays an active role in shaping impressions and forming thoughts. What we see, what we feel, and what we think, are the complex products of interaction between ourselves and what is “out there.” Our feelings and thoughts are shaped and affected by our attitudes and experiences.

No one would argue with this proposition today. Yet when it comes to judges, the myth persists that the minds of judges are blank slates upon which legal and factual propositions impress themselves mechanically and objectively, like keys striking paper. Nothing could be further from the truth. Judges are first and foremost human beings. As such, their conclusions on the facts and the law are shaped by their training and their personal experiences.

The myth that the judicial mind is a blank slate finds its origins in the requirement that judges be impartial and not favour one side or the other in the disputes that are brought before them. To be impartial, the thinking goes, the judge must erase from her mind all preconceptions and mental predispositions. It is true that judges must guard against preconceptions and prejudices influencing their findings of fact and law. It is equally true that they must be neutral as between the contesting parties. However, this does not mean that the judge’s mind must be a blank slate. Indeed, to demand this is to demand the

impossible; no human being can free herself from the mental constructs that allow her to make sense of the world and conceptualize the problem before her.

The great American jurist Benjamin Cardozo recognized the fallacy of the judicial blank mind in “The Nature of the Judicial Process”:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James’s phrase of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any of eyes except our own.⁸ Cardozo concluded:

Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the person, whether he be litigant or judge.⁹

To insist that the judge purge all preconceptions and values from the mind is to place an impossible burden on the judge and induce impossible expectations in the public. The best the judge can do is to become aware of his or her mind-set and guard against errors it may engender. What is required is not mechanical robot-like impassivity, but human impartiality. As the Commentaries on Judicial Conduct of the Canadian judicial Council put it:

[T]he wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.¹⁰

The Myth of the Living Oracle

We have become accustomed to criticism of judges' failings, and this is as it should be. However, we must guard against criticism that is premised on the unrealistic assumption that judges are superhuman beings exempt from normal human failings. Traces of this myth can be found as early as 1765, when William Blackstone in his *Commentaries on the Laws of England* wrote of the judge as "the living oracle[]." ¹¹ More recently, Professor Richard Dworkin portrays the judge as a panoptic Hercules, isolated on law's Mount Olympus. ¹²

As Professor David Pannick notes, "it can be a strain acting as 'the living Oracle.'" ¹³ In humorous vein, he reminds us of the judicial scene from Tolstoy's *Resurrection*. The President of the court was "anxious to begin the sitting and get through with it as early as possible, in time to call before six o'clock on the red-haired [woman] with whom he had begun a romance in the country last summer." ¹⁴ The second judge was feeling gloomy, having just been told that his wife would not be making him any dinner that night. The third judge was suffering from gastric catarrh. Of him Tolstoy wrote:

Now, as he ascended the steps to the platform, his face wore an expression of deep concentration, resulting from a habit he had of using various curious means to decide the answers to questions which he put to himself. Just now he was counting the number of steps from the door of his study to his chair: if they would divide by three the new treatment would cure his catarrh. If not, the treatment would be a failure. There were twenty-six steps, but he managed to get in an extra short one and reached his chair exactly at the twenty-seventh. ¹⁵

In short, judges are human beings. They are sons and daughters, husbands and wives, parents and friends. They coach the local soccer team, cook dinner when they come home at night, and line up in airports when they go on vacation. Insofar as their humanness may be a distraction, as Tolstoy suggests, judges must strive to overcome it. But the benefits of judges being human beings greatly outweigh the detriments. Judges deal with human problems. They must be able to relate to these problems, to understand them. We would not want a robot for a judge even if we could find one. We would worry that the robot would be unable to understand the human condition, the basic requirement for being a judge.

To judge, one must be human and humane. One must be capable of empathy. The most learned and respected of judges attest to the importance of emotion and intuition in deciding the difficult questions that come before them. Thus Justice William J. Brennan of United States Supreme Court wrote that judges must bring to their work "the range of emotional and intuitive responses to a

given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason.”¹⁶

In sum, judges are not living Oracles. They are human beings, trained in the law, who struggle to understand the situations before them and to resolve them in accordance with the law and their consciences.

Judges as human beings are subject to all the vexations and emotions to which ordinary human beings are prone. They may become discouraged at year after year of seeing people at their most unattractive or their most unreasonable. They may struggle with feelings of loathing for people revealed as cheats, liars and murderers. They may weary under the pressures of unceasing work. And they may feel anger at those who abuse the legal system; hence US Chief Justice Burger’s expression of anger in 1986 at an “utterly frivolous” claim and his chastisement of the lawyer who brought it for treating the legal system as “a laboratory where small boys can play.”¹⁷

And judges must learn to live with being wrong. As human beings, judges learn early in their career to deal with criticism. Every new judge dons the judicial robes resolved never to make a mistake. And every new judge fails. Decisions must sometimes be made without the opportunity for full reflection. The law may not be entirely clear. The truth may be elusive. In the result, even the best judges inevitably are found to have erred. The errors are publicly identified by appellate judges and laid plain for all to see. The fact that appellate judges themselves have been known to err may provide only limited consolation. Sometimes the matter is taken up by the press and public, and the publicity is magnified. In extreme cases the judge may be vilified and threatened, and her family may be affected. The judge may disagree with the charges, but judicial protocol dictates that she sit silent and not respond. None of this is easy.

Judges are also human beings in their relations with their peers. Trial judges sometimes bemoan the isolation of their role. The telephone no longer rings. Day after day they sit on their elevated bench, part of the proceedings of the court, yet utterly separate. Their former friends distance themselves and should they meet perchance, confine the conversation to banalities about the weather. Judges meet their fellow judges for coffee and lunch but cannot fully share their work with them. They carry their burden alone. Such is the nature of the job.

Appellate work, where judges sit in groups called panels, brings a different challenge. Each judge brings his or her own perspective to the problem at hand.

They may not see eye to eye. In fact, they may strongly disagree. Yet professional responsibility requires them to lay out both their own position and the defects they see in their colleagues' positions with utter frankness. Egos may be bruised, tempers tempted. Yet all must pursue the process with respect and civility.

There are stories to be sure, about judicial relationships gone wrong. Thus the story is told in British Columbia of two senior appellate judges who had a falling out. For three years they did not speak to each other. One day, one of them entered the elevator of the courthouse without due care and attention, only to discover his nemesis already there. The two enemies rode up to the third floor in stony silence. The doors opened. The first Justice exited. As he did so he turned and faced his colleague. "I will have you know," said he, "that it is I who is not speaking to you."

Once, many years ago when I was a young and guileless law professor, I found myself seated at a luncheon next to a Justice of the Supreme Court Canada. Searching for conversational opener, I asked, not very originally, what it was like to be a Justice of the Supreme Court Canada. "My dear," he said (you were allowed to say such things then) "it's a little like being married to eight other people, except you don't get to choose them."

The recent biography of Chief Justice Brian Dickson, the celebrated lawyer and judge who practised and graced the Bench in this province before going on to the Supreme Court of Canada, offers insights into collegial relations between members of the Supreme Court Canada during the very difficult decade after the introduction of Canada's *Charter of Rights and Freedoms*. For me, the picture that emerges is of a team of dedicated human beings who cared enormously for their work and for their country and routinely put them ahead of their personal concerns. The pressures they worked under were great, their personalities strong and diverse. Sometimes their approaches differed and tensions bubbled to the surface. But the collegial dialogue continued, as it ought to have. At the end of the day they were always able to put differences and dissents behind them and sit down together to share an idea or a laugh.

I joined the Court in this decade, and it taught me what collegiality is. I learned that it meant encouraging the new judge on the block or relieving the older judge showing signs of weariness. And I learned that it meant sharing work and ideas. As Justice Wilson said to me early on, "The people of Canada are not entitled to nine separate votes. They are entitled to nine votes after each Justice has listened to and sincerely considered the views of the other eight."

Judges are human. They are not living Oracles. They do their work through the human processes of inquiry, empathy and reason. It is not always easy, but most find the rewards far outweigh the pains. Let me conclude my catalogue of judicial myths with this quote from Judge Learned Hand:

“A judge’s life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettyfogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor. These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work. If that were all, his life would be mere misery, and he a distracted arbiter between irreconcilable extremes. But there is something else that makes it – anyway to those curious creatures who persist in it – a delectable calling. For when the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefore made, the impress of his self upon the not-self, upon the hitherto formless material of which he was once but a part and over which he has now become the master. That is a pleasure which nobody who has felt it will be likely to underrate.”¹⁸

That pleasure, coupled with the judge’s knowledge that she is serving the public, makes the challenge of living with judicial myths more than worthwhile.

Conclusion

Having deconstructed the myths of legal certainty, the myth of factual certainty, the myth of the blank mind and the myth of the Judge as Living Oracle, what is left? What role does the judge play? And is that role consistent with democracy?

The judge does not have all the answers. The judge is not a high priest with a direct line to heaven, down which the right answers come tumbling. The judge is a human being. She is learned in the law. She possesses, we hope, qualities of experience, patience, empathy, character and sound judgment. But she is nevertheless a human being, exercising a human function.

Why then do we ask judges to resolve difficult legal issues our society throws up? Because, quite simply, the issues must be resolved. When legal disputes arise, we must be able to resolve them and get on with our business, or governance, or whatever the activity is. We need someone in our society to do

this, and that someone is the judge. Through training, experience and careful selection, we do our best to ensure that our judges are up to the task.

When we abandon the myths that:

there is always: – “one” right legal answer to a dispute;

that there is always – one right factual answer to a dispute;

that the judge’s mind is a blank slate and decide in mechanical non-human ways;

and that the judge is a super-human living oracle;

the judge’s role in democracy becomes clearer.

The judge’s role is the human role of resolving the legal disputes our society throws up as impartially as is humanly possible. This function is basic, not only to justice but to democracy. It is vital to democracy in two ways, one *private*, one *public*.

First the *private* - In a democracy, citizens are entitled to bring their disputes and claims before an impartial arbiter with full confidence; the judge will decide the issue impartially, without fear or favour.

Second the *public* – In a democracy, there must be an institution which settles disputes about the lawful exercise of government powers, when citizens challenge that exercise.

Is a law passed by Parliament or federal exercise of executive power within the federal power to pass under s. 91 of the BNA Act? ;

Is a law passed by a Legislature or provincial exercise of executive power within the provincial power under s. 92 of the BNA Act?;

Is a law of either Parliament or the Legislature or the action of a government agent in conformity with the fundamental guarantees of the *Charter of Rights and Freedoms*?

In a *Constitutional* democracy, all power, legislative and executive, must be exercised constitutionally. Someone other than the elected governments –

someone independent and above the political fray and its attendant pressures must resolve disputes about the exercise of this power. That someone is the judges.

This does not mean, as some suggest, that judges are all-powerful. This power, like all public power, must be exercised within the confines of the law and constitution. A number of institutional constraints combine to ensure this result. Judges can decide only those issues that citizens or governments bring before them. Judges have no agendas. Judges can act only within the jurisdiction conferred on them by the law and the constitution. Judges hold Court in public, under the eye of the litigants and the press – the open court principle. Judges must give reasons for their decisions. Judges' decisions are subject to a rigorous appeal process, based on full argument and debate. Judges act with deference to Parliament and the legislatures where they have spoken particularly on complex social issues. On *Charter* issues, Parliament has the constitutional “last word” with the s. 33 Judicial Override, or “notwithstanding” clause.

Finally judges are — and must remain — independent of political and social pressures. Free to decide the case in accordance with the law and the facts — free from — and seen as free from — outside pressures.

These limits, coupled with an independent appointment process, and an effective judicial conduct review process, provide effective institutional checks against judicial excess.

Is the judicial role, thus understood, consistent with democracy? Indeed it is. It is nothing less than the task of upholding the rule of law upon which our democracy is based. Judges, guided by previous decisions and the law, resolve disputes and address uncertainties. In so doing, they maintain law, change law, occasionally strike down law – but always uphold the rule of law. They do this, because that is where the law and duty leads them, conscious as they are of the uncertainties of law and facts with which they work, of their own all too human frailties, and of their vital role in democratic governance.

Notes

1. J. Mortimer, *The Spectator*, August 25, 1990, at p. 14.
2. H. L. A. Hart, *The Concept of Law*, 2nd ed., Clarendon Press, 1994, at pp. 79-99.
3. Lon L. Fuller, “The Forms and Limits of Adjudication”, (1978) 92 *Harvard Law Review* 353, at p. 395.

4. David Pannick, *Judges*, Oxford University Press, 1988, at p.4.
5. *Edwards v. Attorney General for Canada*, [1930] A.C. 124 at 136.
6. Hon. Edward M. Chen, “The Judiciary, Diversity, and Justice for All”, (2003) 10 *Asian Law Journal* 127, at p. 136; Paul Tremblay, “Interviewing and Counseling Across Cultures: Heuristics and Biases”, (2002) 9 *Clinical Law Review* 373, at p. 394; Rupert Ross, “Leaving Our White Eyes Behind: The Sentencing of Native Accused”, (1989) 3 *Canadian Native Law Reporter* 1, at p.2. See also Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, 1991, Volume 1, at pp.17-46.
7. R. F. V. Heuston, *Lives of the Lord Chancellors 1855-1940*, Clarendon Press, 1964, at p. 581 (quoting Lord Campbell).
8. Benjamin N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, 1921, at pp. 12-13.
9. *Id.* at p.167.
10. Canadian Judicial Council, *Commentaries on Judicial Conduct*, Les Éditions Yvon Blais Inc., 1991, at p.12.
11. William Blackstone, *Commentaries on the Laws of England*, Clarendon Press, 1765-69, Volume 1, at p. 47.
12. Ronald Dworkin, *Law’s Empire*, The Belknap Press, 1986, at p.239.
13. Pannick, *supra* note 6, at p. 5.
14. *Id.*
15. *Id.* at pp. 5-6.
16. William J. Brennan, Jr., “Reason, Passion, and ‘the Progress of the Law’”, (1988) 110 *Cardozo Law Review* 3, at p. 9.
17. *Clark v. Florida*, (1986) 475 U.S. 1134, at pp. 1134, 1137 (Burger C.J., concurring).
18. Irving Dilliard, “The Preservation of Personality”, *The Spirit of Liberty: Papers and Addresses of Learned Hand*, Alfred A. Knopf Inc., 1952, at p. 43.