Judicial Neutrality: Introductory Remarks

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If there is one theme woven through this conference, it is that there is nothing static about the concept of human rights. It plays out differently in different eras, in different countries, and in different thinkers. The universal aspect of the theme is that it is always preoccupied with how to make sure that no one is unfairly kept away from society's opportunities. That means that human rights are always about how to change the distribution of power, and that in turn means that some people who thought things were fine the way they were, are going to resist changes they may neither understand nor like. Either way, almost no one is without views in this area, often intensely strong ones.

Most lawyers and judges thought very little about human rights laws until they were transformed from statutory rights protected by Human Rights Codes, into constitutional rights guaranteed by the Charter. For many, this introduced a whole new language into the justice vocabulary, and a whole new way of understanding what the public expected from the justice system. It also, in fact, introduced the judiciary to the public, a public no longer shy about asking the Emperor what he was wearing, now that their expectations for social justice have been constitutionalized and left in the judiciary's interpretive care.

This posed an interesting and ultimately illuminating dilemma for judges. They, who had always seen themselves as part of an institutional division of labour with the Legislature that left Parliament to the people and judges to the law, were now obliged to acknowledge that the people and the law go together. This meant that we, as judges, had to do some serious thinking about who we were and how to maintain our balance. Our hallmarks were independence, neutrality and impartiality, concepts we hardly ever thought about when we were interpreting contracts, awarding damages, or instructing juries. Perhaps we *should* have thought about them, but we didn't. We *presumed* our neutrality and it was a presumption the public happily attributed back to us.

But now the public, armed with newly awarded constitutional rights they took very seriously, thought neutrality was not good enough. What they wanted to know was how informed we were, not so that we could be neutral, whatever that meant, but so that we could be *fair*.

How much did we really understand as judges about the world we were being asked to judge, the public wanted to know, and what were we doing about re-examining our institutional traditions so that we could be truly open-minded when listening to these new kinds of claims? Were we taking advantage of the opportunity given to us by the constitutionalization of human rights to reappraise and update our role to ensure our

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ongoing credibility, or were we hiding behind the old scripts to protect ourselves from expectations we either feared or misunderstood?

This is the challenge of this morning's panel. How do we integrate the concepts of neutrality and impartiality with our new judicial assignments under the Charter, and how do we respond to the revised public expectations which flow from the new rights and aspirations they legitimately inspire?