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DRAFT OF PAPER FOR C.I.A.J. PANEL AUGUST 23, 1986
ON THE ART OF CREATING LAW - JUDICIAL LEGISLATION
(DICTATED BUT NOT READ)

by

Mr. Justice P. Meyer
Superior Court of Quebec

Let me start by apologizing for being unable to be present due to an urgent matter which obliged me to cancel at the last minute. Unfortunately, I had no text for distribution in advance, but I have tried to put together an outline at the last minute, with the help of Mr. Justice D.C. McDonald's secretary, which I hope will give some indication of what I intended to say.

The traditional theory of the separation of powers holds that judges simply interpret or apply laws adopted by the legislature (or, in the case of the common law, apply the existing immemorial custom). In France, after the revolution, this theory had an especially important influence and stare decisis is still not formally a doctrine accepted in the civil law system; however the persuasiveness of the rulings of higher courts certainly borders on it. This theory that judges only apply the law is of course a gross over-simplification, but it provides us with convenient pigeon holes. But we are all aware that where the legislative text is ambiguous clearly interpretation can become judicial legislation in virtue of

what amounts to a tacid delegated power. Where the legislature has not intervened as yet in the common law, all law is of course judge made, and while in theory immemorial custom cannot change, in practice it does constantly. Activist judges like Lord Denning just make the law change a little more quickly - perhaps too quickly sometimes. In the case of a written constitution, we are faced with a statute with unusual status and a cumbersome amending process, and such a document bears a certain resemblance to the common law or to a civil code containing broad principles which legislatures have traditionally been reluctant to modify (thus the civil code of Quebec was virtually untouched for 100 years or so after its adoption in 1866, although today it changes constantly like any other statute). These areas give the courts greater scope for original and creative activity.

The courts are the arbiters of our written constitution, this principle having been adopted by us from the United States where it was first enunciated by Chief Justice Marshall in Marbury v. Madison. Prior to the enactment of our own Charter a few years ago our courts constantly ruled on the distribution of powers under the Constitution (one might note here the significant difference in the interpretation of our Constitution as compared with the United States, namely the success of the provinces before the Privy Council in decentralizing legislative power. According to the late F.R. Scott this was due in large part to the influence of

Juda P. Benjamin Q.C., the former Secretary of State of the U.S. Confederacy, who successfully pleaded the provincial cases in London).

No doubt this power of the courts is essential in a federal state like Canada or the United States. It is equally essential where the Constitution includes a bill of individual rights and freedoms like our Charter or the U.S. Bill of Rights. Without such an effective power in the hands of an independent judiciary constitutional safeguards can be meaningless whether the state in question is a unitary or a federal one (e.g. in the Socialist Bloc).

When the Diefenbaker Bill of Rights was adopted by our Federal Parliament, it had no application to the provinces as it was an ordinary federal statute. Perhaps for this reason or because of a long-standing Canadian tradition of judicial restraint, it was interpreted restrictively and narrowly and our courts were much criticized for this. (See address by Mr. Justice F. Kaufman pleading for boldness in interpreting the Charter, published in 1986 McGill Law Journal 456). In an apparent reaction to this criticism, our courts now seem prepared to go very much further in dealing with the Charter in order to avoid charges of judicial impotence and conservatism, and it may well be that the pendulum has swung too far. While

I entirely agree with Fred Kaufman's views in the above mentioned article, a distinction should be drawn between boldness and rashness in the application of our Charter.

We have learned from the legal realists, like Judge Jerome Frank, that the real law is made by the courts who decide the law definitively for the parties before them, and that judges are therefore legislators. The question is, however, how should judges exercise this enormous power? Should it be with restraint, with defference to the legislature or to the presumed validity of governmental action? Or should it be actively, imposing the court's conception of justice, morality, etc. One should note here that judicial activism is neither inherently conservative or liberal. In the United States at the turn of the century various legislative efforts dealing with child labour, hours of labour, etc. were struck down as violations of freedom of contract by interventionists and conservative judges who were judicial activists. In the 1930's much of Franklin D. Roosevelt's programme of progressive NEW DEAL legislation was struck down by the entrenched conservative majority on the Supreme Court over the objections of liberals like Felix Frankfurter, who believed that the courts should defer to the democratically elected legislature in a free and democratic society. Thus one can be politically liberal and judicially conservative at the same time, or vice versa.

Frankfurter felt that the U.S. Congress should have a prima facie right to do what it felt best in the public interest without obstruction by judges who are appointed and not accountable to anyone politically. I venture to suggest that this view may have a great deal of merit. Courts should be careful of nullifying acts of the legislature or of the executive for a number of reasons: The burden on the person seeking redress is heavy; there is a presumption in favour of validity; and there is a presumption that in a free and democratic society what is done by the legislative power is reasonable. In recent years since the adoption of our Charter of Rights I believe we may well have been less careful than we ought in this area particularly in the light of s. 1 of the Charter. It seems to me that in a free and democratic society where the legislative power prescribes limits on any right protected by the Charter, the presumption is strong that the limits so prescribed are reasonable and justified, so long as we accept that our society is a free and democratic one.

We judges claim and declare in our decisions that these embody justice and morality. But where the existence of a right is unclear, the justice or morality of the case is equally so. The great N.Y.U. Professor of jurisprudence, Edmund Cahn, has written of what constitutes a moral decision, and of our inherent sense of injustice, that is, the still

small voice within us that cries out, and this is what used to be called natural law. But is not even this a relative matter? Judges are products of specific backgrounds, upbringings, education, etc., and their views have been influenced by parents, teachers, and colleagues. Their conceptions of justice vary considerably. There are no absolute truths in this area, at least not in difficult or controversial cases. Only in a pure mathematical system with axioms and postulates can we know for sure if a proposition is true or false, as the distinguished Belguim legal philosopher C. Perelman has shown. He noted that this is true even in precise sciences such as physics where ideas change continually. Law deals with what ought to be not what is. The nearest we can get to truth is by way of a consensus of all the recognized experts and authorities in the field. In the case of law this would be the community of judges, lawyers, legal scholars and writers etc. in a given legal system. It is this which influences the individual judge, apart from the binding decisions of higher courts, and which moulds his opinions. But to these influences on the judge we must of course add public opinion, the media, and even our wives. And even where a consensus does exist it changes with time, partly because society itself changes. Thus judges have a duty to be aware of their own inclinations, their unconscious motives or prejudices and they should only innovate with great trepidation.

We have another problem: The United States. We are the tail of the American dog. Since World War II we have become progressively Americanized and the law is no exception. In ancient times culture, language, religion etc. spread through commerce, invasion, conquest, and missionaries. The Black Death came by ship to Genoa from the Black Sea. Today all change in Canada, or at least most of it, seems to originate south of the border. Normal movement is from west to east and south to north with California often the point of departure. This is true whether we are speaking of the sexual revolution, marriage breakdown, drugs, teenage suicide increased crime, prisoners rights, the abolition of the death penalty, no fault divorce, feminism, etc. Much of the American influence is good, but certainly not all. Especially when we look at the behaviour of the United States courts and particularly the decisions of their Supreme Court under the late Earl Warren, much of the change and innovation came as a result of clear evidence, statistics and facts well documented before the courts, showing the existence of serious wrongs to be righted in American society especially in the area of race. Many of the American problems which the courts sought to deal with did not exist in Canada to the same extent. Furthermore the American courts reached their decisions after a careful consideration of the values at stake and the facts proved before arriving at a innovative policy decision.

Black were excluded from voters lists and juries; they were segregated for school and other purposes; blacks were convicted more freqeuently than whites and the penalties imposed on them were more severe. Police brutality and extortion of confessions was documented. Thus for example the American doctrine of "the fruit of the poisoned tree" (which would exclude as inadmissible, for example, clear evidence of guilt legally obtained but as the result of a confession illegally obtained) has an understandable historical basis in the United States, whereas its introduction into Canada might have very serious negative consequences. In addition, there is a time lag in our adoption of U.S. changes or innovations, and often by the time we are enthusiastically jumping on the American bandwagon, our good neighbours to the south are pulling back, realizing that they have gone too far, and that for example capital punishment may not be totally objectionable in all cases, or that no fault divorce may cause serious economic and other problems for women which were not foreseen. All these facts should lead us to tread warily and to impose other constraints on ourselves in interpreting the Charter than the doctrine of stare decisis.

Judges should beware of the temptation to demonstrate publicly how activist and progressive they are, and must not be afraid of being called timorous or ineffectual. We have been delegated a legislative function deliberately in the Charter,

through its well-thought out ambiguities, the empty linguistic vessels into which we must pour the contents. But our power should not go to our heads and lead us to express in our judgments our own personal preferences or predilections. We must not forget Lord Acton's dictum that power tends to corrupt. If we slavishly follow U.S. tendencies without regard to the special nature of our own society, perhaps this may simply be an indication of our low self esteem (previously we may have suffered from the same inferiority complex in respect of the United Kingdom). Our Charter is a truly wonderful thing, but when one sees what some people would like done with it one can understand better the views of Bill Laderman, the former Dean of the Queen's Law School (even though one might still disagree with him) who fought tooth and nail against an entrenched Bill of Rights in the Constitution. In view of our mixed heritage, perhaps it would not be a bad thing to allow British law to continue to influence us as much as U.S. law particularly in view of our parliamentary system of responsible government. In the long run if we are true to ourselves, and not mere immitators, we will, through the Charter, create a better society for all Canadians.

ADDENDUM

Without commenting in any way I should like to cite a few concrete examples which may perhaps illustrate some of the points made above.

1. The Rauca case on the right to remain in Canada in the face of extradition proceedings and the Cruise Missile case, represent a conservative approach, whereas the original decision in Ontario holding that a provincial court judge was not an impartial tribunal because he could be removed at pleasure by the Attorney General clearly went very far in the opposite direction.

2. According to the Montreal Gazette, on July 25, 1986, Judge Sydney Harris of the Ontario Provincial Court struck down a key obscenity provision in the Criminal Code as unconstitutional. He held that s. 159 dealing with a "disgusting object" was an unreasonable infringement on freedom of speech guaranteed in the Charter.

3. According to a press report on July 24, 1986, Judge Maurice Charles of the Ontario Provincial Court recently dismissed charges against a factory carpet outlet, holding that Ontario's Retail Business Holiday Act governing Sunday shopping hours violated s. 2 of the Charter and was unconstitutional. Not only did it violate the guarantees of freedom of conscience and religion but also of s. 15 providing for equality before the law regardless of religious beliefs.

4. Accroding to the Montreal Gazette of August 1, 1986, Mr. Justice Osler of the Ontario Supreme Court recently ruled that the new section of the Criminal Code passed last December banning publication of the location of a search and the identity of those involved without their consent, unless a related charge was laid, was unconstitutional and unreasonably restricted freedom of the press.

5. According to the Montral Gazette, on August 19, 1986, Mr. Justice Galipeau of the Quebec Superior Court held in a proceeding instituted by a prisoner at the Cowansville Penitentiary on behalf of 243 prisoners that the penitentiary service could not make urine tests mandatory in an effort to control the use of drugs in federal prisons, as this would contravene the Charter.

6. In an article in the National for July/August 1986 at page 6 by A. Wayne MacKay the following comment is made:

> "On one final critical note, the history of fundamental freedoms in Canada did not begin with the Charter. A constitutional Charter of Rights has been super imposed on a well-developed parliamentary democracy which emphasized elected parliamentarians and not judges as the primary agents of social change. In this historical context more might have been made of the shift of power towards the judicial branch of government".

7. In an essay in Time magazine August 11, 1986, at page 55, Robert Bork formerly a Professor at Yale Law School and now a U.S. Federal Judge is quoted to the effect that original intent is the only legitimate basis for constitutional decision, for without it there would be no law other than the will of the judge. John Noonan, a University of California Professor, recently appointed to the Federal Court of Appeal warns that activism by the Supreme Court upsets the balance of America's governing powers by siphoning away the legislature's function of creating law, and turns the Supreme Court into a continuing constitutional convention, leaving the nation no rock upon which to stand.

8. The U.S. Attorney General, Edwin Meese, recently addressed a meeting of U.S. and Canadian prosecutors in Toronto. According to the Montreal Gazette, he blamed the Miranda rules dealing with confessions for much clogging of the U.S. Judicial system and commented critically on these and others excluding evidence obtained improperly. He pointed out that the U.S. courts have recently begun to whittle away at Miranda and that the U.S. Supreme Court has now established that if police use good faith or if the violation of the rules is relatively minor the evidence may still be admissible. Thus the American Courts have now introduced the concept of balancing the constitutional violation against the need for public safety.