Some Thoughts About A Liberal Legal Culture: Considering Canada's *Anti-Terrorism Act*, the Constitution and the *HR Revolution*

By Peter L. Biro

The real purpose of laws, then, is to educate the citizen in the common good, and persuade him to behave in the public interest, rather than to command and restrain. - P.E.T.[1]

One of the great paradoxes of the liberal state is that, while citizen participation in the political life of the state is optional on an individual basis and is never coerced, there can be no liberal state without an intellectually vibrant and politically engaged citizenry. Unlike any other political tradition, liberalism depends, for its sustainability, on the notion that the individual members of society will remain continually engaged in the never-ending process of balancing personal aspirations with community objectives and, wherever possible, actualizing one in the pursuit of the other.

The laws have a persuasive and salutary role to play in this process. Participatory democracy in the liberal state requires a constant critical, if not also grudging, compliance with the laws. This compliance respects and affirms the laws, but only provisionally, and only insofar as it results from a genuine belief that such laws continue to educate society's members in the common good and that the individual's own identity and potentialities have the greatest chance of being most fully realized under such circumstances.

The relation of the citizen to its government is nowhere more complex and sophisticated than in the liberal state. This is because there is no social contract more dynamic and more fluid than the contract between and among the citizens of a liberal state. Liberalism is not, unlike other traditions, concerned first and foremost either with hierarchies or with their abolition. It is less ideological and doctrinaire than any other political tradition. It is less preoccupied with any preconceived notion of the "correct" social order and more interested in ensuring that the societal arrangements of the day best protect and promote the interests of all members of society.

But to know best about one's own interests, each citizen has to be encouraged, I dare say, almost "incentivized", into learning, listening, speaking out and taking action. A failure to participate in the political life of one's country leads not only, as Trudeau once suggested while paraphrasing Plato, to being governed by those less fit than oneself to do the job, but worse, it may lead to the imperceptible end of the liberal society *per se*.

There is no snobbery or pretension in this observation. One of the essential purposes of the laws and of the legal system is precisely to foster a political environment in which the individual is

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[1] *Approaches to Politics* (Toronto: Oxford University Press, 1970), p. 50; from the essay , "A State Made to Measure" which appeared in French in 1958 in a collection of Trudeau's essays published by Jacques Hébert in the journal *Vrai* under the title *Les Cheminements de la politique.*

driven to remain engaged in the debates of the day. This can only be achieved in a truly pluralist society; one in which the individual citizen associates or identifies his or her fullest development and self-expression with a particular set of societal arrangements. It can only be achieved, moreover, when the laws and the legal environment do not discourage self-expression; for when they do, that is, when people view social and political expression as manifestly unwelcome, they become anti-social, disengaged, disinterested and apathetic.

The laws really do have a direct impact on the nature and quality of political discourse in our country.

One can speak about law reform, about an agenda for liberalism, for the Liberal Party of Canada, for the country. I am suggesting that such an agenda should be driven by a reminder and a restatement of fundamental liberal principles: pluralism as a cardinal political value, law as a means to protect and empower, but never as a system that silences voices and stifles expression. We must reaffirm our preference for a legal system and legal culture which encourages us to express who we are, lest we end up with laws which dictate only who we must not become.

The "law reform" agenda in Canada will be a full one for national and provincial governments in the coming years. It will include reforms concerning, *inter alia*, the civil status of the person – e.g., same-sex marriages; radical reform in our laws and policies concerning our aboriginal citizens and peoples; the decriminalization and possible legalization of certain controlled substances, whether for therapeutic or other purposes; revisiting the law governing "compassionate killing", euthanasia and assisted suicide; the overhauling of the entire penal system and the rethinking of traditional approaches to sentencing and punishment in the criminal justice system; expanding the role of alternative forms of dispute resolution in the civil justice system; "internationalizing" Canada's approach to the prosecution of war crimes and crimes against humanity; aggressively addressing the scourge of "corporate" or "white-collar" crime; revamping and modernizing privacy and intellectual property laws to more effectively address the internet and other technological developments; and, perhaps of greatest and most vital importance for any liberal democracy: the "access-to-justice" and legal aid brief[2]. These and so

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[2] The subject of legal aid is deserving of its own conference and volume devoted exclusively to the issues surrounding access to justice. Especially in a liberal democracy, legal aid needs to be explained and understood not merely as a socialized legal defence fund, in criminal cases, or socialized family assistance, in civil family cases, but as a means to convert alienated cynics into citizens. In a pluralist society in which the law and legal institutions purport to recognize the equal moral personality of each individual, the ability to advance one's interests before the courts and other public and private tribunals must be a fully realizable right. In a report of the Canadian Bar Association entitled, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada*, (Ottawa: CBA, February, 2002), the argument for a constitutional right to legal aid is explored in some depth. The CBA has itself made the legal aid brief one of its major priorities. The CBA argues that legal aid is an essential feature of Canadian democracy, that it is required, though not expressly, by the *Charter*, that it is promised in Canada's international commitments, that it is intrinsic to the rule of law. It has called on the federal government to take four main steps to ensure national equity in legal aid: increase its financial contribution to criminal and civil legal aid, lead in negotiations of national standards for legal aid, enact federal legislation on essential legal services, create a national civil legal aid tariff. (www.cba.org/CBA/Advocacy/legalAidAdvocacyResourcekit) We need to support all of these measures. But it is also vital to make the case for legal aid in terms of law, *qua* engine of citizen self-actualization. In her presentation at this conference, Sherri Torjman spoke of "citizen engagement". This must be the ideal, the goal of social justice reform. It is essential that legal aid be understood not merely as a social program for those needing the assistance of the state to protect their own vital interests, but also as a proud institution which

many other important aspects of the law and of our legal system are crying out for attention and reform.

I wish, however, to use these pages to focus on three matters that ought to be of concern to liberals and Liberals alike in Canada. I seize upon these matters precisely because of my liberal preoccupation with the law's ability to liberate and empower the individual and, equally, to intimidate and repress her.

In addressing a colloquium whose guiding mission is the search for the "new liberalism", I cannot help but note in passing that a "new liberalism" must, nevertheless, be a "true" liberalism. In addressing new challenges and in seeking a road map for the future, we ought to consider whether Canadians have always been true, in recent years, to the most timeless principles of liberalism. Have we, in our laws, in our constitution, in our culture, measured up to liberalism's imperatives? I submit that we have not.

In a sense, each of the three matters that I discuss below calls for a reconsideration of the way liberals understand their relation to each other and to government; each offers liberals an opportunity to highlight the uniqueness, indeed, the moral unassailability, of their way of thinking about government and politics - a golden opportunity to differentiate themselves from the "competition" - whether on the battlefield of ideas or in the legislatures on all ends of the ideological and party spectrum. We ought to go back to the well of first principles for some of the most promising "new ideas" that might really take hold in the public imagination. As nothing more than a starting point in the critical self-examination that I propose, here are three projects, among so many other important reforms to be considered, that Canadians can and should be discussing and undertaking:

- Enhancing the legitimacy of our national security protection measures by respecting civil liberties and property rights: Giving the *Anti-terrorism Act* a true "sunset clause".

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has the mandate of demonstrating to otherwise disadvantaged and disengaged members of society that the machinery of the state can actually work for them. It affords individuals the opportunity to actively participate in the workings of the state not merely as subjects of a gigantic and anonymous *Leviathan.* As people are afforded the ability to interact with their fellow citizens and with the state through the medium of an accessible and responsive justice system, they inevitably feel more empowered, less alienated from government - from "the system" - and feel less excluded from participation in the political process. That is, at the very least, one of the working assumptions of theorists of participatory democracy.

We must, in any event, acknowledge that the entire legal aid system is in crisis. Witness the rash of recent "Fisher Applications" which have sought orders compelling the Attorney General to fund legal aid retainers at rates substantially above the current limits set by legal aid. Even when legal aid certificates have been granted, they are frequently refused by lawyers who simply cannot reasonably be expected to provide proper representation at the fixed rates. See both David Gambrill's article, "The floodgate's open", 13 *Law Times*, (Sept. 16, 2002) 1 and Cristin Schmitz's "Trial judges order Crown to pay premiums above current Ontario legal aid rates", 22 *The Lawyers Weekly*, (Sept. 20, 2002) 1. Note the most recent uproar over the Ontario Government's decision to resort to duty counsel and the much criticized public defender system in lieu of a properly funded legal aid system in which individuals would have the right to be represented by counsel of their own choosing. This crisis will not go away. It must be understood as a "social justice" issue - akin to health care - which will require a substantial commitment of funds on the part of both provincial and federal governments.

- Acknowledging our political maturity: Repealing Section 33 of The *Charter*.

- Reconsidering the HR revolution: Giving people the freedom to speak again!

In entertaining these projects, we can begin to correct our recent deviation from the liberal path. The search for the new liberalism entails, at least in part, an acknowledgment of our betrayals of the true liberal tradition.

1. Enhancing the legitimacy of our national security protection measures by respecting civil liberties and property rights: Giving the Anti-terrorism Act a true "sunset clause".

In October 1970, faced with what it said was an "apprehended insurrection" in Quebec, the Trudeau government invoked the *War Measures Act* and effectively instituted a state of martial law. The *FLQ* was the terrorist face of Quebec separatism and Trudeau would not miss the opportunity to use the might of the state to smash this particularly hated enemy from within. Ultimately, this internal security threat - which Trudeau did not, after all, fabricate, whether or not one accepts the view that his government misled Parliament and the Canadian public as to the actual existence of an "apprehended insurrection"[3] - gave the Prime Minister an opportunity to dispel any notion that the ugly nationalism against which he had railed throughout the 1950s and 60s would make any inroads through violent means. That nationalism, manifesting itself principally in the movement for Quebec secession and sovereignty, would have to make its case through the peaceful, though sometimes duplicitous, process of constitutional reform and through democratic political discourse and the use of democratic institutions.[4]

What is clear is that the government of the day characterized the situation as one of national emergency and it reacted accordingly, invoking the use of emergency powers and conducting government business in a fashion that signalled that the extraordinary - even if over-reaching[5] — use of the *War Measures Act* was, as the law required, both provisional and temporary.

On September 11, 2001, the twin towers of the World Trade Center in Manhattan succumbed to the evil of international terrorists who had as their professed target the very foundations of Western liberal democracy.

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[3] See Reg Whitaker, "Apprehended Insurrection? RCMP intelligence and the October Crisis", *Queen's Quarterly* 100:2 (Summer 1993) pp. 383-406.

[4] The subsequent use by a succession of Quebec governments of the *notwithstanding clause* (s.33 of the *Constitution Act, 1982*) in the service of that nationalism certainly calls into question the legitimacy of those institutions and the quality of their democracy. This is the subject of the next section of the paper.

[5] The Trudeau government's proclamation into force of the *War Measures Act* in October 1970 has largely been seen to be nothing short of a "remarkable suspension of civil liberties", which would not have been justified on the basis only of the true nature and extent of the threat posed by the "ill-organized FLQ, which could not actually have mounted an insurrection". See Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1977) p. 253. The same passage appears in the subsequent editions of Hogg's opus.

On October 15, 2001, the *Anti-terrorism Act*[6] had its first reading in the House of Commons. On November 28, it was passed by the House of Commons and on December 18, it received Royal Assent, with most of its provisions coming into force on assent.

I do not propose to debate the wisdom of or the need for a powerful, decisive and extraordinary government response to the threat of terrorism, international or otherwise. It is not a question. Nor do I doubt the good intentions of Western countries who are reacting, even if they are over-reacting, to President Bush's demands that they all fall into line, lest the downing of the towers become a foreshadowing of the collapse of civilization as we know it.

But among my deep concerns about Canada's legislative answer to the insecurities of a post-9/11 world, is that there is really nothing provisional or temporary about it. Notwithstanding the celebrated "safeguards" - including a mandatory three year Parliamentary review - contained in the statute, to which subject I shall return, the *Anti-terrorism Act* is, unlike the proclamation of the *War Measures Act* and the *Public Order Regulations* which were revoked on December 3, 1970, unquestionably intended to be a permanent feature of our legal landscape.

It is difficult to think of any piece of legislation of the magnitude and with the sweeping impact of the *Anti-terrorism Act* that was introduced and brought into force and effect with the lightning speed with which Bill C-36 became law. In a matter of weeks, the House of Commons was presented with legislation that amended some seventeen statutes with consequential amendments to an additional five statutes. It would be inaccurate to charge the government of the day with ushering the draft legislation through Parliament without entertaining debate and criticism. A number of well-considered submissions were made to the House of Commons Standing Committee on Justice and Human Rights[7], and scholars, human rights experts and advocates as well as parliamentarians spoke out on the need for important amendments to the bill[8]. Unfortunately, many of the most important recommendations from a variety of well-respected authorities failed to find their way into the final version of the bill.[9]

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[6] *Bill C-36 - An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism.* (S.C. 2001, c.41)

[7] Among the most compelling submissions were those of The British Columbia Civil Liberties Association (November 7, 2001), the Canadian Bar Association (October 2001), and the Canadian Jewish Congress (November 6, 2001).

[8] Professor Irwin Cotler, M.P. in particular, has managed to be all of these things.

[9] Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in R.J. Daniels, P. Macklem and K. Roach eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill,* (Toronto: University of Toronto Press, 2001) at 111; Cotler, "Constitutional Democracy: Balancing Security and Civil Liberties, CIAJ Conference, *Terrorism, Law and Democracy: How Is Canada Changing Following September 11th*, (Montreal: March 25-26, 2002); Don Stuart, "The Anti-Terrorism Bill C-36: An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System", CIAJ Conference*, Ibid.*; Errol Mendes, "Between Crime and War: Terrorism, Democracy and the Constitution", CIAJ Conference, *Ibid.*; Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s.25 of the Charter", in *The Security of Freedom supra*; Bnai' Brith Canada's report on Bill C-36 (November 6, 2001).

I wish to address, from a broader perspective, the nature of this legislation. We must appreciate that the *Anti-terrorism Act* is no ordinary bill. It does not merely aim, in modest and unobtrusive fashion, to repair minor social, political or economic ills facing the nation. It does not and cannot purport even to resolve the problem at which it takes aim. That would be too smug and presumptuous a claim. It does, however, make one of the more ambitious commitments contained in any piece of drafting to come off the government printer in recent times:

> Whereas the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights and Freedoms* . . .[10]

There can be no question that, in order to deliver on such a commitment to both security and freedom jointly, acknowledging that this commitment is based upon the recognition that people everywhere "are entitled to live their lives in peace, freedom and security"[11], there will have to be some accommodating, compromising and balancing between security and freedom. It may be worth noting the subtlety of the language in the recital. It does not undertake to guarantee absolutely the rights and freedoms in the *Charter*. It undertakes to "respect and promote the values reflected in, and the rights and freedoms guaranteed by" the *Charter*. This is important because it demonstrates Parliament's recognition that *Charter* rights will be abridged by the legislation, but only in accordance with the principles of fundamental justice, and only in accordance with the principle, which I discuss in the next part of this essay, that rights can be legitimately limited only once their primacy and inalienability have been expressly acknowledged. The Department of Justice states that the government,

> . . . has taken steps to combat terrorism and terrorist activities at home and abroad. . . .The new package of legislation creates measures to deter, disable, identify, prosecute, convict and punish terrorist groups. . . . It provides new investigative tools to law enforcement and national security agencies; . . . it ensures that . . . the root causes of hatred are addressed through stronger laws against hate crimes and propaganda.[12]

A few inconveniences might have to be suffered, a few sacrifices made, in order to deliver on the promises contained in this "package of legislation". The legislation is replete with abridgments of both procedural and substantive *Charter* and other rights and freedoms. In an effort to ensure that no stone would be left unturned in the fight against terrorism, Parliament has, calmly - and without too much fuss - laid the groundwork for permanent war-time government in a time of

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[10] From the preamble to the statute. It is perhaps worth noting that the drafters have sought refuge, rightly, in the jurisdictional haven of the "national concern" branch of the Peace, Order and Good Government (P.O.G.G.) power in s. 91 of the Constitution Act, 1867.

[11] The first recital in the preamble is, in a way, even more powerful, for it acknowledges the right of all people to "live their lives in peace, freedom and security".

[12] This "Backgrounder", which I have paraphrased in places, appeared on DOJ's web-site following the coming into force of the legislation – www.canada.justice.gc.ca/en/news/nr/2001/doc_28217.html .

peace. In other words, the legislation, in my submission, has reconfigured some of the basic operating principles of our legal framework. If we are to accept this reconfiguration, we had better first understand what it means.

But this essay assumes this startling proposition to be true, rather than demonstrating that it is the case. I can only point in a general way to some of the features of the legislation that produce this worrisome result, while also directing the readers' attention to the submissions and essays referred to in footnotes 7 and 9 herein.

The *Anti-terrorism Act* casts a very wide and, in my submission, indeterminate net in its definition "terrorist" activity.[13] The non-discrimination principle in the provision designed to protect minorities is inadequate and opens the door for such methods as racial profiling as a standard means for fighting terrorism.[14] The provisions dealing with preventive arrest and detention are intricate and create potential uncertainty as to the duration of the period of detention.[15] The power of the Solicitor General to list "terrorist" groups and organizations is far too arbitrary, sweeping and lacks a sufficient system of accountability and due process.[16] The powers to freeze, seize and forfeit property[17] are absolutely awesome and, particularly as they affect innocent third parties with otherwise valid interests in the property of alleged terrorists or even of unwitting facilitators of terrorist plots, they cut deeply into liberal conceptions of property rights. Moreover, particular note must be made of the provision which obliges all Canadians, indeed, all persons, to report their own possession, custody or control of any terrorist property[18]. This will require such persons/ all persons to make a determination as to the scope and content of "terrorist activity" and to conduct their own due diligence for the purpose of complying with the law. Moreover the disclosure requirements in the statute may well undermine solicitor-client privilege and confidentiality.[19]

I will say that the reconfiguration of operating principles to which I refer above is as much about how we view ourselves in relation to the state as it is about the minutiae of the legislation itself. In the climate of fear which ensued following the devastating events in New York City and the subsequent war conducted from caves far far away from Urban Anywhere, we have acknowledged that we are prepared to compromise a great deal of the liberties on which a truly liberal state is founded. That is to say, we are prepared to postpone our enjoyment of those liberties in the interest of ensuring that we will be able to reclaim them in the future, not as

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[13] S. 83.01.

[14] See Cotler, "Constitutional Democracy: Balancing Security and Civil Liberties" *supra.*

[15] S. 83.3. See Gary Trotter, "The Anti-Terrorism Bill and Preventative Restraints on Liberty", in *The Security of Freedom, supra* at p. 240.

[16] Alan Borovoy framed the problem aptly in his article, "Security's Serpentine Coils", *Globe and Mail,* August 1, 2002, when he stated: "Although such action requires "reasonable grounds", it does not require the government to convene a hearing or produce any evidence. In addition to being stigmatized, perhaps irreparably, those on the list are headed for financial ostracization. The rest of us are explicitly prohibited from dealing with their property".

[17] Ss. 83.08 - 83.17.

[18] Ss. 83.1 and 83.11.

[19] Ss. 83.1 and 83.28.

abstract symbols of our potential as free moral persons, but as the mundane load-bearing girders in the infrastructure of the towers that we inhabit daily.

We have to know that we will get all of our rights back; that is, that the rights and freedoms which might currently be classified as conditional or as being in animated suspension, but which, nevertheless, remain "ours", must be reclaimed. And to those who say that the tenuous and conditional suspension of those rights is now a permanent fact because the conditions of national and international security, or rather, of *insecurity*, are permanent features of our universe, we must respond by saying, "be that as it may, give us back our freedoms so that we can, if reasonably necessary, again agree to forebear from exercising them for a period of time".

The legislation provides for a qualified "sunset clause" only in respect of the powers concerning investigative hearings and preventive arrest[20]. But even then it is not a true "sunset" clause, for it gives Parliament the ability to extend the application of such powers by resolution.

There is no "sunset clause" whatsoever in respect of the remainder of the legislation. There is only a requirement that a Parliamentary committee review the *Anti-terrorism Act* as a whole in three years and that such committee submit a report on the review to Parliament within a year after that review is undertaken[21]. There is also a requirement that the provincial and federal Attorneys General and Solicitors General report annually to Parliament on the use of the preventive arrest and investigative hearing provisions in Bill C-36[22].

We must, as so many have demanded from the outset, have a true "sunset clause", that is, a clause which brings this extraordinary legislation to a close so that we can, if so advised, debate the merits of it all over again. There are certain matters that need to be revisited, restated, repeated and ultimately, reversed. Any law that tampers with the enjoyment of the rights and freedoms that underpin our way of life, however well- advised it may be, must be required to make the case for itself over and over and over again, if necessary and appropriate.

In one of its press releases calling for a tighter definition of "terrorism" and a "true sunset clause", the Canadian Bar Association issued the following statement:

> The CBA acknowledges that there is pressure to pass the legislation quickly. "We believe that quick passage must be accompanied by a sunset clause," says the CBA. "Given the far-reaching nature of the Bill, we need more than a review. If Canadians can be assured that the provisions in the legislation are temporary, they will accept them in this period of immediate response to an extraordinary threat."[23]

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[20] Ss. 83.28, 83.29 and 83.32.

[21] S. 145.

[22] S. 83.31.

[23] "CBA Calls for Tighter Definition of Terrorism, True Sunset Clause in Bill C-36", (October 31, 2001)

In a liberal society we must adopt an attitude of active impatience with measures that we willingly accept as restrictions on our rights and freedoms. We must be eager always to revisit the grounds on which we provisionally sacrificed the recourse to and exercise of our liberties, particularly when that entails relinquishing power over our liberties to agents of the state.

Moreover, as discussed more fully in the last part of this essay, we are conditioned by the laws we enact and live under. Our ability to think and speak critically about our own best interests depends upon the encouragement that we receive and the freedom we enjoy to do so. This is the sense in which I refer to law as being either engine of citizen self-actualization or instrument of stagnation and repression.

We must insist on a true "sunset clause" in the *Anti-terrorism Act*.[24] Liberalism, whether "new" or tradional, demands nothing less.

2) Acknowledging our political maturity: Repealing Section 33 of The Charter.

It has been twenty years since the *Canadian Charter of Rights and Freedoms* was entrenched in our Constitution. Over these last twenty years our courts and tribunals have had ample opportunity to exercise their supervisory responsibility in respect of legislative compliance with and conformity to the principles enshrined in the *Charter*. During this period, our nation's highest court has produced a rich and voluminous jurisprudence both defining the substantive content of the rights and freedoms enumerated in the *Charter* and developing the test for determining whether government measures or actions which limit or restrict those rights and freedoms do so in a manner that can be said to be "reasonable" and "demonstrably justified in a free and democratic society".

The balancing of individual rights and freedoms with the state's interest in measures which result in the compromising of those rights and freedoms is no mundane judicial exercise. Prior to the introduction of the *Charter* to our legal system, judges were generally unfamiliar with this kind of balancing act. Prior to 1982 the principal constitutional doctrine to which the courts resorted in order to strike down or limit the effect of legislation which jeopardized basic civil liberties was the doctrine of "legal federalism", which entailed rendering nugatory laws which were inconsistent with the distribution of legislative powers between Parliament and the provincial Legislatures as enumerated in the *B.N.A. Act*. With the possible exception of the "Implied Bill of

[24] The CBA has recommended that the "sunset clause" apply not only to the power of preventive arrest, but also to the listing of entities provisions, the wiretap authorization provisions, the provisions pertaining to the *Access to Information* and the *Privacy Act,* and the provisions pertaining to the non-disclosure of evidence against a person or entity. CBA Release (December 6, 2001). I would also insist on extending it to the provisions dealing with freezing, seizing and forfeiture of property.

Rights Doctrine"[25], civil liberties had little or no express constitutional standing and the defence of civil liberties generally had to be undertaken on the jurisdictional battlefield.

But for twenty years now, our justices have been refining and applying the test that must be met by the party seeking to justify the right-limiting measure — i.e., the state — in order to save it from being judicially disembowelled. For twenty years our courts have been striking down laws that infringe the rights and freedoms enumerated in the *Charter* but they have also been sparing those laws that could be demonstrated to have met the elaborate test developed under section 1 of the *Charter*. The essential feature of the test is that it requires the limitations on the rights and freedoms at risk to stand or fall based upon the state's ability to establish that the substantive limiting measure is necessary in order, ultimately, to advance the aims of a free and democratic society. In other words, the test is not whether some other legislative objective is more important or valuable than the rights which will be restricted, but whether the restriction of the rights in the particular instance of the measure under review is justifiable on the basis that this will contribute to the growth and preservation of a society which is ultimately founded upon a respect for individual rights and freedoms and for the equal moral personality of each member of that society.

A good deal of judicial ink has been spilled fashioning and applying the "Section 1 Test". The principle of proportionality between the importance and the salutary effect of the right-limiting measure, on the one hand, and the nature and seriousness of the deleterious effect of that measure on the rights and freedoms at issue, on the other hand, has become as central a feature of our constitutional landscape as is the text of the *Charter* itself into which this principle has breathed life.[26]

Section 1 is a magnificent text, both as a work of elegant and noble prose, but also as a masterpiece of nation-building. Section 1 both guarantees the rights and freedoms set out in it and stipulates the sacred formula for regulating all government measures which limit those rights and freedoms.[27] Section 1 is where democracy finds its highest expression in our Constitution; not in the provisions granting suffrage; not even in the democratic rights provision of section 3 of the *Charter* itself. For it is in section 1 that we acknowledge our governments' power over the scope of our liberties, but only in circumstances in which that power ultimately respects and preserves those liberties.

It is lamentable that, some thirty-two sections further into the document, we find the lowest form of "democracy" expressed in our Constitution. Section 33, the infamous *notwithstanding clause*, sits there as a reminder that there were those among us, when this *Charter* was crafted, who

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[25] It was perhaps only for one brief shining moment that this doctrine was given its due, and even then, its champions, Abbott and Rand JJ. gave expression to the doctrine only in *obiter*. The case was *Switzman v. Elbling*, [1957] S.C.R. 285.

[26] The seminal case is *R. v. Oakes*, [1986] 1 S.C.R. 103, with an important refinement to the proportionality test coming later in *Dagenais v. CBC*, [1994] 3 S.C.R. 835.

[27] Section 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society."

believed that democracy was not linked to inalienable rights and freedoms. There were those who believed that, in certain circumstances, if the will of the people clashed with the rights of the people, then will should prevail over rights.

Section 33 confers on Parliament and the Provinces the power to declare that legislation which abridges the fundamental freedoms, legal rights and equality rights of Canadians - indeed of all persons situate in Canada - shall operate notwithstanding the provisions which entrench those rights and freedoms in the *Charter*.[28]

The conceptual bifurcation and divorce of individual rights from legislative supremacy was one of the great fallacies in the so-called democracy argument and, but for the historical fact that section 33 was the ransom that had to be paid to the *Charter's* kidnappers lest the captive foetus be stillborn, it is not an article of the Constitution that we should reluctantly embrace and diligently interpret over time. Instead, section 33 is a blight on our Constitution and we should get rid of it.

There have been many accounts of the events and political machinations behind the deal that gave Canada a *Charter* with a notwithstanding clause[29] - and I need not revisit those events since a number of the participants in this weekend's proceedings were actually there - but one thing about the birth of this override clause should be clearly stated. Both for its opponents and for its proponents it was understood as being antithetical to section 1 and to the idea that rights and freedoms must never be limited except in the service of a liberal state founded on the primacy of those very same rights and freedoms. The notwithstanding clause made a mockery of the whole notion that rights could not be restricted unless the restrictions were justified and defended, explained and accounted for, and not just in political terms.

But our courts have now spent almost twenty years holding governments to account and administering the test that must be passed by governments seeking to limit the rights and freedoms of Canadians. Our Supreme Court has required governments to show that there is a matter of sufficient importance that warrants overriding protected rights and freedoms. It has required Parliament and the Provinces to demonstrate that there is a rational connection between the legislative objective and the limiting measure, that the limiting measure under review impairs the right or freedom at issue as little as possible, and that there is proportionality between the

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[28] The fundamental freedoms are set out in s. 2 and include freedom of conscience and religion, of thought, opinion and expression, of assembly and of association. The legal rights set out in ss. 7-14 include the right to life, liberty and security of the person as well as all of the most sacrosanct procedural protections that underpin all civilized notions of the rule of law and all liberal criminal justice and law enforcement systems. The equality rights set out in s.15 have been the subject of numerous critically important judicial decisions; they have been at the core of a substantial number of social reforms and have, perhaps more than any other aspect of the *Charter*, influenced not only law-making in this country, but also - for better or for worse - the conceptual framework in which we think and speak about rights.

[29] Stephen Clarkson and Christina McCall compellingly describe these events leading up to the Faustian bargain in *Trudeau And Our Times - Vol. 1: The Magnificent Obsession* (Toronto: McClelland and Stewart, 1990), pp. 357-386.

importance and salutary effects of the limiting measure, on the one hand, and the deleterious effect of that limiting measure on the right or freedom at issue, on the other hand.[30]

Having for so long subjected the exercise of state authority to such rigorous standards of review when rights and freedoms were at risk, it is simply unconscionable, at this stage of our political maturity, that we should tolerate, in the name of democracy or regional distinctiveness, the possibility of a constitutionally approved resort to a device which enables our legislatures to unilaterally insulate their laws from scrutiny under section 1.

The use of the notwithstanding clause in 2002 is the political equivalent of an athlete on performance enhancing steroids in a sport that has not yet banned the use of such drugs. It is simply no longer morally acceptable or even politically defensible to maintain this provision anywhere in the Constitution. We don't need it. It doesn't safeguard democracy or the supremacy of legislatures; it diminishes the integrity and undermines the legitimacy of the institutions that would invoke section 33 for any purpose.

We already have constitutional doctrines that enable Parliament to act dramatically and decisively in circumstances of national emergency or where the nation's security is in peril[31]. And in developing the section 1 test, our Supreme Court has demonstrated that the Constitution permits restrictions on rights and freedoms in circumstances in which the state is able to make the case that, while such restrictions provisionally deprive individuals of the full exercise and enjoyment of those rights and freedoms, they are imposed with complete and utter respect for the moral personality of each individual who is required to bear the burden of the limiting measure. This is because section 1 requires the justification of the limiting measure to be made only once it is determined that a constitutionally protected right has been infringed. The acknowledgement of that infringement, however grudging it may be on the part of the lawyers for the state, is one of the cardinal distinctions between the operation of section 1 and the invocation of section 33. For the resort to section 33, even with its five-year sunset clause, amounts to a denial, however provisional it may be, of the very existence of the rights and freedoms that are expressly overridden.

Many will insist, nonetheless, that it is naïve, if not just politically foolhardy, to speak seriously about constitutional reform at this time in our nation's history . After all, Quebec separatism is on the wane and talk of removing section 33 will only raise the nationalist ire of the only Province to have regularly invoked it in the name of cultural preservation, if not also political sovereignty. The Constitution does not even figure on the radar screen of public opinion at this time. Talk about the Constitution is divisive, detrimental to national unity, they will say, and, frankly, it is one of those issues that is just too abstract to sell on page one of the next Liberal Party Red Book.

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[30] This is but a crude synopsis of the marvellously crafted test that has been painstakingly worked out in *Oakes* and later refined in *Dagenais* and other cases.

[31] For example, section 91 of the *Constitution Act, 1867* gives Parliament the power "to make Laws for the Peace, Order, and Good Government of Canada", and the courts have developed a "national concern" and an "emergency" branch of the POGG power.

Yet there are few issues of principle that should never be permitted to drop off the page of any truly liberal policy agenda - even if it is just to say: "This is what we stand for. If the country isn't "ready" for reform today, we will come back to this soon, once we have made the case more adequately, once we have earned the trust and gained the support of our compatriots in the West and in Quebec." And to those who say that this position is condescending to or dismissive of the "regions", I say that we are nation-building and section 33 does not enhance the uniqueness of the regions, it divides and fragments the nation. A strong nation in which no government can establish "freedomless" jurisdictions, even provisionally, need not be one that is hostile to the regions or to the project of preserving and promoting diversity "distinctness".

Once Canadians understand that we are demonstrating the profoundest and highest respect for their individuality and their equal moral personality, once we show them that this enhances the quality of their citizenship and boosts the esteem in which their political institutions and leaders hold them, we will have little difficulty talking over the heads of the demagogues in democrats' clothes who are most inconvenienced by freedom's supremacy and who purport to speak for "ordinary Canadians"[32].

As the philosopher, John Rawls, argued in his seminal treatise on justice, certain matters are simply not within the government's competence as defined by a "just constitution".[33] In light of the true majesty of the text of section 1 of the *Charter* and of the heroic work that our Supreme Court has done to give full effect to the intention of that text, we must surely be convinced that democracy in Canada has reached a level of maturity that makes the continued existence on our books of section 33 seem silly and unnecessary at best and absolutely patronizing, insulting and disrespectful of our equality as moral persons at worst.

Therefore, let us work towards a consensus among "extraordinary Canadians" on the imperative of repealing section 33 of the *Constitution Act, 1982*. We are surely now mature enough to acknowledge what we knew at the time of the Patriation of the Constitution, that the complete

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[32] If we would only stop talking about and making a virtue of "ordinary Canadians" and start convincing each and every Canadian just how EXTRAORDINARY he or she truly is or can become, maybe we might be able to elevate the level and quality of political discourse in this country. Let the NDP keep talking to and about "ordinary Canadians". We need to start treating people with greater respect for their extraordinary qualities, talents and potentialities.

[33] I refer to Rawls' first edition of *A Theory Of Justice* (Cambridge, Mass.: Harvard University Press, 1971), in which the original thesis was first published in one comprehensive volume. It would be foolhardy to purport to summarize the argument or to identify the one passage which can be singled out as authority for the proposition asserted above. The text of *A Theory Of Justice* is replete with references to a "just constitution", including on page 212 of the edition cited herein, in which Rawls states that "the government has no authority to render associations legitimate or illegitimate any more than it has authority in regard to art or science. These matters are not within its competence as defined by a just constitution." This follows a chapter in which Rawls discusses the priority of liberty in the context of freedom of conscience, explaining that the reasoning here can be generalized to apply to other freedoms. There can, Rawls posits, be no compromise of one's religious, moral or philosophical interests unless there is no alternative. See Rawls' discussion of this in the context of his "original position" at p. 206. Perhaps no thinker in modern times has more comprehensively and systematically worked out a theory of rights and social justice ("liberal" or otherwise).

abrogation of rights and freedoms that is contemplated in section 33 is simply not within the competence of our governments as defined by a just and truly liberal constitution.

3) Reconsidering the HR Revolution – Giving People the Freedom to Speak Again!

We have done an admirable job - though not a perfect one by any means - of reversing the tide of sexism, racism and discrimination in the workplace and in our society. Let me not be taken to mean that these scourges are not still with us. But we can be proud of the fact that we have made a concerted effort to educate each other about the pernicious nature and effects of these ills. In so doing, we have sought to make our workplaces environments in which, for the most part, people of all races, religions, ethnic backgrounds, genders, and sexual orientations and people with various disabilities and special needs and challenges can come to work knowing that their differences and particularities must not make them especially vulnerable to abuse and must not disadvantage them in matters concerning their security of tenure, their opportunities for advancement and the quality of their work environment. People understand that there are laws, which protect them against abuse, and discrimination and they understand that there are recourses available to victims of such mistreatment and adverse consequences for those who commit the impugned acts.

Walk through the warehouse, the mailroom, the offices, the coffee stations and the washrooms of most workplaces and there is a good chance that you will see, posted on the wall right next to the fire safety and emergency procedures and the workers' compensation accident reporting procedures, a copy of the sexual harassment policy or the employee code of conduct. Increasingly, employers are producing employee handbooks and policy manuals containing elaborate policies and directives with respect to behaviour in the workplace. These policies tend to go far beyond a restatement of the basic principles of non-discrimination set out in our human rights legislation. They tend to be proactive in the extreme, sometimes even anticipating every imaginable scenario in which some employee might be made to feel uncomfortable, offended, insulted, embarrassed or otherwise inconvenienced. Some workplaces even have policies purporting to govern and restrict the sorts of relationships fellow employees are permitted to engage in with one another – even on their own time.

The HR Revolution to which I refer is not the "Human Rights" revolution, though that is the *sine qua non* of the revolution in question. It is what I refer to as the "Human Resources" revolution that followed and that was itself spawned by the human rights revolution. This is the HR Revolution that should be great cause for concern and that, in my submission, offers one of the most instructive examples of the power of the laws to both "educate the citizen in the common good, and persuade him to behave in the public interest" and also to discourage genuine discourse. It offers an example of that power of the laws gone awry. The HR Revolution took its cue from our human rights laws. But then, in an atmosphere of fear and paranoia - nudged on by U.S. court decisions awarding millions of dollars in damages to complainants whose bosses had taken quite inappropriate liberties with them - anticipating litigation and human rights complaints at every turn, HR departments began to legislate behaviour in the workplace on a scale and to an extent not expressly required or even contemplated in any of the actual human

rights statutes. Dress codes were introduced to proscribe potentially offensive attire; protocols of behaviour and procedures for every conceivable situation in the workplace were developed.

Now the workplace is, indeed, a relatively safe place to be. The glass ceiling, while not yet completely eradicated, is a great deal higher than it had previously been. The demographics of the average workplace scream "diversity" in every way. And individuals are far less frequently singled out for unfair or discriminatory treatment by virtue only of their distinguishing particularities.

But this HR Revolution has claimed its own victims: Individual self-expression and political discourse. The culture of compliance and docility in the workplace, where most Canadians spend the better part of their waking hours, has now trickled out into our homes, our streets and our legislatures. The "right to be heard", that sacred legal principle of procedural fairness, while still very much alive in our courts and tribunals, has not been reinforced elsewhere because its political counterpart, the "freedom to speak" together with the liberal psychological ideal, namely,the craving urge to criticize, have been neutered in the workplace, mainly by provincial human rights laws. These laws, whether by design or by effect, have virtually legislated the bounds of acceptable speech. "Mainstream" public political discourse has been reduced absolutely and unquestionably to two basic social and political imperatives: "Always say the right thing. But whatever you do, never say the wrong thing."

Without going to the texts of the statutes, one need only peruse sections 3(1) of the *Alberta Human Rights, Citizenship and Multiculturalism Act* and 14(1) of the *Saskatchewan Human Rights Code* for representative examples of laws that prohibit speech which might offend or which are "likely to expose persons to hatred or contempt" or which "tend[s] to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person" based on an enumerated ground of discrimination.[34]

While we must not confuse the human rights revolution with its misguided offspring, the HR Revolution, neither should we confuse it with its natural parent, the civil liberties revolution - which got started sometime between Locke and Trudeau, depending on who you ask. While this may not be the place to offer explanations for the evolution and mutation of laws designed to recognize and protect the moral personality of free citizens everywhere, one thing needs to be made absolutely clear because it is at the heart of the argument here today: The HR Revolution, as well-intentioned as it may once have been, was terribly misguided and became the enemy of civil liberties everywhere, and, therefore, of a liberal society.

What is the relation of the legislated political correctness in our workplaces to the rules that govern political debate elsewhere? It is simply that we have been educated by the laws to be docile, to be quiet, inoffensive, without opinion or conviction on matters of *gravitas*. The expression, in the workplace, of strongly held views on issues of public concern are not merely a matter of "bad form", they verge on being downright unlawful — or so one might be forgiven for

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[34] These provisions were cited a few years ago (with reference to corresponding statutes then in effect) in a bold newspaper editorial entitled "Give Free Speech A Very Long Leash - The law always protected offensive speech until human-rights codes came along". *The Globe and Mail*, (January 15, 1999).

believing. We have surely all witnessed — and participated in — the heated and passionate debates amongst our colleagues over whether the Leafs ought to have pulled their goalie in the dying minutes of the game, or whether Britney shouldn't have slept with Jake on Survivor before first giving Lance back the engagement ring he almost died acquiring while doing a guest appearance on Fear Factor. These sorts of angst-filled discussions are perfectly acceptable in the office or on the shop floor. Why? It is because they are of no social or political consequence. It is because they just don't matter.

But watch icicles form in nano-seconds when someone attempts to talk about something that really does matter. The response to a serious statement about "the human condition", the "state of the nation" or world affairs, which I submit is absolutely a conditioned one — i.e., conditioned by our legal culture — typically ranges from bewilderment and bemusement to plain outrage. Politics is just off-limits altogether in the workplace. People have been chastised and disciplined for talking politics in the shop.

And the consequences of talking politics outside the shop are often even graver.

"9/11" certainly hasn't helped matters one bit either. After "9/11" it has, in some circles, effectively become illegal to express certain thoughts and views, even in the most reticent and equivocal manner. Readers are directed back to the text of the *Anti-terrorism Act*.

When our Prime Minister is lambasted in Parliament for having made a fairly tame and not particularly earth-shattering public pronouncement on the possible connections between terrorism and unconscionable disparities between wealthy and desperately impoverished nations, we can see, first hand, why true liberalism is in need of rescuing. I submit that the distance between the legislated intellectual docility of the workplace and the extreme intolerance for free expression of new and diverse ideas and opinions in our "public squares" and legislative assemblies is a short one.

The first thing we can do about this is to acknowledge the phenomenon. Next, we can agree that this is a real problem for a political tradition whose principal virtue is that it, more than any other tradition, views the state as the product of the "general will" in a way in which the "individual will" finds its fullest expression - yet another paradox of liberalism. And when we bring this home to the Canadian polity, we can see that the political parties that don't identify with the "liberal" brand don't have the same problems that Liberals have. They don't have liberalism's problems because they don't have the Liberal Party's opportunities. It is a real struggle to remain relevant; and one achieves this not by ramming a pre-packaged and out-dated ideology down the collective throat of an already disengaged and weary public. One does it by waking everybody up and inviting them to think for themselves and to talk — out loud — about what they believe. One invites them to ask questions and to suggest answers, explanations and solutions without fear of ridicule or reprisal.

The NDP hovers on the precipice of irrelevancy in this country - although it is now embarking on its own process of renewal and revitalization - because it has remained the voice of a now almost outmoded political correctness, and the voice of a very limited constituency, while failing to offer fresh solutions to the problems of that constituency. The hackneyed call for increased entitlements and more radical distribution of wealth, while perfectly legitimate as part of a more

complex approach to the problems of inequality and disadvantage in our society, has not alone empowered enough people — instead it has only romanticized their perpetual victimization — and has not been heard as a siren call for citizens to become more engaged in the public life of their community.

The parties on the "right" have been self-destructing for some time, but that silliness will not last much longer. And once the "right unites", the challenge will become more obvious: What do liberals have to offer that conservatives don't? Liberalism. Given the current state of political discourse in the suites and in the streets, in the offices and in our House of Commons, liberals and Liberals alike must nod their heads in disappointment, take a look around and then recognize that they can have the entire field to themselves, if only they understand that they must earn it by giving Canadians the freedom - indeed, the will - to speak again . . . everywhere.

The human rights revolution has been a good thing and we would not choose to forsake it regardless of its unhappy by-products, principally the HR Revolution. But we must now acknowledge and deal with the HR Revolution and reverse its life-sapping effect on the body politic. For just as the laws have had the effect, even if unintended, of stifling public discourse, they can equally serve to revitalize discussion and debate.

A commitment to living in an authentically liberal state requires of us that we adopt the liberal attitude to our laws and to our legal culture. The reforms that I have proposed herein and that I suggest should be part of an agenda for Canada in the coming months and years are liberal measures. Canadians must strive to work together to identify and fashion the most suitable means to these fundamentally liberal ends.

If, as a celebrated Canadian Prime Minister once said, to be a citizen of Canada is to be a citizen of the world, then, in an era of global engagement when internationalism and multilateralism are being challenged by the unilateralism of the "hyperpower"[35] immediately to the south, what is really at stake here is the quality of world citizenship.

[35] This description of the United States appears in Thomas Axworthy's essay in this volume, "A Choice, Not an Echo: Sharing North America With The Hyperpower".