"SOME ROOTS OF THE CHARTER AND CHALLENGES FOR TOMORROW"

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Thank you for this opportunity to be a participant in this important conference. Congratulations to Association for Canadian Studies for organizing this event. In the time available to me I would like to touch briefly on a number of points:

1. The practice of freedom has enjoyed a significant success in Canada during the past 140 years, notwithstanding some significant bumps along the way. One thinks of the head tax, Komagata Maru, the internment of Canadians of Japanese heritage, anti-Semitic restrictive covenants and other forms of discrimination. However, successive generations of men and women of goodwill from all corners of the Canada and at various times have risen to the occasion and have made significant contributions to the growing of Canadian freedom. From Macdonald and Cartier through the Labour Convention cases of the 1930s to the work of McGill's John Humphrey, Maxwell Cohen, Frank Scott to John Diefenbaker's Canadian Bill of Rights or the judgments of Justices Ivan Rand, Bora Laskin and of our late friend Walter Tarnopolsky.

2. The table at which Her Majesty Queen Elizabeth II sat on April 17, 1982, in front of the Centre Block on Parliament Hill in order to sign the *Canada Act*, is located now in the office of the Speaker of the Senate of Canada. The table serves as a daily reminder of the work accomplished by many Canadians which led to the repatriation of the

Constitution together with the *Canadian Charter of Rights and Freedoms*. On the wall adjacent to this artifact I have a series of photos from the First Ministers' meetings which made this all possible. And I would invite you when visiting Parliament Hill to drop into the office of the Speaker of the Senate and see this part of the *Charter's* story.

3. The First Ministers' of Canada who held the attention of the Nation in the early 1980s made their contribution to the agreement on the repatriation of the constitution with the *Charter of Rights and Freedoms* concerning which we are considering at this conference. I was particularly pleased with the contribution to that process which Richard Hatfield and New Brunswick was able to make. Indeed without the support of Bill Davis of Ontario and Hatfield the *Charter* would not have come into being.

4. The *International Covenants on Human Rights* ratified by Canada in 1976, with the written support and agreement of all provinces, served as an important inspiration for the idea of a Canadian Constitutional Charter. One of the reasons that Premier Richard Hatfield of New Brunswick supported the repatriation with a *Charter of Rights* was because he understood that the standard of human rights provided for by the *Covenants* already imposed human rights obligations upon Canada. We attempted to underscore the fact of this

previously written agreement on a human rights standard. That effort was very difficult.

5. The high standard of the *Covenants* in comparison with the *Charter* is worthy of recollection. During this current period of anti-terrorism legislation, it is instructive to recall the provisions of Article 4 of the *International Covenant on Civil and Political Rights* which clearly articulates the non-derogation of certain rights even in times when the life of a nation is threatened.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other

> States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

6. The *Covenants* have served to guide the courts in the interpretation of the content of the *Charter*.

7. The non-obstante provision of *Section 33* was as you know the deal maker in settling the parliamentary supremacy debate during the 1980 First Ministers' meeting. Most students of the human rights are satisfied with the limited use that legislators have made of the notwithstanding provisions. Students have found it also interesting to study the operation of the *Human Rights Act*[1] adopted by the Parliament of Westminster which allows for the application of the *European Convention of Human Rights*[2] in the United Kingdom. However, the judgment of a tribunal to the effect that a law which contravenes the European convention does not have the result that the offending statute is nullified. Rather that can only be accomplished by an Act of Parliament. In the United Kingdom therefore their system would seem to allow for what might be described as an ongoing non-obstante process. I prefer our Canadian model.

8. The *International Covenant on Economic, Social and Cultural Rights* as a sister covenant to *Civil and Political Rights* provides us with a model for a new initiative in Canada namely an initiative to establish a Canadian social charter.

9. Given that we are presently reflecting on the growth of the *Charter* over the past 25 years, let me limit myself now to a few reflections on one right, namely freedom of religion.

The courts in Canada have faced the difficult task of reconciling the mounting tensions between societal rights for security and the individual's right to freedom of religion. In briefly reviewing particular decisions of the Supreme Court of Canada rendered since enactment of the Charter in 1982, I hope to convey to you the argument that a proper understanding of freedom of religion can serve the right to security through the reasonable accommodation of religious freedom. To the extent that one's freedom of religion does not harm others or jeopardize public safety, religious acceptance and tolerance can, in the end, foster security.

Freedom of religion is entrenched by section 2(*a*) of the *Canadian Charter of Rights of Freedoms*. The Supreme Court of Canada's seminal interpretation of religious freedom was in *R.* v. *Big M Drug Mart Ltd.* in 1985,[3] relatively soon after the Charter was enacted in 1982. That case involved a constitutional challenge to the

Lord's Day Act, which prohibited retail trade on Sundays unless provincial law provided otherwise. In concluding that the legislation violated freedom of religion, due to its coercive effect the Supreme Court stated that "[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination."[4] However, the Court also held that freedom of religion may be limited when it causes harm to others. In particular, the freedom was stated to be "subject to limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[(5)]

There have been notable decisions since *R.* v. *Big M Drug Mart Ltd.* In 1996, *Ross* v. *New Brunswick School District No. 15*[(6)] involved a teacher who was disseminating anti-Semitic works and making anti-Semitic statements outside the classroom. The Supreme Court upheld the teacher's right to express his opinions based on the sincerity of his beliefs, and found that his freedom of religion had been violated when he was deprived of his post. However, the Court restricted the scope of the teacher's freedom of religion and expression through its analysis under section 1 of the Charter, which allows rights and freedoms to be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.

The Court held that if the teacher wished to express anti-Semitic views, he must be removed from the classroom and placed in

an administrative position. Looking at the schoolroom context, the Court emphasized the vulnerability of children and their right to be educated in a school system free from a "poisoned" environment of intolerance. The teacher's religious beliefs, which denigrated and defamed the religious beliefs of others, eroded the very basis of the guarantee of freedom of religion contained in the *Charter*. In other words, the Court limited the teacher's right to freedom of religion under the grounds, set out in *Big M Drug Mart*, of protecting public safety, order, health or morals or the fundamental rights and freedoms of others. At the same time, the Court interpreted the teacher's religious freedom as widely as possible – going so far as to set aside a condition by which Ross was never to publish or sell his material, lest he be removed from even a non-teaching position.

In 2004, the Supreme Court released *Syndicat Northcrest* v. *Amselem*,[(7)] upholding the right of orthodox Jews to construct succahs on their condominium balconies for the purposes of fulfilling a practice of dwelling in small enclosed temporary huts during an annual religious festival. Although the condominium ownership agreement prohibited decorations and constructions on balconies, and the syndicate of co-owners proposed an alternative communal structure in the garden, the Supreme Court held that religious freedom must take precedence, and that the prohibition on the succahs was a non-trivial interference with it. At the same time, the Court emphasized that the succahs must be erected in such a manner so as not to pose a threat to safety by blocking doors or fire lanes. The Court stated that religious conduct that would potentially cause harm

to, or interference with, the rights of others is not automatically protected, as one must look at freedom of religion in relation to other freedoms and with a view to the underlying context in which an apparent conflict of rights arises.

A more recent Supreme Court decision reconciling individual freedom of religion with collective safety or security is *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, rendered in March 2006.[(8)] The appellant was an orthodox Sikh, whose religion required him to wear a kirpan at all times – a kirpan being a religious object that resembles a dagger. After he accidentally dropped his kirpan in the yard of the school he was attending, the school board, relying on a prohibition against carrying weapons, notified the appellant that, in the place of a real kirpan, he should wear a symbolic one.

While the Supreme Court did not have to reconcile two constitutional rights, as only freedom of religion was in issue, it reiterated that freedom is not absolute and can conflict with other constitutional rights. The school board decision prohibiting the appellant from wearing his kirpan to school infringed his freedom of religion, as he genuinely and sincerely believed that he would not be complying with the requirements of his religion were he to wear a symbolic kirpan. Although the board's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective, namely to ensure a reasonable level of safety at the school, and although the decision had a rational connection with the objective, it did not minimally impair the appellant's rights. The decision to

establish an absolute prohibition against wearing a kirpan did not fall within a range of reasonable alternatives in accommodating the appellant's religion. The risk of him using his kirpan for violent purposes, or of another student taking it away from him, was very low.

The Supreme Court noted that the appellant in *Multani* had never claimed a right to wear his kirpan to school without restrictions – he was willing to accept conditions that would ensure that the kirpan was sealed inside his clothing. Furthermore, the Court recognized that there are many objects in schools that could be used to commit violent acts and that are much more easily obtained by students, such as scissors and baseball bats. The evidence also revealed that not a single violent incident related to the presence of kirpans in schools had been reported**.** The Court stated that the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified.

The Court also rejected the argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and sends the message that using force is necessary to assert rights and resolve conflict. It stated that such a view is disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism. A total prohibition against wearing a kirpan to school undermines the value of the religious symbol and sends students the message that some religious practices do not merit the same protection as others.

In summary, these four decisions of the Supreme Court demonstrate the way in which religious freedom must be reconciled with other rights, or may be restricted where its unlimited recognition would undermine the security of others. As first enunciated in *Big M Drug Mart*, freedom of religion is subject to limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. In the *Ross* case, the teacher was precluded from holding a teaching post, as his anti-Semitic views harmed the students in his classroom. Even in the *Amselem* and *Multani* decisions, religious freedom was not absolute and factors relating to safety and security were considered. Mr. Singh Multani had already agreed to certain conditions in being allowed to wear his kirpan, such as ensuring that it was worn under his clothes, carried in a wooden rather than metal sheath, and was securely wrapped and sewn to prevent it from falling out or being taken by another student. The co-owners in the *Amselem* case had undertaken to set up their succahs in such a way that they would not block doors, obstruct fire lanes or otherwise pose a threat to safety or security.

In *Multani*, the Supreme Court assigned an important role to schools in the transmission of Charter values. It stated that if the school in question were to completely ban kirpans, it would "stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others."[(9)] This responsibility placed on schools may indeed be

extended to many of society's institutions – including government in its laws and actions generally.

In the context of religious freedom and collective security, there is perhaps no greater need to promote equality, diversity and multiculturalism than in the context of anti-terrorism. Last October, in *R.* v. *Khawaja*,[(10)] the Ontario Superior Court struck down what has been referred to as the motivation clause in the *Criminal Code* definition of "terrorist activity," which was the requirement that, in order to constitute a terrorist activity, an act or omission must have been "committed in whole or in part for a political, religious or ideological purpose, objective or cause."[(11)] The Court found, among other things, that this requirement violated freedom of religion. On 5 April, the Supreme Court dismissed an application for leave to appeal.[(12)]

The *Khawaja* case essentially stands for the proposition that police, security intelligence agencies and prosecutors should not be focussing on the religions and ideologies of individuals when combating terrorism. The judge noted concerns that "the focus on the essential ingredient of political, religious or ideological motive will chill freedom protected speech, religion, thought, belief, expression and association, and therefore, democratic life; and will promote fear and suspicion of targeted political or religious groups, and will result in racial or ethnic profiling by governmental authorities at many levels."[(13)] As in the *Multani* case, the equality, diversity and

multiculturalism of all religions and religious groups are to be promoted rather than undermined.

As stated in a recent Senate report in which I took part,[(14)] the targeting of individuals based on race, religion or ethnicity does not enhance Canada's anti-terrorism goals. Rather, it leads to the deterioration of government-community relationships. If certain communities believe that they are unfairly targeted by our criminal laws, they may be less likely to interact with police and security intelligence agencies in order to share information regarding actual terrorism. If national security or law enforcement agencies focus their attention and resources on individuals belonging to certain religions, they may fail to stop terrorist activity on the part of individuals who do not have those pre-conceived characteristics.

All of this is to say that a society that promotes religious freedom to the greatest extent possible – that is, provided that the exercise of an individual's freedom does not harm others – is likely to be a safe and secure society. If, for example, succahs are seen annually by neighbours as part of a religious festival, or kirpans are valued as a religious symbol by schools and inevitably students, familiarity and respect will replace fear and mistrust – the latter being at the root of many threats to our safety and security. By accommodating and promoting religious diversity, curtailing intolerant religious speech where it harms others, and ensuring that our laws do not disproportionately target members of certain religious groups, Canadian society is able to protect both religious freedom and

collective security. Given 25 years of the Charter, our courts, legislators and policy-makers have the capacity – and responsibility – to reconcile valid competing human rights claims in order recognize each of them as fully as possible. I am confident Canada and Canadians with the support of distinguished citizens such as you we will continue to grow our freedom.

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[1] *Human Rights Act 1998* (U.K.), 1998, c. 42.

[2] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (*The European Convention on Human Rights)*, E.T.S. No. 5, 213 U.N.T.S. 221, Rome, 4 November 1950, entered into force 3 September 1953, as amended by its Protocols.

[3] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

[4] *Ibid*. at para. 94.

[5] *Ibid*. at para. 95.

[6] *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

[7] *Syndicat Northcrest* v. *Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47.

[8] *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6.

[9] *Ibid*. at para. 78.

[10] *R.* v. *Khawaja*, [2006] O.J. No. 4245 (Ont. S.C.J.) (QL).

[11] *Criminal Code*, R.S.C. 1985, c. C-46, clause 83.01(1)(*b*)(i)(A).

[12] [2006] S.C.C.A. No. 505 (QL).

[13] *R.* v. *Khawaja*, *supra* at para. 73.

[14] Special Senate Committee on the Anti-terrorism Act, *Fundamental Justice in Extraordinary Times*, Ottawa, February 2007, p. 24.