

# CONVOCATION ADDRESS

The Honourable Mr. Justice Michel Bastarache\*

I am very pleased to have been awarded an honorary degree by the University of New Brunswick and to have been invited to say a few words at this Convocation. I feel specially privileged because this recognition comes from my home province and one of its main institutions – an old and well respected institution – an institution that is vitally important to the people of New Brunswick and to making sure that the people of this province are full partners in the Canadian federation and Canadian society in general. In fact, since I have been living in Ontario, I have noticed on many occasions that graduates from UNB and other Maritime universities are well represented in national institutions, public and private, and act as true ambassadors for their *alma mater*. They are proud to be graduates of this University in particular and members of its alumni.

It is with a head full of ideas and a heart full of ambition that the graduates before me have come to the end of their first, second or third academic program. It is certainly a time for rejoicing; it is also a time of anxiety for many because of the uncertainty facing anyone entering into a new career, or even the challenge of another academic program. I want to add my voice to that of your faculty and say to the graduates: you come to this new stage in your lives well prepared and have every reason to be confident in the future.

It will come as no surprise to you that I will be giving a brief message representing foremost the opinion of a jurist. In fact, I am quite at ease with this approach because I have become more and more convinced over the years that today, more than at any other moment in history, law, and especially justice are not the exclusive domain of jurists. Graduates in biology, philosophy, history, and sociology, to name a few disciplines, have a keen interest in legal issues. The reason for this is quite simple; the legal issues that are reported on and debated every day in the news media deal with the fundamental values of our society, whether they be reproductive techniques, freedom of opinion, freedom of religion, the definition of the family, the conditions for the secession of a province or for reforming the Canadian Senate. There is no need for legal expertise to express a view on these issues. I would therefore be inclined to say that the knowledge required to be a person of some culture encompasses more than ever some legal values and principles. One fine example of this is found in the definition of liberty, a value that

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is the very essence of the university, which was given by my predecessor and your present colleague, La Forest J., in a 1995 case called *B(R) v. Children's Aid*. He said, quoting Wilson J:

the liberty interest [is] rooted in the fundamental concepts of human dignity, personal autonomy, privacy, and choice in decisions going to the individual's fundamental being.<sup>1</sup>

The Supreme Court is saying that there is a link between the legal concept of liberty and personal autonomy. My belief is that one's autonomy is seriously limited if one is not well educated. Therein lies the fundamental role of the university.

Canadian judges recognize that their role in society has been enlarged and that their decisions have a greater impact than ever. They consider their task to be more demanding and difficult and they require new tools to deal with this. They are now taking a multidisciplinary approach to problem solving in many situations, consulting academic literature that is outside the legal domain. The participation of judges in the development of values and social institutions has indeed forced them to become more familiar with science and technology, social and economic realities, and changes affecting society in a variety of ways, faster and faster, under the impetus of pluralism, multiculturalism, and globalization. In a way, the state of intellectual tension that characterizes social change is an important element in the development of the law because it is responsible for the diversification of the sources of law and the determination of the elements that judges take into account in establishing legal norms. The recognition of a system of laws in the Aboriginal communities by the Supreme Court has informed the analysis of land claims; the larger recourse to international instruments and customary international law is another indication that the traditional sources of law are now considered insufficient to deal with a large number of legal issues.

The contribution of academics to the evolution of the law is extremely important. They are helping develop the theory of law by organizing legal concepts in systems, facilitating comparative law and proposing new rationalizations for legal theories. Their analyses facilitates decision making because it sheds new light on the content of substantive law. Non-jurists present jurists with different methods for approaching problems that are useful; they also bring a wealth of information regarding the context in which legal decisions must be taken. Non-jurists will more readily question what jurists take for granted, especially where medical or other scientific information is relevant. This is even true in areas like education where the inequality produced by bilingual schools and lack of management rights for minorities was established. And consider the battered woman syndrome and its impact on the concept of self-defence, research on racism and its impact on the right to question persons for jury duty, or research on economic relations in the family and its impact on the law regarding spousal and child support.

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<sup>1</sup> [1995] 1 S.C.R. 315 at para. 80.

The decisions of our courts are more and more the subjects of controversy because the social outcomes are important and, as I have already noted, because everyone has an opinion on a legal decision that deals with moral or ethical issues. Technical decisions on the division of powers between federal and provincial legislatures were all the news in constitutional law 25 years ago; they did not produce any meaningful social debate. Present controversy also results from the fact that courts today are seen as making quasi-political decisions. Obviously, the legislatures themselves have instituted our judicial model by enacting the *Charter of Rights and Freedoms*<sup>2</sup> and determining on their own that control over the exercise of their powers would be given to the courts. Constitutionalism redefined in this manner has nevertheless caused concern for many who see it as a reduction of the democratic process, often reduced to the rule of the majority. Debate over the role of the courts vis-à-vis legislatures is nevertheless valuable because the rule of law is itself dependant on the legitimacy and symbolism of our primary institutions. Legitimacy is the acceptance by society of the legal order and the mechanisms for ensuring its proper functioning.

In a free and democratic society, liberal and individualistic like ours, legal discourse is seen as important. Any educated person will have some understanding of discrimination and freedom of expression. Resort to the courts is seen as an important right for those who want to exercise their right to strike, to speak up and protest, to obtain an abortion, to protect their privacy, to resist deportation, to obtain damages for breach of contract, and to occupy land claimed under a treaty. Confidence in the legal system for resolving present day problems is based on the fact that its process promotes legitimacy and its analytical framework fosters rationality and equality. Law is on everyone's mind. How many times have you heard a child say: "I have a right to this!" And how many adults are saying the same thing in our courts every day? It seems to me that in spite of the problems that affect the legal system today, notably access and delay, the general population has confidence in the system. It is symptomatic, in my view, that a large number of social organizations are putting their cases to the courts as parties or interveners rather than trying to advance their causes by appearing before legislative committees.

Literary culture is transmitted through academic discourse, the development of the desire to learn and discover, university education as such, and the challenge of constantly questioning all that affects our lives. Literary culture is nourished by participation in societal debates. The context in which these debates take place is very important. Social justice, equality of opportunity, and access to justice come at a price in any society; *justice for all* cannot be just a catch phrase. Our institutions must respect and provide protection for the weak and minorities; they must do whatever is possible to provide for an equitable participation in society for all. The central position of human rights in the law and in our culture has changed society in the last 25 years. Some scholars consider that this has had a negative impact on the democratic process by weakening political authority, creating too great a dependency

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<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (U.K.), 1982 c.11.

on judicial institutions and giving too great a prominence to individual rights. Whatever your own view, it seems clear that an educated person will still have to know who is Dante, Mozart, Shakespeare, Molière, Picasso and Einstein, but he or she will also have to know that there is a *Charter of Rights and Freedoms*, a Parliament constrained by it, predominance of the Rule of law and a democratic principle no longer dependant on the majority principle.<sup>3</sup>

I want to extend my best wishes to the graduates and invite them to take full advantage of the autonomy they have and that will grow with further knowledge and experience. To know one's rights and one's responsibilities and to understand the functioning of the institutions that characterize and control society is essential to the exercise of one's citizenship. My message is one of accomplishment: I encourage you to realize your full potential of liberty by pushing always the frontiers of knowledge.

Thank you.

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<sup>3</sup> *Ibid.*

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