LETTER TO BORA LASKIN

21st May, 1982

CONFIDENTIAL

The Right Honourable Bora Laskin, P.C., C.J.C.,
Supreme Court of Canada,
Supreme Court Building,
Wellington Street,
OTTAWA, Ontario, K1A OJ1

Dear Chief Justice Laskin,

I have read the report of the Committee of Investigation. The Executive Committee of the Council intended that I should not be supplied with a copy of the report. In fact, none has been sent to me. If Chief Justice McEachern had not given me a copy, I would have had no opportunity of responding to the Committee's attack on my integrity and my fitness to sit as a judge. This is, to say the least, dismaying. You have had all along the statements that I made; there was no need for an investigation; that is why I said that I did not intend to appear before the Committee. I did *not* say that I did not want an opportunity to meet any criticism the Committee might make of my conduct.

The Committee has concluded that the complaint of Judge Addy is well founded and that my conduct has been such as to support a recommendation for my removal from office. They say, however, that "this is the first time this issue has arisen for determination in Canada." They do not think it would be "fair" to set standards *ex post facto* to support a recommendation for removal in this case." The Committee has, nevertheless, convicted me of abusing my office, of using it as a political platform, and they have questioned whether the public can have confidence in my impartiality. This is tantamount to a vote of censure and, were I to accept it, would entail my resignation.

Furthermore, the Committee is urging upon the Council a course that is unconstitutional. Every judge is appointed subject to the observance of the condition of good behaviour. Judge Addy alleged that I had breached that condition. The Committee has held that I am guilty, but they urge that nothing further be done, that Parliament should not be asked to remove me from office. The Committee may think this is a satisfactory outcome, but a moment's reflection will show that it is untenable. It is, to begin with, an unsound application of the *ex post facto* principle. If you cannot sentence someone *ex post facto* for an offence, you cannot convict him *ex post facto* for the same offence. What is of paramount importance, however, is this: the Committee has found me guilty of a breach of the condition of my appointment. You cannot have a judiciary where such breaches are excused. You cannot have judges continuing in office on

probation, so to speak. Parliament is the final arbiter of good behaviour. The Committee is, in effect, urging the Council to arrogate to itself the right to determine what is or is not a breach of the condition of good behaviour and, by not recommending removal, to withhold its judgment from Parliamentary review, thereby denying me the opportunity for exoneration.

The Committee has given a recital of authorities regarding the doctrine of the separation of powers. All well and good, I suppose, as far as they go. The question is, however, had judges in fact intervened in public debates? Is the convention as rigid as the Committee says? Are there exceptions? What precedents are there establishing appropriate limits to judges intervening in public affairs? All would agree that judges should refrain from partisan political activity; but are they bound to refrain from expressing their views on all matters which may be the subject of contention within the public arena? Here the Committee has shown an enterprising selectivity. For instance, they invoke the authority of Lord Denning, but have overlooked that he has frequently intervened in public affairs, not only from his seat in the House of Lords, but also on many public platforms. So have many other English judges who do not sit in the Lords. Chief Justice McEachern gave the Committee many examples of such; these were ignored.

As for the Canadian precedents, the Committee has simply refused to consider them all. Instead, they have referred to colonial dispatches deploring the practice of judges sitting as members of the Governor's Council. What has this got to do with the case at hand? The Committee says it does not have the facts about Chief Justice Freedman's expressed public support for the invoking of the *War Measures Act* in 1970, and is therefore in no position to comment on it. This is hard to understand, for the facts are well known to every lawyer and judge in Canada who claims any knowledge of public affairs. In any event, as Chief Justice Freedman sits on the Judicial Council, the Committee could have obtained the facts (if there is any doubt about them) by asking him. Why also is no reference made to other instances of judges intervening in matters of political controversy? For instance, in *The Sword and the Scales* (Scarborough: Butterworths, 1979), an admirable collection of Chief Justice Deschênes' speeches (foreword by The Right Honourable Bora Laskin), there is a piece on "The Rights of the Child" (a speech delivered in 1977 to the Canadian Mental Health Association in Sherbrooke), containing an eloquent plea for the recognition of the rights of the unborn child, a subject of perennial controversy. This should have been brought to the attention of the Committee.

Where has the Committee left us? They say that judges should not intervene in political affairs. They cite Lord Denning, who says that judges "must never comment in disparaging terms on the policy of Parliament." Is this the rule the Committee wishes you and your colleagues to adopt? On September 2nd, 1981, at the annual meeting of the Canadian Bar Association in Vancouver, I spoke in support of the Constitution and Charter adopted by the Joint Committee of the

Senate and the House of Commons and supported by all parties in Parliament. When I spoke at Guelph and wrote the piece for the *Globe and Mail*, I was criticizing changes that the First Ministers, not Parliament, had agreed upon. Apparently the Committee does not itself accept the doctrine of the separation of powers when it comes to the distinction of the separation between the executive and legislative branches.

Suppose we take it that the gravamen of my offence lies in using my office "as a platform from which to express [my] views publicly on a matter of great political sensitivity." If this is the standard, I can follow the Committee's reasoning. I spoke at a time when the proposals agreed to by the First Ministers were about to come before Parliament. It was my hope that it might be possible to influence the course that Parliament was to take. I did not wish to disparage the policy of Parliament; rather I wanted to urge Parliament to reinstate the rights of minorities.

What if I had waited until Parliament had acted, and then criticized what they had done? Perhaps that would have been all right. If so, this would explain why Chief Justice Deschênes, who sits on the Judicial Council, could second the motion to have me investigated and then travel to Vancouver in the same month to give a speech denouncing the failure of Parliament to entrench the independence of the judiciary in the new Constitution: to intervene when one may be effective is apparently an offence, but to paw the air in exasperation after the event is not. The one will impair public confidence in the judiciary; the other will not. I fear the public will not see the usefulness of the distinction. What is, after all, the singular aspect of my case? That my intervention aroused the resentment of the Prime Minister? I should think it unwise to make a finding based on such a distinction.

The Committee fails to give the public credit for understanding that judges hold strong views but that they do their best to ensure that they do not determine the content of their judgments. Occasionally, judges feel that, on a question with respect to which they may claim to be qualified to speak, they must give expression to those views. Can we not trust the public to understand that, notwithstanding our own convictions, we judge each case on the evidence and the law? Judge Irving Kaufman of the U.S. Court of Appeals for the Second Circuit, in an article in the *New York Times* (January 30th, 1982 at A23) entitled "Judges Must Speak Out," urged that judges offer their views to the legislature on pending legislation:

> The public may remain confident that judges will follow the advice they give to juries: a case must be judged on its own merits, not on one's personal predilections.

The doctrine of the separation of powers is an American doctrine. Thus, it is odd that there is not a single reference in the Committee's report to American precedents. American lawyers and judges, like those of us in the common law

provinces of Canada, are heirs to the English legal tradition. If you look at the correspondence and comment in the *New York Times* that followed Judge Kaufman's article, you will see that judges, law professors and editorial writers all contributed to a valuable discussion of the question how far judges should intervene in public affairs. Virtually all favoured intervention on appropriate occasions.

The Committee says that it would undermine the independence of the judiciary if judges were constantly engaged in such activity. They say, "it would be possible to have judges speaking out in conflict one with the other." But that has not happened in the past when judges have spoken out; the Committee has not given any reason why it should be feared in the future. The fact is that these interventions by judges are infrequent. (If interventions by members of the Judicial Council do not count, the number is very, very few.)

It is true that these issues occasionally come before the courts. The question of Quebec's claim to a veto came before the Quebec Court of Appeal. Did anyone suggest that the view I had expressed in November (at a time when the question was not being litigated) embarrassed the judges in Quebec? I had not urged a particular argument as to the law. Are the views expressed by Chief Justice Deschênes on the question of the rights of the unborn likely to embarrass the Manitoba judges who may sit on the *Borowski* case? I doubt it.

The Committee accuses me of abusing my office by using it as a political platform. They go on to say:

> One would not have expected Justice Berger's views to have been given the media attention they were given if he had not been a judge but merely [sic] as politician expressing his views in opposition to other politicians.

The Committee holds an exalted view of the influence that judicial office brings. To them, a person's *persona* is defined by the office he holds. The fact that my views were heeded does not stem from the fact that I am a judge. Because the Committee has raised the issue, it is necessary to state that as a lawyer I was engaged in many cases relating to native rights. I argued *R.* v. *White* and *Calder* v. *A.G.B.C.* in the Supreme Court of Canada. The Government of Canada asked me to conduct the Mackenzie Valley Pipeline Inquiry. My report, *Northern Frontier, Northern Homeland*, published in 1977, is used in schools, colleges and universities as a text book on native history and native rights. I have lectured on the history of native rights at universities in Canada and the United States, as well as other countries. I have also, since going on the bench, lectured on the history of minorities in Canada. There are political issues that play continuously over the surface of events; but underlying our national life are the arrangements among our various peoples. In every province there is a minority that speaks either English or French, and this fundamental duality places the condition of minorities at the very centre of our history and our institutional arrangements. Fundamental fairness in the relations between the two charter peoples, in establishing the

distinct and contemporary place of the native peoples, and respect for the rights of racial and ethnic minorities are as essential to the idea of Canadian federalism as fairness in the division of powers between the federal government and the provinces. I have developed these ideas on many occasions; for instance, in the Edgar McInnes Memorial Lecture at York University in 1979; the Goodman Lectures at the University of Toronto in 1980; and the Viscount R.B. Bennett Memorial Lecture at the University of New Brunswick in 1981. In all of these public lectures I urged that the duality of Canada be respected. During the past three years I have taught a seminar on the history of minorities in Canada at the Faculty of Law here at U.B.C. In 1981, I published *Fragile Freedoms*, a history of human rights and dissent in Canada. I mention these facts only to demonstrate that the platform I used was of my own construction.

Apparently, the Committee does not think that there is any distinction between the ordinary round of partisan politics and overarching issues of human rights and fundamental freedoms. These issues do transcend partisan politics. The constitutional debate was an occasion of constitutional renewal, unique in our national life. I believe that my speech at Guelph University and my piece in the *Globe and Mail* were influential in some measure in bringing about the restoration, albeit qualified, of aboriginal rights and treaty rights (Quebec's veto was not restored, but that is another matter). Should a judge remain silent when, by speaking out, he may actually help to prevent a grave injustice to a minority? If he does speak out, is this to be condemned as a foray into partisan politics and (as the Committee holds) an abuse of his office?

The Committee says that my intervention in the debate has impaired public confidence in the judiciary. During my ten years as a judge I have conducted royal commissions for Liberal, Conservative and New Democratic governments. These have entailed the making of recommendations that have been the subject of political controversy. Yet there has never in all that time been a complaint to the Judicial Council from a member of the public – not even by an unsuccessful litigant – that I have not properly discharged the duties of my office. Nor have there, as far as I know, been any complaints to the Council by members of the public about my intervention in the constitutional debate. The complaint was laid by a judge. Then, at the insistence of the Executive Committee, a Committee of Investigation was set up. This Committee, of three judges, proceeding *in camera*, has called into question my integrity and my fitness to sit on the bench. In ten years, no litigant and no lawyer – only Judge Addy and the three judges on the Committee – has done so. Now, the Council proposes to decide the question *in camera* on May 31st. Is this likely to restore public confidence (assuming it has been impaired) in the institution that we all serve?

Public confidence in the judiciary has survived generations of political appointments, unconscionable delays by judges in getting their judgments down, and

various kinds of criminal and otherwise scandalous activity by judges. The notion that it will be impaired because a judge urged our leaders to reconsider their rejection of the rights of minorities is fantastic.

I do not accept the Council's authority to censure me – for this is what the Committee wants the Council to do. The Council has no statutory power to do so. Chief Justice McEachern has tried to persuade the Committee of this, and now the Committee's own lawyer has so advised. Parliament has not conferred any authority upon the Council to declare that judges should be gagged (the word that the Committee chose) as if they were civil servants subject to the Council's supervision, or "to set standards" binding on the judges of Canada. If the Council desires to assert such authority, it must seek it from Parliament.

The Committee says it may be that some of the statements made in the address I gave to the Canadian Bar Association were inappropriate for a judge. In what respect did that speech offend the sensibilities of the members of the Committee? Why are they unable to say? Is it because they do not know where to draw the line? Would Mr. Justice Mackay's speech deploring the tendency of Parliament to delegate greater and greater power to the Cabinet, to ministers and administrative bodies (this spirited attack on what the judge calls "public sector imperialism" was reported in the *Globe and Mail* on May 18, 1982) expose him to investigation? The classical doctrine of the separation of powers no longer holds in all its rigour, if it ever did. Judges sit on Law Reform Committees and Commissions. Judges conduct Royal Commissions. If they speak out on the subjects that they are concerned with, will they now be investigated? Are judges not to speak out on questions relating to the administration of justice itself? What about those judges who belong to the International Commission of Jurists (Canadian Section), which often takes a position on abuses of human rights abroad? Where does the authority to supervise the judges in this way come from? Where does the process stop? The independence of the judges is at stake here.

I believe that a judge has the right to speak out on an appropriate occasion, on questions of human rights and fundamental freedoms, particularly minority rights. Parliament and the legislatures represent majorities; they are not always mindful of the interests of minorities. This is central to the dilemma of the democratic system: how can the majority rule without extinguishing the rights of minorities? The arrangements that we fashion in Canada for the protection of linguistic, racial, ethnic and cultural minorities may prove to be our principal contribution to the legal and political order of the West. We seek to achieve "the regime of tolerance" of which Laurier spoke. The rule enunciated by the Committee would forever bar any judge from speaking in that cause.

Perhaps I can state the issue in this way: suppose that in 1942 one of the judges of the Supreme Court of British Columbia had spoken out against the

internment of the Japanese Canadians? No doubt there would have been a complaint, an investigation by somebody or other, and condemnation would have followed. I do not say for a moment that any act of mine required the moral courage that would have been needed to speak out in 1942. But the issue raised is the same. If a judge does speak out, is it grounds for removing him from the bench?

There are times when, convention notwithstanding, certain things must be said. Occasionally, it will fall to a judge to say them. This, at any rate, is my belief. I acknowledge, however, that, like Judge Addy and the three judges on the Committee, you and your colleagues may take a different view. If you do, you must have the courage of your convictions and recommend my removal from office so that the issue can be brought before Parliament.

I can still scarcely believe that Judge Addy's complaint should have been proceeded with. The Council has, however, taken it up, and now the Committee has held it to be well founded, though it has not been willing to urge that its conclusions be submitted to the judgment of Parliament. But the question can now be resolved only by Parliament. It is too important to be left to judges. Certainly the Judicial Council has no mandate to deal with it; and under no circumstances should it be dealt with behind closed doors. The views of the bar, of scholars, of the Conference of Judges of Canada and, of course, the public, should be considered.

I am sending copies of this letter to each member of the Council so that there will be no misunderstanding about my position.

Yours sincerely,

(signed)Thomas R. Berger

cc: Mr. Cumberland, The Secretary,
and the members of the Judicial Council.