SEMINAR DISCUSSION: KAPLAN

Chair: Peter Kent*

Professor David Bell (Law, University of New Brunswick): That was a very impressive, enlightening, awakening discussion. My question is a point of fact, to what extent were the strings being pulled by American Witnesses?

Professor Kaplan: The legal strings, you mean, for all of these arguments in this campaign. They were clearly being directed from Jehovah's Witness headquarters in Brooklyn, New York. One thing that is interesting about the Jehovah's Witnesses is that their leader during this period was a person named Judge Rutherford who was more or less a lawyer from the southern United States and he had no hesitation at all in using the courts, in using legal mechanisms, for promoting rights. They had a lawyer for many years, a man named Hayden Covington, who was very active in directing all of their legal campaigns and they saw what successes they were enjoying as a result of using the American justice system and it was immediately apparent to them that there wasn't a similar parallel mechanism here, namely a first amendment, and that is why they became active. It all emanated from Brooklyn, New York.

Professor David Townsend (Law, University of New Brunswick): Are we certain that Canadians signed petitions because I know that there were a number of petitions that they circulated in the late 1920s when they lost a number of their broadcasting licenses, and those petitions went pretty far below the 49th parallel to pick up the number of names they had even then.

Professor Kaplan: I haven't examined the petitions personally. All I can tell you is that in researching this book I obviously contacted Jehovah's Witnesses and they have preserved every single record they can, because they believe that when Armageddon comes a record is necessary so that God will know who to save and who to punish. I went to their headquarters in Georgetown, Ontario and they gave me unrestricted access to all of their files and materials, many of which date from the Second World War. And in my experience in looking at those materials, I could not find a single instance where they said something in a published statement that wasn't factually so, whatever they said appears to be true. In terms of describing cases, events, it all appears to be based on what actually happened. There is a rigorous honesty which they seem to have imposed upon themselves. In the National Archives there are a number of files containing letters from American Jehovah's Witnesses to the Prime Minister and to the Justice Minister saying stop all this persecution, and it is clear they are written by Jehovah's Witnesses because you can tell by

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their references to Jehovah God. But you may be right that a significant number of those signatures were not from Canadians, nevertheless from what I understand they were mostly Canadians.

Mr. Tim Rattenbury (Law Reform Division, New Brunswick Department of Justice): The two questions that always interest me about this kind of discussion are first, what would you have done in the circumstances, which translates into what might or what should a government do nowadays and the second one, in relation to the *Charter of Rights*, - would it have made any difference? On the first question, it seems to me that from what was going on that any government is likely to react or to have serious concerns about it. You have a group which is being gratuitously and deliberately offensive in the eyes of the Government to a substantial bulk of the population - what if anything do you do? In the New Brunswick context, the anti-semitic writing of Malcolm Ross is an example. What can you do under the *Human Rights Act* in relation to that. The first question, in the face of this particular issue, what would you do and the second question, again, what difference does it make having the *Bill of Rights*? You mentioned in your closing comments that the fact the Supreme Court eventually came to a couple of decisions which were actually favourable to the Jehovah's Witnesses. The composition of the court happened to tip the balance in one particular way but at the time it was perfectly plausible that the opposite decision might have been reached. The two questions are probably unanswerable.

Professor Kaplan: You posed the essential conundrum that my argument presents and that is how do we deal with these situations, what should LaPointe have done? I would say he should have encouraged a vigorous and informed pluralism, but that is not what Canadian society was all about in July, 1940. That's what I believe it's about today, but it is not what it was about then. And LaPointe was just a man who was trying to make the best decision he could. There was an obnoxious and disgusting group, there was significant representations made to suppress them and he decided to go along with it. When McKenzie King found out, his diary indicates that he was reluctant, he didn't like the idea of punishing these people for their ideas about God but, as he indicated in his diary, he was willing to go along because Justice Minister LaPointe thought it was a good thing. So historical hindsight is easy. You should say they should have been entitled to make representations and so on. Eventually that is what happened, a special committee was formed, a special committee of the House, a Defence of Canada Regulations Committee. They began to investigate and look into the whole way in which the Defence of Canada regulations outlawed the Witnesses, the Communist party, and fascist organizations. Representations were heard, some Members of Parliament, some CCF members, a Social Creditor, got up and said, well look this is wrong, we have got to do stuff and the balance began to be tipped. I don't know that I would have acted any differently as a political leader in that context but with historical hindsight we can

use that experience and illustrate it for the purposes of demonstrating what should have happened. What could have happened and how best we can achieve our objectives as a society governed by the rule of law? That is what I use the experience for, not to say LaPointe was a bad guy and Villeneuve was even worse. That is not the point, the point is that this historical experience can be used to inform and enrich our debate about how government action takes place today.

Professor Tom Kuttner (Law, University of New Brunswick): I am wondering about the relationship between the conscription crisis and this crisis. One way of looking at this is that if in fact Quebec was going to refuse to participate in the war effort, then we would have had a really complex problem in terms of whatever one wants to call it, sedition or not, that is a huge portion of the population refuses to participate in this government action. If we are going to have to suppress French Canada on the basis of its refusal to participate in the war effort, we wouldn't be talking about two dozen school children, or five hundred men and women, we would be talking about however many millions of people. And so this deal we have talked about, the *quid pro quo* that rather than have the full force of the government come down on French Canada, it is now going to come down on small groups. I'm not saying this is good or bad but appropo with what would you have done, it may very well be that there are all sorts of other personal reasons why LaPointe or whoever is opposed to Jehovah's Witnesses. This was a crisis and I am just wondering to the extent how helpful it is to take war-time situations in supression of minorites in peace-time even given the example of Malcolm Ross and anti-semitism, we aren't faced with the kind of crisis in Canada that was faced in 1940.

Professor Kaplan: Acting in haste, people in institutions are going to act badly because they don't have the benefit of hindsight, they don't have the benefit of thinking about things carefully, exploring options, holding Royal Commissions, engaging in consultation. There is no doubt about that. But if we are going to talk about the value of legal mechanisms to protect minority dissent, when are legal mechanisms useful? Are they useful in peacetime? Sure. When do they really matter? They matter during crisis times. One thing that was interesting about October 1970 was the *Bill of Rights*. You never see this in the *Bill of Rights* that Diefenbaker used to sign and people have in their offices, there was a special provision in the *Bill of Rights*, a statute actually passed by Parliament, that explicitly says the *Bill of Rights* does not apply during the invocation of the *War Measures Act*. And when the *War Measures Act* was invoked in October, 1970, the *Bill of Rights* didn't apply and 450 people were arrested and jailed and I think there were two convictions as a result. Your point is a good one, these were extreme times, people were acting quickly. If you are going to have formal protection, when do you need it? You need it in the extreme times, you don't need it when times are pretty good and you can use your ordinary legal mechanisms to deal with people who are causing problems if they are breaking the law.

Professor J. Iwanicki (Philosophy, University of New Brunswick): The question that I wanted to ask was to what extent is the kind of information that you presented us this morning, was that put before the Courts in these cases and what has happened to that whole sort of development of the Brandis brief?

Professor Kaplan: The question is very simple, they used to try it a lot and they still do it but now they are putting my book before the courts. But the problem, when you look at the stuff they used to put before the courts, is that more often than not, it hurt them more than anything else. In all these briefs, which are preserved at their headquarters and there are some available at the National Archives, they would just be these extended religious harangues that interwove law with religion and sense of justice and it was totally useless to the court. It wasn't a dispassionate description of events, but it was filled with reference to biblical authorities and so on. Now they do use briefs. I know they started using my book in child custody cases, but in the blood transfusion cases, of course, as judges here will know, they use all sorts of expert evidence, about whether transfusions are good, whether they are bad and they submit a whole bunch of that stuff, ready to go at any time.

Professor J. Iwanicki: That leads to a second question. A study of your kind, do you see it as making a contribution to legal scholarship generally or do you see it as having any kind of possibility as being presented to a court and saying, look this is the way you should decide in light of the historical developments that have brought us to this predicament?

Professor Kaplan: I hope it makes a contribution to scholarship but what do courts have to do, there are judges here, they can answer this question better than I can, they are people trying to solve human problems and we've got legal standards which they use to do that. I treated to you to a fairly extensive description of what Jehovah's Witnesses believe and I think you have to understand what they believe to understand what their behaviour is, because if you don't understand what they believe, you can't understand why they stand for hours on end holding up the *Watchtower* and why they stop people on their way to Mass and why they think their message is so important and why they are so persistent. That information is useful, I would think, to judges as decision makers because it explains their behaviour and the sincerity of their views.

Professor J. Iwanicki: But my point is more specific. Say an important case were to come before the Courts now, having to do with a fairly complex social-historical issue, why couldn't a study of your sort be presented to the Court to say, look, this is to give you some sort of insight, how this problem gets here and presumably give some insight to the sort of solution that could be developed. Yet you seem to be reluctant to want to suggest that.

Professor Kaplan: I just don't want to interfere with the independence of the judiciary.

Mr. Allen Ruben (Barrister and Vice-President Canadian Bar Association, New Brunswick Branch): Dr. Professor Kaplan, do you think one should distinguish when you talk about minority dissent which is basically a passive denial. However, if that dissent turns out to be overt act as, say, the attack upon the Catholic Church, should one with the courts distinguish between say, passive dissent and aggressive overt dissent that causes damage and possibly in the case, well, the United States is looking at that now, at the Jehovah's Witnesses instead of refusing to salute the flag, burning the flag, which is what the American courts have recently looked at. Should that be distinguished by the courts?

Professor Kaplan: My own personal view is that we had a discussion about this last night and someone was telling me about this Ross case. My own view is, not about that because I don't know anything about that - but about Keegstra and Zundel and about all sorts of other people who would, I guess, in your formulation, be called or described as aggressive dissenters as opposed to passive dissenters, that our society and our common values as a society are advanced by allowing everybody to say what they want and that is the best way which we as society can promote the values of freedom and freedom of belief, thought and conscience. I think a vigorous pluralism is best advanced by letting a thousand flowers bloom, and I know that is going to get Tom Kuttner going.

Professor Tom Kuttner: I want to ask you about the fascist parties during the war, do you take the same view?

Professor Kaplan: That is a really good question because both the fascists and the Communist Party before the Soviet Union was invaded by Germany and the Fascist Party throughout took a very active anti-war position. There is no doubt about that. And you can look in *Hansard* where there are examples of Members of Parliament reading into the record some of their defeatest propaganda and that's what it was. Should there have been censorship of their defeatest propaganda? That is another example of where the State is imperiled. We have a *Charter of Rights* that allows for freedom of speech, we've got to allow that kind of speech. I don't know what the answer to that question is. I don't have an answer but it seems to me that one would be hard pressed to make a distinction between political speech and religious, they are both as important in our society.

Professor D. Townsend: There were recently a number of Witness cases in the courts involving health care and child custody. I think that in the Witness centre in Canada outside Toronto they have two Witness lawyers trying to cover all these cases. There is a Witness lawyer also in this city that

flies to Toronto on a regular basis to try and help them out. How come when these cases could have been predicted in the age of the *Charter* there are so few Witness lawyers?

Professor Kaplan: I am not an expert on the Jehovah's Witnesses, I am certainly not a spokesperson for them either. What I try to do is understand what they were and how they grew and what they were all about. The Jehovah's Witnesses have a legal team and they retain outside counsel when they can't handle matters themselves. I don't know why there aren't more Jehovah's Witness lawyers. I would think that for a group that claims about 100,000 members in Canada, three full time lawyers, which is what they have in Georgetown to fight their legal fights seems to be an adequate number.

Professor Ann Condon (History, University of New Brunswick, Saint John): I think we can get very emotional about pluralism and we may be losing what seems to be a turning point in Canadian jurisprudence during the period of the Second World War. I gather what happened between 1940 and 1950 is that a consensus developed in Canada that the government was no longer representative of all the people and that the government was capable of corruption and that separate protections had to be enunciated in order to protect some of its citizens. This is very different from the original idea that Parliament embraced all people and that all people could find protection for whatever they considered important within the normal operation of government.

Professor Kaplan: I don't agree with that formulation at all. The way I would describe it is that during the Second World War government intervention in the economy and national life reached a high-water mark up until that point. There was a sense among Canadian people that Canada's war effort was a turning point in our history of the nation and there was a sense among Canadian people that if we could accomplish this increase in our production in creating all of this material to fight the war that when the war was over we could continue to direct this energy to building a better Canada. And you see that in the rise of the social democratic parties after the war, the election of the first social democratic government, the CCF in Saskatchewan. The first thing it did was introduce the Saskatchewan *Bill of Rights*, so there was a sense the government could be a powerful instrument of social justice. But there was also a sense as a result not just of Jehovah's Witnesses, but treatment of Japanese-Canadians, of other political dissenters, that some mechanism was required to restrain government power, that government power was so significant and as illustrated by the Roncarelli's abuses, by Duplessis's abuses against Roncarelli, that some mechanism was needed so as to put the limits on what government could do because it had become so powerful. That is how I would state it.

Mr. Rattenbury: It strikes me as ironic the way things have developed in some ways. The story you have given us is of pressure for a *Bill of Rights* and

the *Charter of Rights*, and yet at the end of the day one finds that those pieces of legislation are in some cases the very pieces of legislation dogging you, to suppress the kind of dissent you were talking about.

Professor Kaplan: We saw that during the Second World War in the United States when the First Amendment had been in operation for two hundred years but it was used to justify the expulsion of school children in 1940 and then it was used three years later to provide for the readmission to public schools. The first few years of The *Charter* are now behind us but I don't think we have set the law down for even another generation. It is going to be a spectrum of decisions and things are going to happen and the *Charter* is going to reflect contemporary values so it may be true that there are cases reaching results you are indicating but over the long term there will be adjustments.