

## ***Can Lawyers Save Us?***

### ***The Role of Government Counsel in Protecting the Rule of Law***

**Speaking Notes - Chief Justice Michael J. Wood**

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The Rule of Law is a foundational principle of Canadian Democracy. It ensures that all individuals and institutions, including government, are accountable under the law, that laws are fairly applied and that justice is administered impartially.

Lawyers employed by public entities play a crucial role in upholding and defending the Rule of Law. Through legal advice, litigation, legislative review and the promotion of access to justice they safeguard the

integrity of Canada's legal system and ensure that governments act within legal and constitutional boundaries.

Let's start with an obvious question that has a range of possible answers.

## **What is meant by “The Rule of Law” and why is it important?**

“Rule of Law” is a phrase used with increasing frequency in recent years. It has been described using terms such as “foundation”, “cornerstone” and “fundamental”. We have seen references in the media to the rule of law being “tested”, “under attack” or “in jeopardy”. The Rule of Law means different things to different people; some definitions are narrow and others expansive. Everyone agrees its preservation is necessary to sustain our democracy.

We are all familiar with the representation of the goddess Justitia wearing a blindfold and holding the scales of justice. This metaphor is intended to convey the idea that for justice to be fair, it must be dispassionate and blind to matters of authority, power or prestige.

In the common law world, the Rule of Law is frequently said to originate with the Magna Carta in 1215 by which the sovereign, King John, agreed to abide by certain principles in dealing with his subjects. The Magna Carta recognized fundamental rights such as trial by a jury

of one's peers and constrained the King's authority to make unreasonable and arbitrary decisions. He agreed to be subject to the law of the land.

The Canadian constitution is based, in part, on the Rule of Law. The Supreme Court of Canada in *Reference re Secession of Quebec*, 1998 CanLII 793 described it this way:

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959 CanLII 50 \(SCC\)](#), [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

71 In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second,

we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference, supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

In 2016, the Canadian Judicial Council released a paper entitled: **“Why is Judicial Independence Important to You?”**. In this article, the CJC described the Rule of Law in the following terms:

*The expression “Rule of Law” describes more generally a single, overarching rule that expresses an agreement – both as individuals and as a collective, a community – to be bound by and subject to the law.*

...

*The belief in and an adherence to the Rule of Law is a cornerstone of Canada’s constitutional democracy. It is the tool by which a truly impartial and independent judiciary carries out its work. It is the fundamental idea that each judge has sworn, upon oath, to uphold. The Rule of Law distinguishes us from other countries where no such*

***protections exist: where tyrants and their armies and their secret police hold citizens in terror; where wrongdoers are unaccountable; where complicity goes unpunished; where democracy is illusory; and where the rights of the few can be trampled by the power of the mob, or majority.***

In 2020, Chief Justice Richard Wagner addressed the Canadian Bar Association Annual Meeting which was focused on judicial independence and the Rule of Law. In his remarks, he said:

***This separation of powers [of the three branches of government] and the ability of each branch to operate freely within its own domain gets to the heart of what judicial independence means. The equilibrium of all three branches is what gives us our vibrant democracy, strong Rule of Law and robust protections for people's rights and freedoms. When one is upset, the equilibrium goes out of balance.***

Chief Justice Wagner also observed that all is not well in relation to the Rule of Law. He said:

***We live in troubled times. The Rule of Law and judicial independence are under threat around the world. We cannot be complacent. We must avoid actions that will disrupt the delicate balance Canadians throughout history have worked so hard to get right.***

These concerns are not unique to Canada. In 2024, the **World Justice Project** released its report on the **Rule of Law Index** which ranks countries based upon their adherence to the Rule of Law. The definition used by the World Justice Project included four universal principles which were described as follows:

1. Accountability – the government as well as private actors are accountable under the law.
2. Just law – the law is clear, publicized, stable and is applied evenly. It protects human rights as well as property, contract and procedural rights.
3. Open government – the processes by which the law is adopted, administered, adjudicated and enforced are accessible, fair and efficient.
4. Accessible and impartial justice – justice is delivered in a timely manner by competent, ethical and independent representatives and

neutrals who are accessible, have adequate resources and reflect the makeup of the communities they serve.

The fundamental importance of these principles is reflected in the following passage from the World Justice Project report:

*The Rule of Law affects all of us in our everyday lives. Although we may not be aware of it, the Rule of Law is profoundly important – and not just for lawyers or judges. Every sector of society is a stakeholder in the Rule of Law.*

It may be of interest for you to know that Canada ranked 12<sup>th</sup> on the list while the United States ranked 26<sup>th</sup> which was a significant drop from its position in earlier Index reports.

Also in 2024, Gerald J. Postema published an article in “Judicature” entitled: “**An Almost Sacred Responsibility: The Rule of Law in Times of Peril**”. Amongst other academic accomplishments, Mr.

Postema held the position of professor of law emeritus at the University of North Carolina at Chapel Hill. He wrote the article specifically in response to the falling status of the United States in the WJP Rule of



Law Index. Professor Postema said the core demands of the Rule of Law could be encompassed in three fundamental principles:

1. Sovereignty of law – law alone must prevail over all other modes of ruling power.
2. Equality in the eyes of the law – those who are bound by the law must also enjoy equal protection of it and recourse to it.
3. Fidelity – all members of the community take responsibility for holding each other and law officials to account under the law.

Professor Postema described the third principle, fidelity, as the

***“animating spirit of the Rule of Law.”***

Professor Postema’s thesis is that the Rule of Law is not threatened by actions taken in violation of it, but rather the failure of the community to demand accountability when this occurs. He says that it takes integrity and courage for lawyers, judges and the broader community to hold those who wield ruling power accountable. This in turn necessitates education, support, correction and re-enforcement.

Similar sentiments were expressed across the pond in the 2024 Bingham lecture delivered by Attorney General Lord Hermer K.C. which he called: **“The Rule of Law in an Age of Populism”**. He described the importance of the Rule of Law as follows:

*Far from being at odds with democracy, as some populists would have us believe, the rule of law is the bedrock on which it rests. What good is democracy – indeed, can democracy exist – without the right to free and fair elections or freedom of speech, guaranteed by the right of access to the courts and an independent judiciary? And I would go further. Democracy, in my view, is inextricably related to the rule of law, properly understood. For what good is the rule of law without democracy, which confers essential legitimacy on the rules that govern the relationship between citizen and state?*

In responding to threats to the Rule of Law, Lord Hermer advocated for the strengthening of Parliament’s role and promotion of a Rule of Law culture. With respect to the role of Parliament, he said:

*This must start by recognising that upholding the rule of law cannot just be left to the courts. All branches of our constitution must see the rule of law, in its fullest sense, as a guiding force for their own actions.*

...

*As lawyers know, Parliament's authority in our constitution is legal authority, an authority that requires that Parliament maintains in its legislation the ideals of the rule of law, of government under law, one of the contributions to the modern world of which we in the UK are justly proud. And as I (following Lord Bingham) have explained, those ideals are much thicker and more substantive than the thin gruel of a formal conception of 'rule by law'.*

His argument in support of a Rule of Law culture contains echoes of what Postema referred to as "fidelity". Lord Hermer said:

*We need to explain that the rule of law is not the preserve of arid constitutional theory. We need to explain how it provides the stable and predictable environment in which people can plan their lives, do business and get ahead; in which businesses can invest, the economy can grow; people can resolve disputes fairly and peacefully, and express and enjoy their basic rights and freedoms. We must illustrate how systems that do not hold to these values can be arbitrary and capricious. And backsliding from Rule of Law values, once it begins, can take an unpredictable course.*

*The story that we must tell is how the rule of law matters for growth, jobs and people's livelihoods – how it impacts upon the pound in their pocket and on the type of future their children deserve to enjoy. Governments that undermine, or take a 'pick and mix' approach to these values, disincentivize investment.*

...

*Education has a crucial role to play. We must take these messages to our schools and wider communities. I commend the work of civil society groups and charities such as Young Citizens and the Citizenship Foundation, and the Bingham Centre itself, who work with schools to promote a better understanding of the law and its importance in society. I believe it is right to think about whether even more can be done to strengthen the role of citizenship education as a means of promoting a better understanding of our constitution and, particularly, the importance of the rule of law.*

*But we must also talk about these issues in a way that resonates with the public and in language that everyone understands. Because most people would instinctively recognise rule of law principles as values that are part of the very fabric of our society. Fair play. Justice. Rules that apply equally to all; not one rule for them, and another for the rest of us. And where disputes do arise – whether with a business, an employer, or a neighbour – an independent courts system which provides the means for their just resolution.*

*And in the public realm, law is the great leveller that holds the powerful to account, and ensures that individual rights are respected. Those rights – human rights – are our rights, and belong to us all.*

Adam Dodek published an article entitled “**Rule of law depression**” in the current issue of The Advocate’s Journal in which he describes “thick” and “thin” versions of the Rule of Law. He suggests Canada has

focussed on the latter which encompasses processes and structures.

Dodek argues we should also consider an expanded (“thick”) view of the Rule of Law which includes substantive components such as protection of fundamental human rights and democratic governance.

Returning to the question of what is meant by the Rule of Law, it is clear we have come a long way from the Magna Carta. The Rule of Law represents the fundamental understandings on which our society and democracy is based. In Canada, it includes:

- Three equal branches of government with constitutionally based checks and balances.
- Foundational principles of:
  - Equality before and under the law.
  - Primacy of law over actions of government and persons.
  - Necessity for public trust and confidence in the unbiased application of the law.

- Accountability of individuals and governments.
- Mechanisms for the recognition and enforcement including:
  - Legislative enactments;
  - Independent administrative tribunals and courts; and
  - Free and fair elections.
- A judicial system which is fair, efficient and accessible.

## **What is the State of the Rule of Law in Canada?**

In my view, Canada is not immune from the challenges described by Professor Postema and Lord Hermer and tabulated by the WJP Rule of Law Index.

A cursory review of Canadian media will turn up multiple references to statements by politicians and others which could be seen as undermining the Rule of Law. The Globe and Mail, in a recent editorial, accused an elected official of demonstrating an “unjustified contempt for courts” and noted that the Rule of Law meant officials should respect not just judgments with which they agreed, but also ones they may dislike.

In 2023, Canadian Lawyer published an opinion piece by Michael Spratt titled **“Political Posturing about Paul Bernardo’s Case is Undermining the Rule of Law”**. He opened with the following:

*Let's get straight to the point because, once again, we are diving into the wild world of Canadian politics, where some politicians seem to have lost their moral compass and a firm grip on reality.*

*It should not be too much to ask for our elected leaders to refrain from undermining the rule of law, interfering in the justice system, and in one case bordering on criminal negligence, advocating for acts of torture and jailhouse beatings.*

*But here we are.*

In April 2025, the three chief justices in Ontario issued an unprecedented joint statement on judicial independence which included the following:

*We are very proud of the work of the judicial officials who preside in the Ontario courts. Judicial independence is a cornerstone of our constitutional democracy. An independent judiciary protects the public, not just judicial officials. It means a society governed by the Rule of Law. In*



***Canada, this means, as is set out in s. 52 of the Constitution Act, 1982 that the constitution is the supreme law of the country...Every Canadian has the constitutional right to have their legal issues decided by fair and impartial judiciary. Our justice system is founded on public confidence that decisions, whether popular or not, are fully heard and fairly made. It is crucial that judiciary are both actually independent and appear to be independent so the public can be confident that judicial decisions are made without bias.***

In addition to undermining the independence and reputation of the judiciary there have been several recent events which, might be interpreted as engaging Rule of Law considerations (although I decline to opine on whether they, in fact, do so). These include:

- The enforceability of public restrictions during the covid-19 pandemic.
- The implementation of the *Emergencies Act*.
- The use of the Charter's not-withstanding clause on a peremptory basis.

- Criticism of judges and other public officials as being influenced by improper factors, acting “outside of their [constitutional] lane” and ignoring the views of the “public”.

In his article Adam Dodek observes that Canada, unlike some countries, relies on unwritten constitutional conventions and Rule of Law norms.

In his opinion, this could lead to erosion of the Rule of Law where those conventions and norms are ignored or reinterpreted by the government of the day. He cites two examples which he says illustrate his concerns. They come from different eras but both involve Prime Ministers by the name of Trudeau.

In 1981 the Supreme Court of Canada considered an appeal of various decisions on reference questions related to the authority of the federal government to request the repatriation of the Canadian constitution from the United Kingdom. With respect to whether the consent of the provinces was required the Supreme Court said it was not, as a matter of law, but found there was a convention that the provinces’ consent would

be obtained before repatriation. The government of Prime Minister Pierre Elliot Trudeau chose to follow the convention and began negotiating for provincial agreements.

Fast forward to 2018-19 and what has been referred to as the SNC-Lavalin affair. This matter directly engaged the constitutional convention that the Attorney-General acts independently of the government in making prosecutorial decisions. The information presented publicly at the time suggested the government of Prime Minister Justin Trudeau did not follow this convention in its dealing with Attorney-General Jody Wilson-Raybould.

In his article Adam Dodek posed the following question:

***“Would a prime minister today, one hell-bent on change, respect conventions the way that Pierre Trudeau did? Or would they act like his son, Justin Trudeau, did in SNC-Lavalin?”***

With this background, let’s turn to the question before us.

## **Can Public Lawyers Save Us and, If So, How?**

You will be relieved to know that I am firmly of the view that protection and upholding the Rule of Law is the responsibility of everyone and not just public lawyers. It requires mutual respect and support between the branches of government as well as the development of a “Rule of Law culture, through education and social discourse.”

Despite this, I also believe that public sector lawyers are in a unique position. Those employed by federal or provincial governments act as agents of the Minister of Justice and Attorney General. They participate in the drafting of legislation, conduct litigation and provide legal advice.

The Minister of Justice and Attorney General (as well as their agents) are obliged to ensure that the administration of public affairs is done in accordance with the law (s. 4(a) of the *Department of Justice Act* (Canada) and s. 29(1)(b) of the *Public Service Act* (Nova Scotia)).

Being a government lawyer means you are a member of the apolitical public service responsible for maintaining bureaucratic neutrality. The

legal advice given to your client, the Crown, must be objective and respect the Rule of Law. It is not your role to find “loopholes” or to make interpretive arguments which stretch the bounds of credulity. Your advice should remain constant regardless of the government of the day.

In 2013, Patrick J. Monahan, the Deputy Attorney General of Ontario published an article in the Supreme Court Law Review entitled: **“In the Public Interest: Understanding the Special Role of the Government Lawyer”**. In that article, after referring to the statutory requirement to ensure administration of public affairs in accordance with the law, Mr. Monahan said:

*...This responsibility to uphold and advance the rule of law falls not just to the Attorney but to all government lawyers who act on his or her behalf.*

*What does this mean in practical terms for government lawyers on a day-to-day basis? In my view, there are three principles that must serve as touchstones in the fulfilment of our public interest role, namely: (i) independence; (ii) a commitment to principled decision-making; and (iii) accountability.*

He went on to describe the public interest role of government lawyers as follows:

***This public interest role was aptly captured some years ago by then-Deputy Attorney General of Canada John Tait, who underscored the duty of objectivity and impartiality that must guide the public service lawyer in the performance of his or her role:***

***The duty to promote and uphold the rule of law means that there is a quality of objectivity in the interpretation of the law that is important to the public service lawyer. There must be a fair inquiry into what the law actually is. The rule of law is not protected by unduly stretching the interpretation to fit the client's wishes. And it is not protected by giving one interpretation to one department and another to another department.***

Government lawyers, like all members of the Bar, have an obligation to respect and uphold the Rule of Law. This will impact the advice they give to their client, the Crown, as well as how they conduct litigation.

Objectivity, integrity and fairness should always govern their conduct. In this way they do their part to help develop a Rule of Law culture which will sustain our democracy.

I would conclude by adopting wholeheartedly Mr. Monahan's description of the special role of government lawyers. These words continue to hold true 12 years after they were first written:

*Government lawyers have a special role to play in the administration of justice. Their client is the Crown and their overarching responsibility is to advance the public interest. This provides government lawyers with a broader and more complex mandate than private sector counsel, since lawyers in government are not obliged to serve the particular interests of a private client. At the same time, government lawyers are constrained by the need to provide pragmatic as well as principled advice, advice that addresses in a practical way the realities and exigencies facing their clients within government. Moreover, there are clear lines of accountability between all government lawyers and the Attorney General who, as Chief Law Officer of the Crown, must answer to the legislature and ultimately the public for the legal conduct of the government.*

*Government lawyers have been described by one commentator as "the keeper's of the Crown's conscience". This description seems extravagant since, as discussed above, government lawyers do not have an open-ended mandate to pronounce on the morality or wisdom of proposed government action. Still, government lawyers do have an important responsibility to advocate for, and defend, values of legality and the rule of law within government.*

I invite all of you to reflect on these principles and recognize the crucial role played by the Rule of Law in our society. This is not a topic which should be left only to academic research and discourse but rather should be front of mind in all that we do as justice system participants and as citizens of this great country. We can all contribute to Canada becoming a place with a true Rule of Law culture.

Thank you and good luck!