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The Coxford Lecture
The Rule of Justice:
The Compassionate Application of Law to Life

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I graduated from law school in 1970 and I've been proud every day since of being a lawyer. My father was a lawyer, as are our two sons, and I've always seen lawyers as democracy's warriors: the people who protect rights and by protecting rights protect justice. You law students are the future democracy warriors—actually, the future of democracy full stop—so this lecture is dedicated to you and to the hope that you will make justice your transcendent preoccupation, no matter what you decide to do with your law degree. You are, after all, in law school where you have a window on what the law says—guided by your professors—and a window on what the law looks like outside the walls of your classrooms—guided by watching the news.

The law's majestic purpose is to ensure that justice is done, but the law's reality is not always delivered to the public it was intended to serve. More and more, I think justice is in crisis because more and more people have decided that, like the Red Queen in Alice in Wonderland, the law is what they say it is. There is seemingly no more consensus about what justice means, or what democracy means, or even what law is for.

Until a couple of weeks ago[1] I would have said that that breakdown is only true outside Canada, but now even I worry about whether justice's center will hold here, which is where you future lawyers come in. It will be up to you to decide how fair and respectful this country will be and how tenaciously it will cling to what I see as Canada's magnificent evolutionary grasp of what justice means.

So in this lecture I'd like to tell you about what I see as Canada's triumphant democratic justice success in my lifetime, the role judges have and should play in maintaining those successes and finally, the global risks of not taking all of this seriously.

Let's start with the good news. Canada, I'm proud to say, has, in the decades since I graduated from law school in 1970, increasingly delivered justice to its many publics. Legislators across the country, encouraged by a public newly sensitized the previous decade to the inhibiting power of tradition, sent roving flashlights across their social landscapes, exposing the inequities both created and hidden by the law's Pavlovian obedience to the neutrality of its own indifference.

This Coxford Lecture was delivered via Zoom at the University of Western Ontario on February 9, 2022.

1. Before the Truckers' Protest that paralyzed Ottawa in early 2022.

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And it responded with the seismic reformulation of what constitutes the Canadian mainstream and who gets to join it. We entered into serious dialogue with Indigenous peoples, welcomed waves of non-white immigrants, and swept away barriers for those with different sexual and linguistic identities. We abolished the matrimonial property regimes that for centuries had kept wives on an economic continuum that ranged from invisible to inconsolable, and watched women ponder competing visions of security as they made the transition to a world with options.

And then, with the enactment of the *Charter of Rights and Freedoms* 40 years ago, our justice journey became a justice juggernaut. We constitutionalized the protection of rights, gave independent judges the authority to enforce them, and introduced the public to a new, uniquely Canadian vision of justice that rendered the status quo vulnerable to heightened expectations.

And now I consider us the world's greatest justice exporter, with our legislators passing laws and our courts rendering decisions that are emulated throughout the Western world. Having had the benefit of watching more mature democracies work their way through the conceptual challenges of modern governance, we carved out our own unique vision, one that started where they left off, parting company with the past and developing a robust new justice consensus that's the envy of the world.

Where for others treating everyone the same is the dominant governing principle, for us treating everyone the same can result in ignoring the differences that need to be respected if we're to be a truly inclusive society. Unlike the United States, we in Canada were never concerned only with the rights of individuals. Our historical roots involved a constitutional appreciation that the two cultural groups at the constitutional bargaining table, the French and the English, could remain distinct and assimilated and yet theoretically of equal worth and entitlement.

That is, unlike the United States whose individualism promoted assimilation, we in Canada have always conceded that the right to integrate based on differences has as much legal and political integrity as the right to assimilate.

That is why, for example, Canadians sometimes find problematic the view that all speech should be protected regardless of content because it promotes the marketplace of ideas. To Canadians, that's the theory that sees no distinction between yelling 'fire!' in a crowded theatre and yelling 'theatre!' in a crowded firehall. Sometimes hateful and vitriolic speech silences those it targets, especially if they're vulnerable, with the result that far from promoting healthy conversations, it promotes toxic monologues. In Canada, unlike the United States, we respect freedom of speech, but we do not worship it.

So we have integration based on difference, equality based on inclusion despite difference, and compassion based on respect and fairness. These are the principles that to me form the moral core of Canada's national values, the values that make us the most successful practitioners of multiculturalism in the world, and the values whose integrity requires the legal profession's vigilant protection.

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And that brings me to access to justice. Are we actually delivering it to the public?

When I was in first year university, everybody told me to take Philosophy with a certain professor. In the very first class, he asked the following question: "If a tree falls in the middle of a forest and no one hears it, does it still make a noise?" I turned to my best friend Sharon and said, "I'm out of here—who cares?"

Now that I'm older and don't have the answers to everything the way I thought I did when I was 18, I have come to appreciate what a wonderfully instructive metaphor that professor's question was. If you can't hear something, you don't know about it, and if you don't know about it, then it probably doesn't exist for you. And if it doesn't exist for you, you don't have to do anything about it. But that doesn't mean the tree didn't fall and didn't make a noise, and it doesn't mean we can ignore it. It may have caused damage, and the longer you leave that damage the harder it'll be to fix.

The noise we've been ignoring is the sound of a very angry public losing confidence in us. It's a public that's been mad for a long, long time, and, like the character from the movie *Network*, I'm not sure they're going to take it anymore. And frankly, I'm not sure they should.

I'm not talking about fees or billings or legal aid or even *pro bono*. Those are our beloved old standards in the access to justice repertoire and you all know the tunes.

I have a more fundamental concern, and that is that I cannot for the life of me understand why we still resolve civil disputes the way we did more than a century ago. In a speech to the American Bar Association called "The Causes of Popular Dissatisfaction with the Administration of Justice," Roscoe Pound criticized the civil justice system's trials for being overly fixated on procedure, overly adversarial, too expensive, too long, too out of date.

The year was 1906: three years after the Wright brothers made the first human flight at Kitty Hawk, 10 years after *Plessy v Ferguson*[2] informed blacks that segregation was constitutional, eight years before the most cataclysmic war the world had ever fought, a generation before rural North America became urbanized, and two generations before its governments became decidedly distributive.

But consider what's happened since then. The horse and buggy of 1906 have been replaced by cars and planes, morphine by medical anæsthetics, and the surgical knife by the laser. The principle of *caveat emptor* is being replaced by consumer law. Child labour has been replaced, period. A whole network of social services and systems has been put in place to replace the luck of the draw that used to characterize employment relationships. The phonograph has been replaced by Spotify, the hegemony of the majority has been replaced by the assertive diversity of minorities, and adoring wives have been replaced by exhausted ones.

And yet, with all these profound changes over the last 116 years, we still conduct civil trials almost exactly the same way we did in 1906, and any good

2. 163 US 537 (1896).

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litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Can we say that about any other profession?

If the medical profession hasn't been afraid over the century to experiment with life in order to find better ways to save it, can the legal system in good conscience resist experimenting with justice in order to find better ways to deliver it?

Justice may be blind, but the public is not, and the public doesn't think it should take many years and several thousands of dollars to decide where their children should live, whether their employers should have fired them, or whether their accident was compensable. They want their day in court, not their years.

We can't keep telling the public that this increasingly incomprehensible complicated process is in their interest and for their benefit because they're not buying it anymore. When we say, "It can't be done" and the public asks, "Why not?" they deserve a better reason than, "Because we've always done it this way."

We can't talk seriously about access to justice without getting serious about how inaccessible the result, and not merely the system, is for most people. Process is the map, law is the highway, and justice is the destination. But if much of the time people can't get to that destination because the maps are too complicated and the highways are impassable then, as Gertrude Stein once said, "there's no there there." And if "there's no there there," what's the point of having a whole system to get to where almost no one can afford to go?

So let's be bold and acknowledge that the public has judged our relationship with incremental change to have been largely Sisyphean. The tinkering at the edges with reforms like mediation and arbitration may have been a necessary rehearsal, but it hasn't exactly been the hit with the public we thought it would be.

I think it's finally time—again—to think about designing an entirely new way of delivering justice to ordinary people with ordinary disputes and ordinary bank accounts. That's what *real* access to justice needs and that's what the public is entitled to get. Justice must be seen to be believed, and if the public doesn't see it, how can they be expected to believe in it? And getting the public to believe in justice is what the legal system is all about.

What about the public's belief in the judicial role? The underlying principles of democracy and the rule of law have become so contested that the Ahab-like perennial quest for the white whale of the judicial enterprise—"What is the role of a judge in a democracy?"—is more elusive than ever.

Everyone knows that courts have the authority to decide questions of law, everybody knows that judicial decisions about rights are inevitably polarizing, and everybody knows that no matter how polarizing, all judges see themselves as independent and impartial. But that doesn't mean that that's how the *public* sees us.

My strong belief is that only time will judge how successfully judges and courts will be seen to have acted in the best interests of the court's legitimacy and authority, which means that judges have to stay true to their own integrity and not keep their finger on the fluctuations of the national pulse.

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The reality is that however we see ourselves, there will always be those who think that what we are doing in our own rhetorically Daedalian fashion is *ex cathedra*, or political, or illegitimate, or just plain wrong. And sometimes they'll be right.

What do I think judges who are truly independent and impartial must do to protect their own integrity and the legitimacy of the courts? Understand the diversity that makes up our country; recognize that to address the people and issues before us, we have to really listen to the arguments and not impose pre-existing perceptions on them; and, above all, embrace humility and see the world we judge with rigour and compassion from the ground up, not from our exalted tops down. This won't cauterize controversy, but it will protect our integrity, and there's no legitimacy without integrity.

So my remarks will be about some things to keep in mind when you are judging the judges, from the perspective of someone who became a judge 46 years ago and remains a realistic romantic about the role of the courts, if not always about how that role is fulfilled.

1. Judicial interpretation means interpreting language or behaviour. Both are imprecise and loaded with nuance. That means judges almost always have to make a choice from among available conclusions. Because no words or human behaviour have absolute meanings, it's up to the judge to decide what they mean based on an understanding of law, language, and human behaviour.

Let me give one example of how the context of a word can affect its meaning. I remember watching Newt Gingrich tell a Republican gathering in 1995 that he was a revolutionary and that the press was reactionary. I for one stopped feeling the same way about the words 'revolutionary' or 'reactionary'.

2. There are those who say values have no place in judging because judges are interpreting law, not values. But almost every time judges interpret law, they make law and, implicitly, weigh competing values. Consider the following examples: the judge who in 1873 said "the paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother"[3]; the judge who in 1915 stated that admitting women to the legal profession would be a "manifest violation of the law of public decency"[4]; the judge who said in 1905 that fault-based support laws were desirable because wives "ought to be preserved from imminent temptation"[5]; the courts that said in 1949 that sanctity of the contract and restrictive covenants took precedence over the rights of Jews to buy property[6]; and the court that said in 1939 that freedom of commerce took precedence

3. *Bradwell v The State of Illinois*, 83 US 130 (1873).

4. *Langstaff v Bar of Quebec* [1915], 47 RJQ 131.

5. *Squire v Squire and O'Callaghan*, [1905] P 4 (Probate, Divorce and Admiralty Division).

6. *Re Noble and Wolf*, [1949] 4 DLR 374 (Ont CA), rev'd *Noble et al v Alley*, [1951] SCR 64.

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over the rights of blacks to be served beer[7]; not to mention the entire history of common law . . .

It's worth remembering that as long ago as the 19th century, when the House of Lords routinely declawed social welfare and labour legislation, the British Prime Minister, Lord Salisbury, felt sufficiently moved to rebuke Lord Halsbury as follows: "The judicial salad requires both legal oil and political vinegar; but disastrous effects will follow if due proportion is not observed."[8]

3. Weighing values and taking public policy into account doesn't impair judicial neutrality or impartiality. Pretending that we do not take them into account, and refusing to confront our own personal views and be open in spite of them, may be the biggest risk to impartiality. As Walter Lippmann said in his brilliant book Public Opinion, "[w]e do not first see, and then define; we define first and then see."

It is fundamental that judges be free from inappropriate or undue influence, independent in fact and appearance, and intellectually willing and able to hear the evidence and arguments with an open mind. But neutrality and impartiality do not and cannot mean that judges have no prior conceptions, opinions, or sensibilities about society's values. It means only that those preconceptions must not close their minds to the evidence and the arguments presented. Judges must be prepared, when the situation warrants, to experience what Herbert Spencer called the tragedy of "the murder of a beautiful theory by a gang of brutal facts."[9] In other words, there's a critical difference between an open mind and an empty one.

4. Values and social realities change over time and judges should not and cannot be shy about acknowledging this. In 1776, when the American Declaration of Independence pronounced that all men are created equal, many of the framers of the Constitution had slaves, and women could not vote. In 1633 Galileo was forced to apologize publicly for spreading news of the evidence revealed by his telescope—that the earth revolves around the sun, not the other way around as the church had taught for centuries.

Truths change over time and judges should not hesitate to acknowledge these changes. The transformation of *Plessy v Ferguson*[10] into *Brown v Board of Education*[11] is only one of the dramatic jurisprudential reflections of the inexorability of society's evolutionary progress towards pouring more content into rights.

5. The use of labels or epithets instead of analysis is not enlightening. Provocative phrases may all too easily become shorthand ways to avoid thinking. The phrase

7. *Christie v The York Corporation*, [1940] SCR 139.
8. Salisbury to Halsbury, November 1897, quoted in RFV Heuston, *Lives of the Lord Chancellors* (Oxford, 1964) at 57.
9. Herbert Spencer, quoted in Histor, "The Baby on the Doorstep" (1920) 29:22 Reedy's Mirror at 428.
10. See *Plessy*, *supra* note 2.
11. 347 US 483 (1954).

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'political correctness' may, for example, replace the need to think about disadvantage; the phrase 'special interest groups' may replace the need to entertain valid grievances; the phrase 'reverse discrimination' may replace the need to open the competition and actually try to reverse discrimination; and the phrase 'the merit principle' may replace the need to discuss whether that's what we've had all along. And 'activism', as we know, is only used conveniently to presumptively dismiss the legitimacy of a decision that expands rights, not restricts them.

6. And here we come to the role of public opinion. In Edith Wharton's *The Age of Innocence*, the van der Luydens and Mrs. Manson Mingott were custodians and interpreters of social norms in old New York. They were the self-appointed and accepted arbiters of what passed for public opinion at the time. Judges have no such omniscient oracles of prevailing social opinions. Nor should they.

Part of the task, in fact, may be to reach a conclusion *despite* the perceived prevailing public opinions. When we speak of an independent judiciary, we're talking about a judiciary free from precisely this kind of influence. As Lillian Hellman once said, "I cannot and will not cut my conscience to fit this year's fashions."[12]

Public opinion, in its splendid indeterminacy, is not evidence. It is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the bases for its opinion, susceptible to wild mood swings, and reliably unreliable. In framing its opinion, the public is not expected to weigh all relevant information, or to be impartial, or to be right. The same cannot be said about judges.

7. Let me end with *Brown v Board of Education*. When it was released, President Eisenhower was furious. He told a speechwriter, "I am convinced that the Supreme Court decision set back progress in the South at least 15 years.... Feelings are deep on this, especially where children are involved.... We can't demand perfection in these moral questions."[13] In context, Eisenhower wasn't wrong to worry about the ensuing public controversy and criticism. Almost 70 years later, in some quarters the decision is still an open sore.

But how has time judged the judgment? The answer may well be in these words I read in the New York Times on the 50th anniversary of the decision from a 14-year-old African American boy, who said:

> In Arkansas, when I was little, my dad would ask for directions and they would just look at him like he was crazy. I said, 'Maybe they didn't hear you.' I didn't really understand. But now I do. It still goes on, throughout your whole life.[14]

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12. Letter from Lillian Hellman to the House Un-American Activities Committee (HUAC) (19 May 1952) in Ellen Schrecker, *The Age of McCarthyism: A Brief History with Documents* (Bedford Books of St Martin's Press, 1994) at 201-02.

13. Emmet John Hughes, *The Ordeal of Power: A Political Memoir of the Eisenhower Years* (Atheneum, 1963) at 201 [emphasis removed].

14. R J Johnson, quoted in Jane Gordon, Morgan Chilson & Laura Randall, "In the Classroom: *Brown*'s Children's Children", *New York Times* (18 January 2004), online: https://www.nytimes.com/2004/01/18/education/in-the-classroom-brown-s-children-s-children.html

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That is how injustice sounds and that is how injustice feels. And being fearlessly open to understanding how injustice sounds and feels to those who come before us, is what judges are for. It is the compassionate application of law to life. Otherwise, what's the point?

And that brings us to 'the rule of law'.

I confess that I have always been somewhat confused by the use of the term 'the rule of law' as an organizing principle. Beyond students of scholars like Joseph Raz or H.L.A. Hart, I think the debate between positivists who see the rule of law as a procedural concept and those who see it as one with moral substance is lost on most lawyers, let alone on members of the public. Universal principles to which most of us are expected to give aspirational loyalty should not be shackled with semantic ambiguity. After all, this generation has seen the rule of law impose apartheid, segregation, and genocidal discrimination. It frankly makes me wonder why we cling so tenaciously to the moniker.

So what are we talking about when we talk about 'the rule of law'? What we're talking about, I think, are universal goals: ensuring limitations on arbitrary state power, protection against rule by whim, and our belief in law as an instrument of procedural *and* substantive justice.

If I'm right that that's what we are really talking about when we talk about a just rule of law, doesn't that mean that what we're talking about is what we've come to see as the indispensable instruments of democracy: due process; an independent judiciary; protection for minorities; a free press; and rights of association, religion, and expression, for example?

Those are core democratic values, and I for one am not the least bit embarrassed to trumpet them, because when we trumpet those core democratic values, we trumpet the instruments of justice, and justice is what laws are supposed to promote.

And I think we need to emphasize again and again that when we talk about democracy, we're not just talking about elections. To say democracy is only about elections is like saying you don't need the whole building if you have the door. Elections tell democracy it's welcome to come in, but elections are only the entrance. Without a home, democracy can't settle down. It needs an edifice of rules and rights and respect to grow up healthy and secure.

I know democratic values are no guarantee, but they are the best goals because without democracy there are no rights, without rights there is no tolerance, without tolerance there is no justice, and without justice there is no hope.

So I think, with great respect, that we should be out there promoting the universalism of democratic values rather than a contested euphemism like 'rule of law'. We need the rule of justice, not just the rule of law.

Is that what we have? I think we have to acknowledge that this is not, by any stretch, the best of all possible worlds at the moment. We're at the edge of a future unlike any I've seen in my lifetime. It is a future that is very divisive, very insensitive, and, at times, very macho. That makes it very dangerous. We have to worry not only about how the climate is changing the world, but how the moral

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climate is creating an atmosphere polluted by bombastic and intellectual sanctimony and a moral free-for-all. Everyone is talking and no one is listening.

We're rolling back hard-fought human rights for minorities, immigrants, refugees, workers, and women. We are in a world now where too often law and justice are in a dysfunctional relationship and a world where prejudice poisons and hate kills. Too many governments have interfered with the independence of their judges and media; too many people are strident; too many people have been killed; too many people are poor; too many children are hungry; and too many people have lost hope. We are forgetting our compassion and making the vulnerable more vulnerable in a world that was supposed to have learned the horrendous cost of discrimination after the Second World War so that being different would no longer expose someone to danger.

We're in danger of a new status quo where anger triumphs over respect and indignity triumphs over decency, where injustice is tolerated and tolerance is not.

The human rights abuses occurring in some parts of the world are putting the rest of the world in danger because intolerance, in its hegemonic insularity, seeks to impose its intolerant truth on others. Yet we're too reluctant to call to account the intolerant behavior that abuses citizens and instead we hide behind silencing concepts like cultural relativism, or domestic sovereignty, or root causes.

These are concepts that excuse intolerance. Silence in the face of intolerance means that intolerance wins, and when intolerance wins, injustice wins and democracy loses.

Is it time perhaps to hold a Bretton Woods Conference on Human Rights and Democracy? Maybe, maybe not, but we have to do something to retain our global humanity.

Let me conclude with a story about retaining our humanity. It's taken from a book called *Fragments* and was written several years ago by a man in his mid-50s living in Switzerland.[15] The book is hopelessly mired in controversy over its authenticity, but I find the language and imagery compelling.

The title of the book comes from the fragments of memories the man says he recovered in recent years, memories relating to the years he spent from the ages of about four or five in concentration camps. After the war, when the young boy was 10 or 11—he never really remembered how old he was—he was placed in a foster home in Switzerland. The brutality of the only life he had really known left him totally unprepared for the civility of his new surroundings. School, in particular, was utterly bewildering.

And hence this story about the day he was totally humiliated by his teacher in front of a giggling classroom when he was asked to identify a coloured poster of the Swiss hero, William Tell, of whom, of course, he had never heard.

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15. See Binjamin Wilkomirski, *Fragments: Memories of a Wartime Childhood*, translated by Carol Brown Janeway (Schocken, 1997).

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"What do you see here?" [the teacher] asks again.
"Tell! William Tell! The arrow!" they're calling from all the benches.
"So—what do you see? Describe the picture," says the teacher, who's still turned toward me.
I stare in horror at the picture, at this man called Tell, who's obviously a hero, and he's holding a strange weapon and aiming it, and he's aiming it at a child, and the child's just standing there, not knowing what's coming.
I turn away ...
Why is she showing me this terrible picture? Here in this country, where everyone keeps saying I'm to forget, and that it never happened, I only dreamed it. But they know all about it!
"You're supposed to be looking at the picture—what do you see?" she asks impatiently, and I make myself look at the picture again.
"I see—I see an SS man," I say hesitantly, "and he's shooting at children," I add quickly.
A gale of laughter in the classroom.
"Quiet," barks the teacher, then turns back to me.
"I'm sorry—what did you say?" and I can see that she's getting angry. ...
"The hero's shooting the children, but ..."
"But what?" the teacher says fiercely. "What do you mean?" Her face is turning red.
"... But ... but it's not normal," I say, trying not to cry.
"Who or what isn't normal here?" Now she's beside herself, and shouting. I force down the lump in my throat and I try to concentrate. But I can't interpret what's going on. What's this about? ...
"It's not normal bec-because ..." I'm stuttering again.
"Because why?" she says loudly.
"Because our block warden said, 'Bullets are too good for children,' and bec-bec-because only grown-ups get shot ... or they go into the gas. The children get thrown in the fire, or killed by hand—mostly, that is."
She screeches, losing her composure, "Sit down and stop talking drivel." ...
I look over at the teacher, standing there shaking with anger, standing there in front of the big blackboard, her hands still on her hips. My eyes begin to smart, and the big blackboard turns watery, gets bigger and bigger until it surrounds the whole classroom and turns into a black sky ...[16]

This is a story about a child who interprets the world based on what he knows and a teacher who judges him based on what she does *not* know.

Each of us is limited by what we do not know, and each of us is limited by what others do not know. With knowledge comes understanding, with understanding comes wisdom, and with wisdom comes the capacity to make justice happen.

And to make justice happen, we can never forget how the world looks to those who are vulnerable. And that's what I mean by the rule of justice, a rule that puts compassion in the service of law and law in the service of humanity. It's what I consider to be our profession's noble mandate and why I'm so deeply proud to be part of that profession.

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16. *Ibid* at 128-30.

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Thank you all for listening and thank you to Steven Coxford for the honor of allowing me to participate in his distinguished lecture series and for giving me the chance to extol the rule of justice.

Justice Rosalie Silberman Abella is a graduate of the University of Toronto. After practising civil and criminal litigation she was appointed to Ontario's Family Court in 1976, to the Court of Appeal for Ontario in 1992, and to the Supreme Court of Canada in 2004, becoming the first Jewish woman to sit on Canada's highest court. After her retirement from the Supreme Court in 2021 she became the Pisar Visiting Professor of Law at Harvard Law School. In addition to her judicial appointments, she has served as the sole commissioner of the federal Royal Commission on Equality in Employment (1983-84); as author of the Ontario Study into Access to Legal Services by the Disabled (1983); as chair of the Ontario Labour Relations Board (1984-89) and the Ontario Law Reform Commission (1989-92); as a member of the Ontario Human Rights Commission; and as a member of the judicial inquiry into the Donald Marshall, Jr. case.

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