

# Conversation

## with Harry Arthurs

There's no reason, in a civilized society, for censorship, according to civil libertarian and Osgoode Hall Law School professor Harry Arthurs. In a free society it should be up to us as individuals to make that decision and not up to the government to lead us by the hand. In an interview with Excalibur's Bruce Gates, Professor Arthurs discussed some of the current issues that have profound effects on our rights as Canadians.

### How free are we as Canadians?

We're not as free as we think we are, or as free as we think we ought to be. But for most of us that realization never comes home because we never want to do things which test the limits of our freedom. Occasionally in the federal government, or the provincial government, some bureaucrat will do things which intrude on our lives. But basically we can go on, on a day-to-day basis, and no one will bother us very much. And that's what makes life tolerable. But until we begin to be concerned, not about intrusions into our own personal lives, but looking around and seeing that the lives of our fellow citizens are being intruded upon, only then do we appreciate the limits of freedom.

**In an article written by you in the February/March 1979 issue of Quest magazine, you seemed to be conveying the impression that Canadians are generally apathetic — or perhaps complacent is a better description.**

Yes, I think Canadians generally are. In a way, it's one of our endearing virtues as a country. It makes life bearable in a nasty kind of world. On the other hand, one pays a certain price for it. And the price you pay is that people whose behavior or ideas or interests don't conform to those of the majority are often brushed aside.

**It seems Canada is unlike the United States when it comes to civil liberties. Canadians do not seem to be as active as their American counterparts in this regard. The states are very active in their quest for civil liberties.**

Sure. And they're also more active than we are in their suppression of civil liberties. You find extremes, and that's what I'm saying with regard to Canadians' seeming complacency and ambivalence. We tend to avoid those extremes. You find people in the United States who are asserting themselves very strongly, exercising their freedom of speech, and a variety of other freedoms. At the same time you find intrusions on a daily basis — wide authority by police, by the government — which would be hard to find the equal of in Canada. Certainly one explanation for why we've been relatively quiet about protecting civil liberties here is that happily we haven't had some of the extreme examples of repression that one sees in the States, although ours are certainly bad enough and deserve a stronger response.

### As in the War Measures Act?

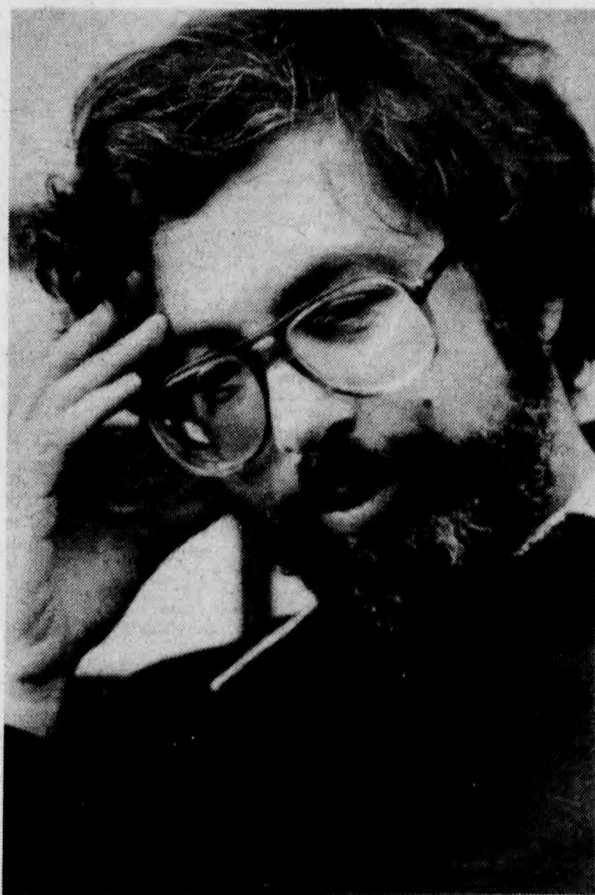
The War Measures Act certainly — both as it was used in wartime against Japanese Canadians, and as it was used in 1970 in Quebec. It was a quite unacceptable record for a democratic country.

**In that same article in Quest you stated somewhat wryly: "The reason we view civil liberties as a dull topic is that we are decent citizens of a decent country governed by a decent people." This false sense of well being is disturbing in light of what you've just said, and in light of the recent Peter Treu case and the case against the Toronto Sun.**

Well, to be fair, in both the Treu case and the Sun case, ultimately the good guys prevailed. In both cases, happily the result came out on the libertarian side.

**But what exactly did you mean when you said Canadians were "decent" citizens in a "decent" country and governed by "decent" people?**

Well, we have an image of ourselves, as people that aren't all that bad. And we aren't, by lots of standards, terribly bad. We're not as bad as Chile, and we're not as bad as Franco's Spain. And I would have to say that in a lot of respects the repression, the intervention, and the interference with civil liberties has not even been as bad as the States, which has a very active civil liberties movement and has a lot of institutions which are visibly defending civil liberties. Whether they



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exist as a response to people that are interfering with liberties is really an interesting question.

**It's something that will probably be debated quite consistently over the next couple of years in talks about amending the BNA Act or adopting a new Canadian constitution.**

Yes, well I think what we're really talking about is a question of political culture and social culture, rather than institutional or legal answers. It's how people feel — people including governments, judges, ordinary citizens, those who write newspaper editorials and so on. These are the people that put ideas into currency in a society and give them effect. You can structure things the way you want, you can write things into laws as much as you want, but if the people who carry out these laws are not committed to those ideas, are not prepared to make them come alive, then they're just not going to happen.

**Then Canadian people are going to have to be more assertive in order to make it happen. They can't be complacent.**

That's right. Exactly.

**That leads to the issue of a bill of rights. Professor Peter Hogg in his book (Constitutional Law of Canada) has described the purpose of a bill of rights as something "to define and guarantee certain civil liberties which are regarded as so basic that they should receive immunity, or at least special protection, from state action." We do have a bill of rights, of course. Prime Minister Diefenbaker brought it in back in 1960. But as you suggested in Quest, only five of 50 cases heard by the Supreme Court of Canada were found to have violated the Bill. Would you agree that Canadians need a constitutional bill of rights, one that is entrenched?**

I would like to think that entrenchment would change everything. But I don't think it would. Without entrenchment, a court that had been anxious to protect civil liberties could have done so under the existing bill in many more cases than it did. With entrenchment, I doubt that they would view the matter any differently. The fact of the matter is that if judges are not particularly sensitive to civil liberties values, then they will not be sensitive to them regardless of whether they're entrenched or not entrenched. Entrenchment means very little except symbolic protection for a bill. It means technically speaking that it would be hard for a government to repeal a bill of rights without securing a constitutional amendment. I accept that. On the other hand, no government in our political culture could repeal our present bill of rights as it presently stands. That is to say, they have the legal right to do it, but the political risks of repealing it, I suppose, would not be worth the gain. So I really don't think

entrenchment would make a whole lot of difference until the courts, the police, public officials, opinion formers and citizens get serious about it. At that point, again, entrenchment becomes irrelevant. If everyone is serious about it, then it doesn't have to be enshrined in the constitution.

**But our court, the Supreme court of Canada, that is, was created by an act of parliament. It is not constitutionally guaranteed, as in the U.S. Supreme Court, which by means of the American constitution is a body separate from political wings like the Senate, the House of Representatives, and the President. Do you think that Canada's Supreme Court, because it is not entrenched, may be a bit wary of ruling against government legislation that may be in violation of individual rights?**

Well, the Supreme Court has done lots of things which governments don't like, even though it isn't constitutionally entrenched. Again it's a question of our political culture. And a government which would seem to be at odds with the rulings of the Court would be in a lot of trouble. I think entrenchment is a red herring, but I will say this: the ability of the court to strike down legislation up to this point has largely been exercised in relation to the distribution of powers between the provinces and the federal government. And it has struck down provincial legislation which it said intruded on the federal sphere, and they have struck down provincial legislation which intruded on the provincial sphere. And in some cases, the legislation in question was civil liberties legislation. In the 1950s particularly, some gains were made in the protection of civil liberties because infringing provincial legislation was held not to lie within provincial confidence, and the courts struck it down.

### And today?

Unfortunately, the trend of the 1970s has been in exactly the opposite direction. Infringing provincial legislation, which has been complained of as infringing the federal sphere, has been sustained by the Court — particularly in two quite recent cases, one having to do with the Nova Scotia Film Censorship Board, and the other having to do with the Montreal bylaw forbidding parades and demonstrations. In both cases, the Supreme Court's precedents from the 1950s would have been thought to be bases for striking down the provincial laws. In both cases the Supreme Court said, "No. We accept the province's right to legislate in these matters." Now that was very surprising. The Court had the power, they had used the power in the past, but decided not to use it at this time. What happens is the question of federal versus provincial power gets all confused with liberties and suppressions. The Court knew how to use that confusion to its advantage from a civil liberties point of view twenty years ago. But it's not using it today.

### Why would that be?

Courts change. When we say "court" we mean nine human beings. Some retire, some get old, some change their minds, new people come on with different approaches. They sense a change, perhaps, in the mood of the country, giving the provinces more elbow room and restricting the federal government. There are a lot of different explanations. But a court is only a collection of nine people at any given time.

**Further on the subject of civil liberties, a subject that is always contentious is free speech. But where does free speech end? The preaching of hate propaganda is free speech, but how do we reconcile ourselves to accept it?**

I think that is one of the toughest questions a civil libertarian has to answer. Stirring up race hatred is now an offence under the Criminal Code. I don't think it should be there for several reasons. The most important is that it seems to me the surest inoculation against racism is to say to ordinary citizens, "Look, you've got to stand up and fight it. Don't shuffle this job off on the police or the censor."

**That brings us to one final point about censorship. There have been some recent examples of film censorship. "Luna" was the most recent. Do we need a censor board at all?**

No. The most I would say we need is a classification board so that people know what they're going to see. But I can see absolutely no reason in a civilized society for censorship.