

CHAFF FROM THE CHARTER'S THRESHING FLOOR

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In determining the meaning and the application of the principles of the *Charter*, the courts now have a duty to hear and consider all facts and materials which, if tendered a few years ago, would probably have dismayed a trial judge, offended the ordinary rules of evidence, and would be firmly ruled inadmissible.

Because section 1 of the *Charter* requires that the court determine what reasonable limits ought to be placed upon the freedoms it guarantees, judges must now hear what informed people of every profession and class called to assert a questioned right, have to say about its nature and effect. The judges must also hear informed people called to oppose that right. Only then can the judge decide whether there are any limitations upon that right that are prescribed by law; and if so, whether such limitations are justified in a free and democratic society.

The First Twenty Months

In these first 20 months in the life of the *Charter*, courts have spoken a loud and clear "Open O Sesame" to witnesses expert in a broad spectrum of human affairs. Cognoscenti of many disciplines, including physicians, surgeons, radiologists, gynecologists, fetologists, embriologists, ethicists, economists, statisticians, administrators — all experts in some field of human knowledge and behaviour — these have been heard and have contributed to the determination of vital issues of which the *Charter* invites and requires judicial scrutiny.

With the broadening of the areas into which the judiciary will now inquire, the duties of counsel have vastly increased. It is no longer sufficient that a barrister be a specialist in the examination and cross-examination of witnesses or an expert in constitutional, administrative, labour or criminal law. A lawyer must now be a philosopher as well, because the *Charter* is, itself, a philosophical document. Its basic philosophy is one of freedom limited only by laws that can be justified in a free and democratic society where impediments upon the individual are minimal and where all participate in the ultimate business of lawmaking.

Not only must lawyers, who rely upon and argue the principles of the *Charter*, be philosophers, but judges must be philosopher-princes, men of the widest knowledge and the broadest vision who have recognized that the proper study of mankind is man. Their values too, must be consonant with the principles of the *Charter* because it is the supreme law of the land.

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Specialization, Not Necessarily The Wave of The Future

It is ironical that at a meeting of the Canadian Bar Association, held in Quebec City in August of 1983, a detailed report on specialization in the legal profession was presented.¹ The report strongly favoured professional specialization. It was a well-prepared document. Its *ratio* was based upon the principle that members of the general public ought to know where they can find the expertise they require from among the members of the legal profession, and the price that such services command. Its thrust was to encourage members of the bar to specialize.

To me, it seemed passing strange that at this particular juncture in Canada's constitutional development, when new ideas are being generated and new concepts are being tested, many of which stretch across the traditional disciplines of the professions, lawyers should wish to narrow their interests and attenuate their concerns. Specialized lawyers may be regarded as desirable tools to serve the public better in the profession's role as expeditors. But at the very moment that specialization, with its dimming tunnel-vision is being endorsed, the most significant developments in our law are demanding of the members of our profession that we grow into more knowledgeable and understanding generalists.

As I read this report, I recalled the words of Erasmus, the greatest of all humanists of the Renaissance that rekindled the lamps of inquiry and learning. It was he who described the lawyers of his time as a very learned class of very ignorant men. So learned in the formalities of pleading was the medieval lawyer, he generally remained ignorant of the nature of the men and women for whom he pleaded.

The complexities of our laws today, reflecting as they do the nature of contemporary society, naturally move the lawyer into the confines of a special field of study and practice. Yet, I reject the popular notion that it is inevitable that members of a learned profession are condemned to the paradoxical fate of ultimately knowing more and more about less and less, until ultimately, they will know virtually everything about absolutely nothing.

The closer he closets himself among his fellow specialists, the narrower does any man become, for knowledge grows not in the isolation of the learned, but by the cross-pollenization of a multitude of human brains:

Sure it is cephalic cloisters
Never breed the pearlled oysters.

The lawyer can, and indeed must, continue to draw upon the rich repositories of the knowledge of every profession and every man's trade. His province is all knowledge and all experience. As it was immodestly said of Sherlock Holmes, so it may be repeated and applied to the barrister that while all other men are specialists, his specialism is omniscience.

1. Report of the Canadian Bar Association Special Committee on Specialization in the Legal Profession, *The Unknown Experts: Legal Specialists in Canada Today* (1983).

The broad scope of the inquiry that the *Charter* contemplates and, indeed, renders necessary, is bound to inspire the expansion, not the diminution of the legal mind. The great need today is for the legal generalist, and nowhere so much as in the study and application of the *Constitution* where advocacy requires that counsel be prepared to range so far over the many fields of knowledge that in the process of addressing the court, he will be undressing himself, in the sense of Sir Norman Birkett's observation that great advocacy is in the last and supreme analysis, the product of what the man is who produces it.

The Specialist Judge

It is not only the practitioner's knowledge that the *Charter* challenges. It challenges the judge as well, and demands of him patience, experience and a sense of history greater by far than ever before was expected of him.

While some of our colleagues have come to believe it inevitable that lawyers must specialize, none that I know have considered the effect that specialization is likely to have upon a very special class of lawyers. I am thinking of the judge. Who among us would wish the judge before whom we appear week after week, to be a specialist in but a single field of law? Any field — even if it be the field in which counsel themselves specialize? The genius of the judicial process lies in the phenomenon that the great judge and particularly the judge who sits in an appellate court, must be a generalist of generalists, a man for every season. It is the broad sweep of the judge's knowledge and vision that distinguishes his place on the bench from that of the mere administrator who presides over his inferior tribunal "more stubborn-hard than hammer'd iron".

It is precisely because our judges are society's great generalists that, in an era in which almost every established institution has been attacked, the courts have remained firm and free of any concerted chorus of criticism or disparagement. Judges as a class, have maintained the dignity of their high office, their integrity and their reputation for competence and fairness. The public accepts their judgments across the land, not merely as binding, but as just and reasonable. So universally are they respected that, strange to tell, alone among our venerable institutions, the authority of the courts has not diminished: it has been systematically enlarged, and nowhere to so startling a degree or in so sensitive a place, as in matters constitutional.

Never, since the gestation of the *British North America Act, 1867*, have Canadians witnessed so brilliant an explosion of constitutional writing and learned writhing as the universities, the bench and the bar have detonated in the *Charter's* first 20 months.

The solo parts that judges play in expanding the law through judicial interpretation and that academicians, accompanying them play in explain-

ing what the judges meant, have always been recognized and appreciated. But all too seldom is the practising lawyer credited for his inventiveness. During these first few months of the *Charter*, however, the role of counsel as innovator, has been firmly established and is likely to be assured for decades to come. No less than the judge on the bench, the lawyer at the bar can now find abundant opportunity for discovery and creation.

If the legal profession were to move its best brains into specialized fields, from what speciality would our judges of the future be selected? A judge who has dwindled into a mere specialist is likely to be a specious judge: superficially plausible in small matters, but shallow-pated in matters of great moment to the nation.

The *Charter*, having been declared the supreme law of Canada, most judges who have been considering its terms stand tiptoe and tall above the maze of statutes, regulations, orders and directives that have come to occupy so overwhelming a place in the concerns of the bench and the bar. In a brief 20 months, judges, with the help of a rejuvenated legal profession and stimulated by the concepts of the *Charter*, have cast a keen eye upon some of the hitherto unseen horizons of the law. Our vision has been sharpened. What seemed to be too distant to warrant even a passing thought a mere 20 months ago, is finding focus and is now seriously being examined for the first time.

Judges and lawyers, finding they no longer need be mere scribes, nit-pickers and necromancers reviving the legerdemain of ancient forms and fouled-up fancies, are turning to the task of weighing competing interests and analysing moral alternatives. And in the future, I see emerging from the legal profession the philosopher-judge proclaiming the ethics and the ethos of the free and democratic society that the *Charter* encourages us to ponder and to build. The hour of the Renaissance man, once more has struck. I believe one of the most unexpected and most valuable effects of the *Charter* cases upon the legal profession will be to stay or possibly to reverse the trend toward specialization.

In the *Quebec Protestant School Board* case², testimony was led from five expert witnesses, including an historian, a mathematician, a sociologist and two demographers. These witnesses offered evidence on how *Bill 101* fit into the general pattern of Quebec's history, its impact on both Anglophone and Francophone populations of the province, and its relationship to the principles of section 23 of the *Charter*. The judgment contains many socio-economic and historical facts and opinions. In hearing this evidence and adopting much of it, the court signalled to counsel its willingness in *Charter* trials to consider matters that heretofore were regarded as irrelevant and inadmissible.

Materials of this kind can effectively be brought before a court only

2. *Quebec Association of Protestant School Boards v. Attorney-General of Quebec* (No. 2) (1982), 140 D.L.R. (3d) 33 (Que. S.C.), aff'd (1983), 1 D.L.R. (4th) 573 (Que. C.A.) leave to appeal to S.C.C. granted, Sept. 20, 1983.

in the course of an actual trial. They do not lend themselves to convincing presentation upon a mere motion in chambers that seeks relief by way of an injunction or a writ of *certiorari* or prohibition or *mandamus* based upon affidavits alone.

While affidavits are, of course, permitted in a serious *Charter* case, there is no satisfactory substitute for *viva voce* evidence heard by a Judge or jury where examination and cross-examination by counsel, and a few well-directed questions from the bench are most likely to accurately test the conflicting values that now fall to be weighed and determined in every such action.

After a plaintiff asserts in a statement of claim or other appropriate pleading, and establishes by evidence that a given set of facts constitutes a violation of a right or freedom guaranteed by the *Charter*, counsel opposing the relief that is sought must plead and then lead evidence of justification upon the principles set out in its first section. The proceedings that are contemplated are of an adversary nature. The plaintiff, having established his claim upon a guarantee enunciated in the *Charter*, the defendant must then take up the burden of demonstrating by evidence and argument that the guaranteed right has been limited — not denied — by the impugned law or decision in a reasonable manner and to a reasonable extent; and he must further go on to convince the court that the impugned law or decision limiting the guaranteed right is justified in a free and democratic society.

Borowski v. Attorney General of Canada³

The action was commenced on September 5, 1978, asking the Court of Queen's Bench for Saskatchewan for a judgment declaring subsections (4), (5) and (6) of section 251 of the *Criminal Code*⁴ of Canada (the therapeutic abortion provisions) invalid as offending section 2 of the *Canadian Bill of Rights*⁵ and, (in the statement of claim as amended), sections 12 and 14 of the *Charter of Rights and Freedoms*. Because the Attorney General of Canada was unwilling to submit to the jurisdiction of the Saskatchewan Court of Queen's Bench, and because the Attorney General also denied Mr. Borowski's status to launch the proceedings, it was 4½ years before the trial began in the Queen's Bench with Borowski as plaintiff. In the interval it was necessary for the Supreme Court of Canada to hear and adjudicate in the plaintiff's favour upon both of these preliminary matters.⁶

Impact of the Charter

Much had changed in the intervening 4½ years. We began our action by pleading the *Canadian Bill of Rights* and "the right of the individual to life, liberty and security of the person". But when the trial began, the

3. *Borowski v. Attorney-General of Canada*, [1984] 1 W.W.R. 15 (Sask. Q.B.).

4. *Criminal Code*, R.S.C. 1970, c. C-34, s. 251(4)(5)(6), as amended.

5. *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, s. 2.

6. *Minister of Justice of Canada v. Borowski* (1981), 130 D.L.R. (3d) 588 (S.C.C.).

Canadian *Charter of Rights and Freedoms* was 13 months old. Accordingly, we amended our statement of claim to plead sections 7, 12 and 14 of the *Charter* to support our prayer for a declaratory judgment.

Our argument was not complex: based upon an age-old tradition that the law favours life and not death, we argued that section 251 of the *Criminal Code*, which goes back a hundred years, by its first three subsections, prohibits the termination of all intra-uterine human life by abortion. In 1969 “therapeutic abortions” were permitted. Subsections (4), (5) and (6) were added to allow an abortion to be performed by a qualified medical practitioner in an accredited hospital if an abortion committee lawfully established by the hospital’s governing body should issue a certificate stating that in the opinion of a majority of its members, continuation of the pregnancy would, or would be likely to, endanger the life or health of the mother.

We argued that under these new subsections, the unborn child is denied certain fundamental rights guaranteed to “everyone” under the *Charter*:

1. Denied to the unborn child is the right to life and the right not to be deprived of life except in accordance with the principles of fundamental justice as guaranteed by section 7 of the *Charter*;
2. Also denied to the unborn child is the right not to be subjected to cruel and unusual treatment as stated in section 12 of the *Charter*; and
3. Denied to the unborn child is the right to have someone speak for him or her before the committee whose actions almost invariably result in the issue of a certificate that authorizes the termination of a child’s life, contrary to section 14 of the *Charter*.

We sought a declaration that by virtue of the *Bill of Rights* and the *Charter*, subsections (4), (5) and (6) of section 251 of the *Criminal Code* are unconstitutional.

Our basic position was simply this, that “everyone”, as it appears in sections 7 and 12 of the *Charter*, includes the unborn child living within the body of his mother. Whilst living there, he like his mother, has the right to life and the right not to be deprived of life except in accordance with the principles of fundamental justice. Under section 251, subsection (4) of the *Code*, if, in the opinion of a majority of the committee, a pregnancy would or would be likely to endanger the mother’s life or health, an abortion certificate may be granted (and almost invariably is granted).

But the *Code* is silent concerning the life and health of the unborn child. We argued that if that child is “someone” — “anyone” within the meaning of the *Charter*’s key word, “everyone”, he also must be considered, before it is decided to destroy him. His life and his health are also important. He is not so small or insignificant that the *Canadian Charter of Rights and Freedoms* and the *Bill of Rights* have ignored or forgotten him. If an abortion committee is to exist at all, then its members must be charged with the duty, not only of considering the life and health of the mother, but of considering as well, the life and health of the unborn child

who, within her body, is carried as a living, lively passenger for a term of about nine months. In the normal course of things, his life will continue in the world outside. We say that the child cannot be capriciously destroyed. He has a right to continue to live and to emerge from his mother's body whole, alive and well. To that child the mother and every member of society owes a duty of care to ensure that his life be preserved and not destroyed so that he may live — because "Everyone has the right to life..."

We contended that in order that the child may not be denied the benign protection of the principles of fundamental justice, a committee or other tribunal or body must fairly and fully hear the unborn through his counsel, *amicus* or guardian; must hear what is urged against the continuation of his or her life; must actually see the child as we miraculously are now able to do with the advanced technology of ultra-sound; and the committee must hear and see the mother who asks that the separate, individual life within her be destroyed. The tribunal must then adjudicate not upon the rights of the mother alone, but upon the rights of mother and child — applying the principle that the laws of Canada favour life and that no one, however small or silent, may be denied that right without good and sufficient cause, and in keeping with the principles of natural justice.

It was our position that there being no such substantive and procedural safeguards, the lives of unborn children were being destroyed in Canada at the rate of more than 60,000 each year. In Toronto, where there are more abortions than live births, there are not enough children being born and allowed to live to maintain the present population of Canada's largest city. In the result, we claimed that subsections (4), (5) and (6) of section 251 of the *Criminal Code* have created a punishment without a crime and a death sentence without a trial. And this, assuredly cannot be justified in a free and democratic society.

The Impact of Common Knowledge, Common Law and Common Sense

There exist strong arguments in the law, as it has grown and developed since the time Blackstone wrote his *Commentaries*, to support the claim to life of the unborn; that the child *en ventre sa mere* is an individual separate and apart from his mother, and that he is "someone" and not a "nothing". That "someone" now has the right to live and the right not to be deprived of his life, save in accordance with the principles of fundamental justice.

Long before the *Canadian Bill of Rights* and the *Charter*, the common law's first concern was always the protection and preservation of human life.

Blackstone, in his *Commentaries on the Laws of England*, wrote that:

- I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law *as soon as an infant is able to stir in the mother's womb.*⁷

“Quickening” was the ancient phrase used by a mother to describe the first stirring of an infant in her womb. It was the evidence, and the only evidence, the ancient judges had before them and could consider to determine the time that the gift of life endowed the unborn child with legal rights. Lacking the scientific knowledge of our times — “quickening” was the obvious and the only evidence anyone could look to for the purpose of determining the existence of a new and separate human being within the mother’s body.

It was not a very accurate criterion because “quickening” is a mother’s perception of the movement of the child within her body. Also it may come late in pregnancy because the uterus, through which the sense of movement may be conveyed, is not a very sensitive organ. Indeed sometimes “quickening” is perceived by the mother for the first time as late as the 8th month of pregnancy.

All that has changed. Significant advances in science, in the past ten years have made it possible for a mother, as well as for her whole family, to see the new child within her body, hands, feet, head and all, as soon as 8 weeks after conception. With this relatively simple instrument that any radiologist can operate, a mother can see her living child, not merely stirring within her body, but watch that child move in its amniotic fluid, sometimes jump as on a trampoline, suck a thumb, wave a hand and hiccough.

But how could I bring before the Court that little unborn “somebody”, that microcosm encompassed in the macrocosmic universality enshrined in the *Charter’s* phrase, “everyone”? How could I exhibit to a judge, so he might see and hear for himself the unborn child as a living, active, moving, changing human being so that a judge’s senses and his good sense, would recognize this new member of the human race? How could I demonstrate that that unborn child is “someone” to be reckoned with under the *Charter* and the common law, whether residing inside or outside his mother’s body?

Citing all of the numerous legal authorities on the status of the unborn, (formidable though that body of law unquestionably is) would not, in my view, be sufficient to carry the day unless I could produce a substantial substratum of factual scientific evidence to convince a judge that the unborn child is no less a human being whilst residing in his mother’s body than he is when he emerges from her body. The Chinese, for more than 5,000 years, realized this simple fact by calculating the age of a child on the day of his birth as one year. On his next birthday he is two. But this Chinese tradition we in the West have not yet adopted.

7. I. R. Kerr (ed.), *Blackstone’s Commentaries* (4th ed. 1876) 101.

I was convinced that my help had to come from the facts — the scientific facts — graphically and orally presented. With the coming of the *Charter*, judges were receptive to the idea that the whole field of scientific knowledge lay within the province of their inquiry and adjudication. As a member of the last remaining profession of generalists, I believed that a judge would feel at home in every environment — medical, ethical, philosophical, biological — all of which have relevance to the issues in *Borowski's* case.

Happily, this fresh judicial approach coincided with an explosion of medical and biological knowledge of intra-uterine life. Ultra-sound was now making all of this possible. The medical profession was producing men and women of great gifts who were discovering the nature of the life of the tiniest of human beings in the body of mothers. With the new technology, these scientists observed, examined and were actually treating the babies within their mothers' bodies.

What I consider to be of the greatest importance was the evidence I was able to lead after combing the hospitals, laboratories and medical infirmaries of the scientific world, and bringing within the four walls of a Regina court room, a body of knowledge and experience that had not been assembled before. Coincidentally much of the scientific knowledge had been developed in the five years during which the *Borowski* case was in the course of its own gestation.

The expertise of the witnesses I called at the trial will give you some idea of the scope and the variety of the fields of knowledge that were relevant to the determination of the principles at issue. It also demonstrates the challenging nature of the task that faces all of us, as we attempt to transform the *Charter* from symbolic words into a living reality.

