

## THE CHARTER — EMERGING ISSUES AND FUTURE ACTION

The Honourable Mark MacGuigan\*

I am delighted to be here today to participate in this important conference sponsored by the Canadian Institute for the Administration of Justice in the "Age of the Charter". Its effects are only just beginning to be felt and its implications are still imperfectly understood by us all. However, clearly the *Charter* sets standards which must guide many of my decisions. According to the agenda for this conference you have spent the last two days analyzing the operation of the *Charter* in its first eighteen months. Today I want to talk to you about emerging *Charter* issues and how I see my role in promoting the resolution of these issues. What then, is my authority to promote the resolution of *Charter* issues in Parliament, before the courts and with the public?

One of my major responsibilities is to advise the Government of Canada on the implications of the *Charter* for federal legislation. Soon after the proclamation of the *Charter*, the Government of Canada made a commitment to legislate greater conformity between our existing laws and the *Charter*. Our purpose in adopting this course of action is to avoid difficulty and cost to litigants in challenging legislation and to avoid the risk of disrupting important government programs that might be successfully challenged in the courts. In our review of federal statutes, regulations and administrative practices, we are finding a number of issues where we are convinced action must be taken before all the nuances of rights guaranteed under the *Charter* are evolved by the courts.

The question of what constitutes a reasonable search in the criminal law and for the purpose of enforcing a regulatory scheme is one of particular interest to governments. On the one hand, the Alberta Court of Appeal in *Southam v. Hunter*<sup>1</sup> has struck down section 10 of the *Combines Investigation Act*<sup>2</sup> on the basis that the grounds for the authorization to search were not substantiated by sworn evidence. On the other hand, the Quebec Superior Court in the *Rolbin*<sup>3</sup> case held that a demand for information under section 231 of the *Income Tax Act*<sup>4</sup> was not a search.

One of the most controversial issues is the writ of assistance authorized under the *Narcotic Control Act*.<sup>5</sup> As a matter of policy, I have indicated publicly that I will recommend to cabinet that writs of assistance be abolished. The difficulty, of course, is to replace the writ with investigative techniques that will be effective in the world of the drug trafficker while respecting the value that the state must not lightly interfere with

\* Q.C., M.P., Minister of Justice and Attorney General for Canada.

1. *Southam Inc. v. Hunter (Director of Investigation and Research of the Combines Investigation Branch) et al.* (1983) 147 D.L.R. (3d) 420, [1983] 3 W.W.R. 385, 42 A.R. 93, 24 Alta L.R. (2d) 307, 65 C.P.R. (2d) 116, 4 C.R.R. 368 (C.A.).

2. R.S.C. 1970, c. C-23.

3. *Rolbin v. The Queen* (1982), 2 C.R.R. 166 (Qué. S.C.).

4. S.C. 1970-71-72, c. 63.

5. R.S.C. 1970, c. N-1.

personal privacy. To this end, I am considering the recommendation of the Law Reform Commission of Canada on telephone warrants and hope to bring forward legislation to draw the necessary balance in the next session of Parliament.

In the area of administrative or regulatory searches, we are finding that the existing powers of entry in many instances appear to be so broad that they permit entry to a dwelling place without a warrant. At common law, the distinction between dwelling places and other premises has been recognized historically, with more rigorous safeguards recognized for dwelling places. The challenge in implementing the *Charter* in this area is to balance the need to verify compliance with the requirements of regulated activities against the rights of those carrying out the activity to the greatest possible degree of freedom from government interference. While I do not believe that section 8 of the *Charter* has set up a warrant requirement for entry to any premises, I do think the courts will scrutinize more carefully existing powers under federal regulatory statutes. I hope to bring forward legislation at the next session of Parliament to change the law in this area.

The right to freedom of expression and freedom of association in section 2 of the *Charter* poses some very serious problems. Some will argue that under the *Charter*, public servants have a right, apparently unqualified, to comment publicly on any matter and to participate in politics. The nature of limits on that right, in the context of an apolitical tradition of public service has to be considered. On another aspect of freedom of expression — the question of film censorship, the Ontario Divisional Court held in the *Ontario Film and Video Appreciation Society* case<sup>6</sup> that any limit on freedom of expression must not be left to administrative discretion, but must be “articulated with some precision” in a provision which has the force of law. It strikes me that this decision may demonstrate that courts are now sensitive to vagueness and the breadth of statutory limits on *Charter* rights, and are prepared to react against imprecision in those cases in which section 1 of the *Charter* is raised. Clearly, there must be some guidelines to indicate to public servants the sort of conduct that is or is not permissible. They have to know the ground rules so that their ability to do their job and serve the public is not imperilled.

Similarly, the incidence of racist activity in Canada is under examination by a Special Parliamentary Committee on Visible Minorities. One of the serious questions I have to deal with is the apparent inadequacy of the hate propaganda provisions of the *Criminal Code*. The presence of that kind of propaganda in our society surely negates the entitlement of the minorities who are liable to vilification and defamation by racists to equal protection of the laws. I believe that we must discourage this kind of propaganda, and that the technical defects in our laws need to be abol-

6. *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583, 147 D.L.R. (3d) 58 (H.C.).

ished, to enable our courts to balance freedom of expression with the tendency to provoke racial hatred and violence.

Even though the equality rights in section 15 of the *Charter* do not come into effect until April 17, 1985, we are becoming increasingly aware of the enormous potential impact of these rights. Work has begun to ensure conformity of federal legislation with the *Charter* in this area. We have already introduced in Parliament amendments to the *Unemployment Insurance Act*<sup>7</sup> to overcome the effects of the *Bliss*<sup>8</sup> decision and to make sure the act does not discriminate on the basis of pregnancy. The question of mandatory retirement is under active consideration and it is an issue of very serious proportion. We have already had cases challenging mandatory retirement under federal and provincial Human Rights Legislation, and I have no doubt that, unless the issue is settled before 1985, legislative provisions requiring retirement at age 65 will be challenged as discriminatory on the basis of age. When can an employer require an employee to retire? What will happen in a job market that is especially difficult for young first-time job seekers if mandatory retirement is inconsistent with section 15? We have been put on notice in *Ontario Human Rights Commission v. Borough of Etobicoke*<sup>9</sup> that in this field the subjective good faith of an employment policy in favour of mandatory retirement is not enough. There must also be an objective demonstration of the relationship between obligatory retirement and the efficient, economic and safe performance of an individual job. Can we no longer generalize across entire sectors of the economy? Or is it more a matter of having to substantiate the basis for our assumptions about age in the context of employability?

Another problem the government has been working on in the last 18 months is the question of sexual discrimination in section 12(1)(b) of the *Indian Act*<sup>10</sup> which stipulates that Indian women who marry non-Indian men, lose their Indian status. Taken in their overall context, the legal ramifications of these issues are perhaps the least important. Other aspects of these questions are more troublesome and socially, politically and economically, they may be profound. The Government has undertaken to resolve these problems and I am optimistic that the time for delay is past.

While the volume of litigation has not been large, important issues have emerged with respect to the right to earn a livelihood in section 6 of the *Charter*. In *Re Skapinker*<sup>11</sup> the Ontario Court of Appeal held that the requirement in Ontario that lawyers be Canadian citizens was not a reasonable limit within the meaning of section 1. Leave has been granted to appeal this case to the Supreme Court of Canada. Recently a Nova Scotia

7. "An Act to amend the Unemployment Insurance Act, 1971 (maternity benefits)" Bill C-205, 32nd Parl., 1<sup>st</sup> Sess. First Reading, May 2, 1980.

8. *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, (1978) 23 N.R. 527, 92 D.L.R. (3d) 417, [1978] 6 W.W.R. 711, 78 C.L.L.C. 14, 175.

9. [1982] 1 S.C.R. 202, 40 N.R. 159, 82 C.L.L.C. 17,005.

10. R.S.C. 1970, c. I-6.

11. *Re Skapinker and Law Society of Upper Canada* (1983), 40 O.R. (2d) 481, 145 D.L.R. (3d) 502, 3 C.R.R. 211 (C.A.).

court upheld the statutory requirement in that province that door-to-door salesmen be residents of Nova Scotia.<sup>12</sup> At the federal level, provisions in the *Public Service Employment Act*<sup>13</sup> relating to citizenship and local preference for job selection must now be re-examined and re-evaluated in light of the *Charter*.

In my role in resolving *Charter* issues in legislation I am faced with an extraordinary variety of potential problems. Section 7 of the *Charter* has been invoked to question the validity of the law permitting abortions under certain circumstances in lengthy court proceedings in Saskatchewan.<sup>14</sup> The indications are that this issue will also be raised in Ontario and Manitoba. Section 7 is also being used in proceedings now before the Federal Court of Canada to challenge the decision of the Government of Canada to permit testing of the cruise missile.<sup>15</sup> An action is also under way in the Federal Court contending that the "Federal 6 and 5" program infringes the right of federal civil servants to bargain collectively. Inmates in the Kent Penitentiary in British Columbia have challenged their exclusion as electors under the *Canada Elections Act*<sup>16</sup> as a denial of their rights under Section 3 of the *Charter*.<sup>17</sup> There have been several instances where proceedings to deport people thought to be illegally in Canada have been the subject of court challenges on the basis of the *Charter*.<sup>18</sup> In Alberta, courts have held that freedom of religion is a defence<sup>19</sup> to charges under the *Lord's Day Act*<sup>20</sup> and an assault on provincial legislation that complements that act has succeeded in Ontario.

From all this it is apparent that the process of enacting legislation to amend existing laws to conform with the *Charter* will be a continuous one. While we will attempt to move as quickly as possible our task is complicated by the fact that as courts interpret the *Charter*, new areas of possible challenge become apparent.

In exercising my responsibilities to promote the resolution of *Charter* issues, I have a role in facilitating the evolution of *Charter* cases in the courts. One of the most active programs in this area is the court challenges program. This program was updated in December, 1982 to cover test cases in which litigants are asserting official language or minority language education rights under the *Charter*. Until then, the program was directed to challenges based on sections 93 and 133 of the *Constitution Act, 1867*. In order to be considered for funding under the program, the case must have substantial importance and legal merit and must have consequences for a

12. *Basile v. Attorney-General of Nova Scotia* (1983), 148 D.L.R. (3d) 382 (N.S. S.C.).

13. R.S.C. 1970, c. P-32.

14. *Borowski v. Minister of Justice of Canada et al.* (1983), 23 Sask. R. 259 (Q.B.).

15. *The Queen et al. v. Operation Dismantle Inc. et al.* Fed. C.A. unreported, Nov. 28, 1983.

16. R.S.C. 1970, c. 14 (1<sup>st</sup> Supp.).

17. *Jolivet et al. v. H.M. the Queen in Right of Canada et al.* (1983), 3 C.R.D. 325.30-01 (B.C. S.C.).

18. See, e.g., *Re Federal Republic of Germany and Ramca* (1983), 41 O.R. (2d) 225, 145 D.L.R. (3d) 638, 4 C.R.R. 42 (C.A.) and *Re Gittens and The Queen* (1982), 137 D.L.R. (3d) 687, 68 C.C.C. (2d) 438, 1 C.R.R. 346 (Fed. Ct.).

19. *R. v. Big M. Drug Mart Ltd.* (1983), 3 C.R.D. 525.90-03 (Alta. C.A.).

20. R.S.C. 1970, c. L-13.

number of people. Although administered by the Secretary of State, the Department of Justice provides advice on whether or not a particular case meets the criteria for funding. The list of *Charter* cases already funded by the program includes:

- cases involving challenges to *Quebec's Bill 101 (Quebec Protestant School Board v. A.G. Quebec;*<sup>21</sup> *Devine et al v. Procureur Général du Québec*<sup>22</sup>;
- cases involving the validity of legislation passed in English only in Manitoba, Saskatchewan and Alberta (*Bilodeau v. Attorney General of Manitoba*,<sup>23</sup> *R. v. Mercure*,<sup>24</sup> *R. v. Lefebvre*<sup>25</sup>).

We will undoubtedly see a growth in the number of applications to the courts for clarification of official language rights and minority language education rights. Litigation to interpret minority language education rights is in various stages of progress in Ontario and Alberta and can be expected in other provinces. Ontario has referred to its Court of Appeal certain questions relating to minority language education rights under the *Charter* in light of its existing education act and proposed policy for linguistic rights. Questions we hope to see resolved are — does section 23 extend to a requirement for minority language school boards and what is the scope of “where the number of those children so warrants”.

Finally, I have a role in educating the public about the rights guaranteed in the *Charter*. To this end, the government has established a Human Rights Law Fund which has three objectives: to inform Canadians about matters related to the *Charter* and human rights legislation, to promote developments in human rights law in Canada, to enlarge the body of knowledge of human rights law. An initial project was the series of seminars for the judiciary which were financed by my department and conducted with brilliant success under the auspices of this Institute. Funds have been granted to a great variety of projects ranging from translation of *Charter* manuscripts, legal research, summer courses on the *Charter*, special *Charter* editions of periodicals and even some modest assistance to this conference. There is still a great deal of work to be done in the area of public legal education and I consider this to be an important aspect of my role as Minister of Justice.

Mr. Chairman, perhaps the most glaring reality after 18 months of the *Charter* is the unsettled state of many important areas of the law. Until we have some decisions from the Supreme Court of Canada, we do not know what the new rules will be in minority language and education rights, important areas of the criminal law, freedom of expression, the right to earn a livelihood in any province and the reviewability of cabinet decisions. But I have tried to give you an account of my role in resolving

21. (1982), 140 D.L.R. (3d) 33, 3 C.R.R. 114 (Qué. S.C.).

22. [1982] C.S. 355.

23. [1981] 5 W.W.R. 393, 61 C.C.C. (2d) 217 (Man. C.A.).

24. [1981] 4 W.W.R. 435 (Sask. Prov. Ct.).

25. [1982] 5 W.W.R. 481, 39 A.R. 203, 21 Alta. L.R. (2d) 65, 69 C.C.C. (2d) 448 (Q.B.).

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*Charter* issues and, in conclusion, I want to assure you that I take the view that, as Minister of Justice as well as Attorney General, it is my responsibility, not just to follow the instructions or protect the interests of a client, department or agency, or even of my own department but to represent the interests of law and justice as a whole. In this sense my first duty is to the Constitution of Canada, including the *Charter of Rights and Freedoms*.