

CANADIAN RIGHTS AND FREEDOMS — FIRST CLASS OR CHARTER?

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The Canadian *Charter of Rights and Freedoms* has apparently enjoyed a *succès fou* in its eighteen months or so of life since proclamation.¹ Unlike the earlier and ill-starred Canadian Bill of Rights, the *Charter* has produced even at this stage a significant quantity of cases, with 600 or more having now come before the courts. With no sign of this jurisprudential flood abating, the *Charter* is said to have produced “a litigation quantum leap surpassing anything in Canadian history”.² This flood in its turn has given rise to a corresponding flow of literature — four sets of special reports or digests,³ fifty learned articles or comments,⁴ four special journal issues⁵ and no fewer than seven texts or treatises.⁶ Small wonder that some commentators see the proclamation of the *Charter* as “the most significant event affecting Canada’s system of government since creation of the Canadian federation”.⁷

This enthusiasm, however, is by no means universal. Some commentators stringently criticize the *Charter* as a piece of legal drafting. Others doubt the reality of its social impact. Yet others query the value of any impact which it could have and the likelihood of its producing any real social improvement.

This paper will examine each of these three criticisms, will argue that none of them is wholly justified, but that each can fruitfully lead us on to deeper and more ultimate questions.

The Draft

“Viewed as a draft the *Charter* is an absolute disaster — it’s so vague that it will take ten years or more to work out what it means,” argued former Senator Eugene Forsey in an address at Carleton University.⁸ This view, he told his audience, was shared by Elmer Driedger. Quite apart from

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1. The *Charter* was proclaimed in force on April 17, 1982 by Queen Elizabeth II in Ottawa.
2. *Toronto Globe and Mail*, April 18, 1983, at 7, col. 1.
3. *The Canadian Charter of Rights: Annotated* (Aurora, Ontario: Canadian Law Book 1982 — looseleaf); *Canadian Rights Reporter* (Scarborough, Ontario: Butterworth’s, October 1982 — monthly); *Charter of Rights Decisions* (Vancouver, B.C.: Western Legal Publications, December 1982 — bi-weekly); *Charter of Rights Decisions* (Ottawa, Ontario: Department of Justice, June 1983).
4. According to the bibliography prepared by the Library of The Law Reform Commission of Canada.
5. *The New Constitution and the Charter: Background, Analysis, and Commentary* (1982-83), 8 Queen’s L.J.; *The New Constitution and Charter of Rights: Fundamental Issues and Strategies* (1982), 4 Supreme Court L.R.; *Canadian Charter of Rights and Freedoms*, [1982] U.B.C.L. Rev. (Charter Edition); *The Canadian Charter of Rights and Freedoms* (1983), 61 Can. Bar Rev..
6. P.W. Hogg, *Canada Act 1982 Annotated* (1st ed. 1982); D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (1st ed. 1982); W. Tarnopolsky (ed.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982); M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act 1982* (1st ed. 1983); A.W. McKay, *The Canadian Charter of Rights, Law Practice Revolutionized* (1st ed. 1982); McLeod et al., *The Canadian Charter of Rights* (1st ed. 1983); W.R. McKeercher, *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms* (1st ed. 1983).
7. *Supra*, n. 2.
8. Former Senator Eugene Forsey speaking at Carleton University during Political Science Week on March 1, 1983.

this, the criticism seems borne out by the increasing volume of *Charter* case law — the *Charter* has produced, it has been said, “a wonderland for judges with cases going in every direction and clogging up the justice system”.

In any Charter of Rights vagueness and uncertainty will cause serious concern. After all the whole idea of “a government of laws and not of men”, of the Rule of Law and of rights Charters is to replace human whim by predictable rules, arbitrary interference by intervention authorized by law, and unbounded power by limited authority, and above all to tell citizens where they stand. To the extent that laws are vague and uncertain the citizens are no better off; they still don't know precisely where they stand. Clearly the laws in fundamental charters should be as certain as possible.

In fact, however, — a point glossed over by this criticism — one hundred per cent certainty is impossible. As shown by the American Realists and others, complete legal certainty is unattainable because of two factors, *viz.* the open texture of language and the unforeseeability of the future.

First, open texture.⁹ Long familiar to philosophers, this phrase denotes an unavoidable linguistic feature of all general nouns, general verbs and other general words in any language. The fact is that such words, while clearly covering some cases and excluding others, equally clearly admit of borderline cases where the application of the word is doubtful. For instance, while there are many different shades of green and many colours which could never be mistaken for green, there are as well some borderline hues which it is hard to know whether to describe as green or not. Likewise, while the term ‘religion’, as used in s.2(a) of the *Charter* (“freedom of conscience and religion”) clearly applies to Roman Catholicism and does not apply to socialism, it is hard to say whether it would apply, for example, to freemasonry. Such general words, as H.L.A. Hart put it, have a clear core of meaning at the centre but a vague penumbra at the boundary.¹⁰ Naturally this inescapable feature of ordinary language is reproduced in law, whether such law is couched directly in ordinary words or written in technical terms which are then defined and explained in ordinary words. The notion, then, of a hundred per cent certain Charter is a complete chimaera.

Next, the unforeseeability of the future.¹¹ Whatever legal rule we draft, there will inevitably be borderline cases later which we cannot foresee when drafting. But even if we could foresee such cases, we could not necessarily predict our own reaction to them later when they do arise. Until fairly recently, for instance, there was little difference between the ordinary and the medical concept of death,¹² and laws defining crimes of homicide needed no special definition of “death”. Today, by contrast, doctors can restart stopped hearts, can keep them going artificially and can even sometimes

9. See H.L.A. Hart, *The Concept of Law* (1st ed. 1961), at 120-150.

10. *Ibid.*

11. *Ibid.*

12. Law Reform Commission of Canada, *Working Paper 28: Euthanasia, Aiding Suicide and Cessation of Treatment* (1982), at 3-14.

replace them, but even if lawmakers had foreseen this fifty years ago, they wouldn't have known how in the light of these developments we would want today to define "death". In lawmaking, as in other walks of life, "sufficient to the day is the evil thereof" — we must defer crossing some bridges until we come to them.

Even if full certainty in rights Charters were possible, it would not necessarily prove desirable. For certainty comes at a price; the more we have of it, the less we have of other things like breadth and clarity. In tax law, for example, the attempt to legislate for every eventuality, close every loophole and ensure full equity between taxpayers has produced rules of such complexity that few can really understand them — "the tax system has become far too complex for the average tax payer to understand . . . it is in all likelihood the most universally applied legislation and the least understood . . . this tends to create uncertainty, to add substantial administrative costs and to erode public confidence".¹³ In criminal law, which, in the words of Dickson J.,¹⁴ "should be characterized by clarity, simplicity and certainty", the same tendency is found — as the Law Reform Commission of Canada observed, "clarity, certainty and comprehensiveness — the first of these is always a poor third in law".¹⁵

To strive for complete certainty at the price of breadth and clarity is surely undesirable in law, which should be as intelligible as possible to the members of the society it is meant to serve. This is particularly so with constitutional documents and Charters of Rights, which form higher or organic law, are more important than other laws and may well be more long-lived. As Dale Gibson observed, "the fact that it is a constitutional document rather than an ordinary Statute dictates that the *Charter* should be, in some respects, construed differently than other legislation. As Professor Paul Freund once said, courts must be careful 'not to read the provisions of the Constitution like a last will and testament, lest indeed they become one?'"¹⁶

What is needed in all legal drafting is a balance between the needs of certainty and those of clarity. On the one hand, laws must not be so vague as to leave the citizen uncertain where he stands and therefore at the mercy of the state authorities. On the other hand, they must not be so complex and detailed in the cause of certainty as to leave the citizen still not knowing where he stands and still therefore at the mercy of his government. An optimal mix of certainty and clarity is needed.

The nature of that mix will obviously vary with the nature of the document. Rules of property law, charging provisions in tax statutes and definitions of offences in a Criminal Code quite obviously should lean towards certainty. Constitutional provisions, rules on criminal defences and defini-

13. Standing Committee on Finance, Trade and Economic Affairs, Report, 5 October, 1982, at 5.

14. *Leary v. The Queen*, [1978] 1 S.C.R. 29 at 42; (1977), 74 D.L.R. (3d) 103 at 121, 33 C.C.C. (2d) 473 at 491.

15. Law Reform Commission of Canada, *Working Paper 19: Theft and Fraud*, (1977), at 4.

16. Dale Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations", in *The Canadian Charter of Rights and Freedoms: Commentary* (W. Tarnopolsky ed., 1982) 25 at 26.

tions of rights and freedoms should surely lean towards breadth and clarity. Rights Charters are documents in which draftsmen must paint with a broad brush and leave the detailed "inking in" to later interpreters.

Some of this "inking in" inevitably relates to matters which cannot be solved by any Charter but which call for judgment on a case by case basis. For instance, s.24(2) of the *Charter* requires the exclusion of evidence "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute". No Charter, however, could lay down categorically *ex ante* all the cases where such admission would prevent justice being seen to be done. On the contrary, fairness to the accused and fairness to the society whose laws he is alleged to have offended must be delicately balanced in each individual case in the light of all the circumstances.

Accordingly, criticisms of the *Charter* on the score of vagueness and uncertainty are, it is suggested, largely misconceived. The *Charter*, like the *Constitution Act 1982* of which it forms a part, and like that Act's predecessor of 1867, is meant to be a "living tree". The draftsman, the critics and the courts must clearly give it room and time to spread itself and grow.

The Impact

But, what of the fruit of this new living tree? What of its actual impact? Speaking in Ottawa,¹⁷ Ed Greenspan reviewed the jurisprudence and criticized defence counsel for routinely appealing to the *Charter* without sufficient arguments and criticized courts for routinely rejecting such appeals in accordance with the "reasonable limits" provision in s.1, without proper consideration of the point at issue. This is, he claimed, to "trivialize the Charter and to harden judicial attitudes against letting it work".

Arguably also the thrust of the *Charter* has been undercut by the opting-out provisions of s.33. For while the whole point of the *Charter* was to entrench our rights and freedoms beyond the reach of ordinary legislation, federal or provincial, these provisions have put them back within that reach and left them to be set aside both federally and provincially. Giving with one hand and taking away with the other, the *Charter* is, it has been said, a "betrayal" of our hopes and aspirations — a betrayal all the more lamentable in the light of the action taken by Quebec.

For all these reasons, says Greenspan, the *Charter* has proved "no red letter day for human rights". On the contrary, it provides "rights that come straight from the bargain basement".

These criticisms go too far, it is suggested. Even if most appeals to the *Charter* have proved unsuccessful, this must be viewed in context and account must be taken of a variety of factors. In the first place, most of the rights appearing in the *Charter* could be found more or less already in our pre-existing law — in common law, in different statutes, and in the *Canadian*

17. Edward Greenspan, "Law Enforcement and the Canadian Charter of Rights and Freedoms", Address to Second Annual Future of Criminal Law Symposium: Arthur Maloney Lectures, March 4 and 5, 1983.

Bill of Rights — and could be seen generally well observed in practice. Novelty, then, is not to be found in the content of the *Charter* but rather in the fact of its partial entrenchment. This being so, it would have been naive surely to expect the advent of the *Charter* to turn the country upside down.

Secondly, to the extent that some change could be anticipated, it is misguided to look only at reported cases. To see the law simply in terms of court decisions is to overlook the fact that one such decision may often alter official and other behaviour significantly without the need for further appeal to the courts. To stress the one case which goes to court and to forget the hundreds which have no need to do so is to take an unduly pathological approach to law.

Thirdly, one should not only look at lower court cases. While certainly most appeals to the *Charter* have so far proved unsuccessful, most of these were, as Dubin J. pointed out at the Ottawa conference, not really *Charter* cases but rather cases where defendants were clutching at straws. Besides, a glance at the jurisprudence of the higher courts reveals about forty cases with significant *Charter* impact.¹⁸ The Ontario Court of Appeal, for instance, held the Ontario *Theatres Act* unconstitutional because of the undefined discretion given to the Censor Board.¹⁹ The British Columbia Court of Appeal held invalid, as contrary to fundamental principles of justice referred to in s.7, a provincial provision making it a strict liability offence to drive during suspension of one's licence.²⁰ Most notably, perhaps, the Quebec Court of Appeal ruled the restrictions on entry to English schools in Bill 101 to be in breach of the *Charter* guarantee of minority language educational rights.²¹

Admittedly the courts have frequently used the 'reasonable limits' provision in s.1 to restrict other sections of the *Charter*. Even so, this does not mean that governments can limit our rights and freedoms simply as they please. On the contrary, courts are beginning to require them to show that any such limits are justified and will clearly no longer view our legislatures as so sovereign as to let the mere claim to need such limits justify them.²² Reference to international law and laws of other countries may lead the courts to ask why such limits are really needed, if, for example, the laws of Australia or the provisions of the Treaty of Rome do not recognize them.

Finally, the question of the opting-out provisions in s.33. Undoubtedly this is a disappointment to all who wanted rights and freedoms fully entrenched, although politically some such compromise may have been necessary at the time to make a Charter of Rights part of our constitutional landscape. In time, perhaps, and we can only hope, the opting-out provision may be whittled down or even amended out of existence. Meanwhile, despite Quebec's deplorable blanket opting-out, some comfort may be drawn from

18. *Toronto Globe and Mail*, July 7, 1983, at 4, col. 3.

19. *Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, (1983), 41 O.R. (2d) 583 (Div. Ct.).

20. *Reference Re. s. 94 (2) of Motor Vehicle Act R.S.B.C. 1979, c. 288* (1983), 42 B.C.L.R. 364 (C.A.).

21. *Quebec Association of Protestant School Boards v. A.G. of Quebec* (1982), 140 D.L.R. (3d) 33 (Que. S.C.).

22. *Ibid.* and see, Department of Justice, *Charter of Rights Decisions* (June 28, 1983) at 7.

the fact that democratically elected governments may generally fear to deprive their own electors of their rights and freedoms, as witness the fact that no adherent to the Treaty of Rome has withdrawn from that treaty. As Chief Justice Deschênes observed, the real sanction here is political.²³

In any event, the opting-out concession is not a complete give away. It applies only to s.2 and ss.7-15; it does not apply to the sections on democratic, mobility or minority language educational rights, the last of which served to invalidate Quebec's Bill 101. So, while there can be said to be a betrayal, it is only a partial one. In the meantime, since politics have been well described as the art of the possible, in this context, as in most others, half a loaf is better than no bread at all.

Criticisms on the score of lack of impact, therefore, go too far. The *Charter*, far from being without impact or providing bargain basement rights, is clearly making itself felt already across Canada. The newly planted living tree is already bearing fruit.

Real Value

But how far is that fruit wholesome? How far is the *Charter's* impact of any real social benefit to the community it is meant to serve? Serious doubts on this score have been worryingly raised by Robert Samek in a recent deeply perceptive paper.²⁴

"Social evils",²⁵ he points out, "cannot be cured by a stroke of the legislative pen To make the ink indelible does not change anything; on the contrary it merely distracts the eye. No legal entrenchment of fundamental rights can entrench them in a society which does not practice what it preaches".

Later he concludes:²⁶

it is a fairly safe bet that the new *Charter* will make little difference to the average Canadian. The lot of the majority is not going to be changed, for the *Charter* is not concerned with their bread and butter rights. In the great liberal tradition, economic rights do not generally qualify for inclusion in a political charter lest they contaminate the purity of the doctrine with everyday problems.

What should be done, in Samek's view, is not to entrench rights so much as to "untrench" them from their ideology, i.e. — from the "false consciousness" arising when the superstructure of our social system theory is out of line with the reality of its foundation.

This criticism, with which many, including the present author, have considerable sympathy, involves two separate contentions. One is that there is nothing in the *Charter* for average Canadians regarding what really

23. *Alliance des Professeurs de Montréal et Rodrigue Dubé v. P.G. Québec*, A.C.S., unreported, April 27, 1983.

24. R.A. Samek, "Untrenching Fundamental Rights" (1982), 27 McGill L.J. 755.

25. *Ibid.*, at 755.

26. *Ibid.*, at 756-757.

matters to them, nothing on "bread and butter" rights. The other is that rewriting laws from within the legal system really changes nothing; like rearranging the furniture on the sinking Titanic, it merely substitutes activity for action.

"Bread and Butter" Rights

Much force lies in the question often theoretically put by Third World statesmen: "What good is freedom of expression to those with empty bellies?" This force is not in any way diminished by general western hostility to the inclusion in Charters of Rights and Liberties of economic rights. At the same time it is not in any way augmented by the general socialist concentration on them.

But why this western hostility to including economic rights? Is it really, as Samek suggests, due to some theoretical quest for purity of doctrine? Or is it due rather to more practical concerns with the location of the duties corresponding to such rights?

Roughly speaking, rights fall into two categories: "non-interference" rights and "recipient" rights. The former concern what we are entitled to be free from — with what can't be done to us by others and particularly by governments. This category includes 'most of what are usually called "legal" rights, e.g. the right to life, the right to liberty, the right to security of the person and the right to be secure against unreasonable search and seizure. The second category concerns what we are entitled to get, e.g. the necessities of life, a reasonable standard of living, clean air and so forth.

Clearly between these categories of rights there is a significant difference as regards the duties corresponding to them. Non-interference rights impose no serious burden on the duty-holders; they only impose the negative burden of not intervening — they are mere restrictions. By contrast, recipient rights impose considerable burden on the duty-holder; they impose the duty of providing those things the right-holders have a right to — they require positive action.

Now the problem with such positive duties, and therefore with recipient rights, is surely not so much a theoretical one as the practical one of deciding who must bear the burden. Suppose we wanted at some future date to amend our *Charter* to include a right to the necessities of life. Who ought to have the duty of providing them — one's family, one's neighbour, one's local community, one's province or one's state? This question is not raised theoretically in order to rule out the possible inclusion of such rights, but rather to suggest that there may be little sense in their insertion in a *Charter* without spelling out the answer *ex ante*, or at least being prepared to work it out pragmatically *ex post*. One reason surely for their non-inclusion to date has been lack of consensus on the answer. Much as we might agree in principle that law should underwrite the moral right to the necessities of life, we may still disagree in practice on its implementation — we are not necessarily agreed how far we want a welfare state.

Accordingly, criticisms levelled against the *Charter* on account of lack of bread and butter rights can be met in two ways. First, the lack can be

explained and so excused. Second, the *Charter* should not simply be blamed for not being what it was never meant to be, but rather it should be seen for what it is — a Charter of non-interference rights.

This said, however, Samek's question still awaits an answer. Being what it is, a Charter of non-interference rights, does the Canadian *Charter of Rights and Freedoms* do all that much for the average Canadian? In short, what use are rights like free speech for the jobless, the hungry, the homeless and so on?

Here a brief look at one historical example may be instructive. This year, in Canada as elsewhere, people have been commemorating what happened fifty years ago within the Soviet Union, when millions of Ukrainians died of starvation as a result of Stalin's deliberate policy of collectivization. According to Malcolm Muggeridge,²⁷ who was in Moscow as a correspondent at the time and visited Kiev and other affected areas, the death rate was no less than 25,000 per day. But, so he tells us, almost the worst aspect of it all was the deafening silence on the matter — no one dared speak for fear of liquidation. In consequence, outside Russia people were totally unaware of what was happening, and Muggeridge's accounts in the *Manchester Guardian* were met with universal disbelief. George Bernard Shaw, the Webbs and other Soviet admirers thought them pure invention, Beatrice Webb having been personally reassured of this by Soviet Ambassador Maisky! Not until the famous Krushchev revelations was the ghastly truth admitted.

Now surely, if people had been able to speak out, it would have been for the better. Surely world opinion could have made itself felt, brought pressure to bear and somehow improved the situation. Is it not the case in politics and government that talk is a necessary prelude to action? To those who say, "what use to empty bellies is free speech, the right to liberty and so on?", the answer surely must be: "quite a lot".

Legal and Social Change

Samek often distinguishes between real law reform and mere legal law reform.²⁸ The former changes what really happens, the latter merely what is said in statutes and so on. A change in the statute book, he argues, will not necessarily produce a change in the real world outside.

On this Samek is clearly right. A law, it has been said, is what it does, and this being so, reforming it means not just changing what it says but also changing what is done by those applying it. Real law reform means changing the activity of police officers, crown prosecutors, judges, tax inspectors, welfare officials, bureaucrats and so on — in short, changing the behaviour of all those responsible for the running of society. Sometimes this may be brought about without changing the written law itself.

Conversely, we can change the written law without in any way altering anyone's behaviour. Indeed, the Law Reform Commission of Canada said:

27. *Manchester Guardian*, April 17, 1983, at 1, col. 1.

28. R.A. Samek, "A Case for Social Law Reform" (1977), 55 *Can. Bar Rev.* 409.

Take for example the problem of vagrancy. Till recently, begging or wandering around without apparent means of support was an offence against the Criminal Code. But is it really a crime? Not really, many people thought; and so, in 1972 the law was changed and that particular provision was repealed. There still remained, however, the problem of what to do with beggars or unkempt and disorderly people in public places. So the police, who had to solve this problem, took to charging vagrants with violations of a local law: they charged them with being 'waifs'. The alteration of the law brought no real progress, for the real problem still remained unsolved.²⁹

It does not follow, though, that changing the written law will never change what people do or change it for the better. After all, will not the cases discussed earlier result in an improvement in official behaviour? The Ontario Censor Board will have to operate by rules, B.C. police will have to disprove defendant pleas of ignorance as to licence suspension, and the Quebec Ministry of Education will have to allow certain anglophone children to be educated in their own language. Legal law reform can be of some use — sometimes it pays to change the labels. Rearranging the furniture on the Titanic may have had no point, but rearranging the passengers on board a carrier recently aground off California so changed the lie of the vessel as to enable it to get afloat again.

We should not, therefore, be too pessimistic. Admittedly we might prefer a Charter with bread and butter rights to the one we have with only non-interference rights, but surely the latter is better than no Charter at all. Admittedly too, a change of labels may be less effective than a change of contents, but sometimes the former can produce the latter. Meanwhile, as Plato advised, we should not let the best become the enemy of the good.

New Questions

A feature common to all three criticisms discussed above is the product-orientation of their approach to the *Charter*. Human rights and Charters which contain them seem to be viewed as objects — things which we want, which we are entitled to and which the *Charter* says we have. This product-oriented approach in general has been well criticized by Ivan Illich,³⁰ who points out our tendency today to prefer nouns to verbs. We talk, for instance, of "getting an education" instead of "learning", and of "providing health care" instead of "healing". Likewise, when it comes to government and human rights, we talk of getting a constitution and of having a Charter of Rights and Freedoms. Might we more fruitfully perhaps talk of a process of "constituting" ourselves and "charting" our human rights? Such an approach could raise new questions which are merely indicated in this paper. First, how should we chart our rights and freedoms, and to what extent should we regard the *Charter* as a guidepost rather than a hitchpost? Second, who is to do the charting — the government, the courts or ultimately the whole community?

To focus briefly on the second question, remarkably little consideration has yet been given to the role of the community regarding the *Charter's*

29. Law Reform Commission of Canada, *A True Reflection: 3rd Annual Report*. (1973-74).

30. I.D. Illich, *Tools for Conviviality* (1st ed. 1973).

application, interpretation and general operation. On the contrary, it has been simply taken for granted that the *Charter's* meaning, like that of other legislation, would be worked out by the courts. Is not interpretation of statutes *par excellence* a matter of law for the judges? And how could interpretation of a Bill of Rights be left to the executive government?

Those who oppose entrenchment of the *Charter*³¹ on the ground that human rights disputes are essentially political issues not suitable for judicial resolution, are always met with the following argument. Most human rights disputes involve a conflict between the citizen and his government. To leave such disputes to be resolved by the government (or by a Parliament controlled by the government) is to make the government judge in its own cause. This is exactly contrary to the requirement of natural justice that cases be decided by neutral third parties. This requirement of natural justice is precisely what is achieved by entrenchment, which takes the decision away from government and hands it to courts of independent judges.

With all respect, however, how far will our courts be seen in this regard as absolutely neutral? How far will courts, staffed by individuals drawn from the establishment, i.e. that small class at the top in all walks of public life, and therefore suspected of unconsciously identifying with that establishment, be seen as truly neutral by disadvantaged individuals grieving against the authorities?³² How far would fairness, or its appearance, suggest the entrusting of decision-making in these matters to a tribunal with greater lay composition? Admittedly, in many human rights cases trials at first instance could involve a jury, but what about the ultimate interpretation of the *Charter*? Would it be feasible and, if so, desirable to entrust this too to a body composed partly at least of ordinary members of the community?

Such questions, raised here rather than answered, are obscured by concentration on the form and content of the *Charter* as though it were the last word on the subject. In fact, however, the *Charter* is not the last word but the first word. For in Canada, as elsewhere, the story of human rights is not one of arrival but rather one of endless pilgrimage towards a distant destination we may never reach. The important thing is not the product but the process. In this regard, Alan Mewett perceptively observed:

Whether the law in twenty years time will be all that much different from the law today is less important than the process that will have to be gone through. Reasons will have to be enunciated, and from interpretation of the *Charter* will eventually come an overall philosophy of criminal law and its enforcement.³³

31. E.g., D.A. Schmeiser, "The Entrenchment of a Bill of Rights" (1981), 19 Alta. L.R. 375.

32. See J.A.G. Griffith, *The Politics of the Judiciary* (1977), for the thesis that it was this sort of identification that has led English judges to display far more readiness to allow claims of denial of natural justice by trade union members against their unions than by university students against their universities.

33. A.W. Mewett, "Editorial: The *Charter*, Criminal Law and The Supreme Court" (1981-82), 24 Cr. L.Q. 385 at 386.