

COMMENTARY

Following is an abstract of part of the commentary on the subject-matter of the papers presented by Professors Garant and Whyte, made by Professor Paul A. Bender at the invitation of the session moderator, l'Hon. M. le juge Jacques Dugas.

When I listened to Professor Whyte say that the reason I was invited here was to make retribution for the fact that Americans had traumatized the Canadian framers through the *Lochner* case,¹ that destroyed my self confidence! I will, however, try to make some useful comments on the *Charter*, and especially section 7, which I find one of the most mystifying — and therefore, to an academic — one of the most interesting provisions.

What I shall try to do is talk about three things. First, I think it might be interesting for me to reflect briefly on what would happen if the cruise missile case were brought in the United States, just as a comparative excursion. Second, I shall talk about section 7 issues, and in particular one which has not been mentioned by either of the speakers, but which I feel is a seed I would like to plant in your mind: namely the possibility of there being some affirmative rights under section 7. (I'll say what I mean by that when I get to it.) Third, I shall say a word about what I consider to be a very serious and perhaps one of the most important dilemmas that faces judges in Canada under the *Charter*. It is the question Prof. Whyte has just discussed and the question which I was told to "arbitrate": namely, whether there are substantive rights under section 7 as well as rights to procedural fairness.

With regard to the cruise missile controversy, if it had occurred in the United States, a few things could be said with certainty. Other things are not so clear. The mere fact that the decision would have been made by the Cabinet, or the Cabinet Officer, or even by the President of the United States would not insulate that decision from judicial review if there were some substantive claim of a violation of a constitutional right. The reason I feel fairly confident about this is that American courts have, on a number of occasions, exercised jurisdiction over the highest of our political offices. The Watergate case, and in particular the claim for the Oval Office tapes, had some constitutional overtones. In that case the court relied very heavily on the constitutional guarantee of a fair trial in requiring President Nixon to turn over the tapes.

Perhaps more closely in point is the case which arose at the time of the Korean War when President Truman seized the steel mills as a way of avoiding a strike that was apparently impending in order to make sure that the plants continued to produce for the war effort. There the Supreme Court enjoined the Cabinet Officer responsible for the order, the Secretary of Commerce, from effecting that seizure.

1. *Lochner v. New York*, 198 U.S. 45 (1905).

The American courts have created some doctrines that surface from time to time, which are in the nature of judicially-created limitations on the courts' powers to exercise jurisdiction. In Canada not many doctrines of this nature have been developed. There are very broad rules of standing and Canadian courts also render advisory opinions (or references, as they are called in Canada). The United States on the other hand has a whole ream of what I would call "judicial self-protection devices" which are used by the courts to limit or totally avoid the necessity of deciding very delicate issues. It is conceivable that the cruise missile case would fall within one of these doctrines, although that is pure speculation given that many of these doctrines are only vaguely defined.

There is also a "political question" doctrine which apparently was responsible for the failure of American courts to adjudicate the constitutionality of the undeclared war in Vietnam. This doctrine developed because the courts felt that they did not want to interfere with foreign affairs of that kind; that they did not wish to interfere with an ongoing conflict with a foreign country. It is conceivable that if a substantive challenge were made to the cruise missile in the United States the courts might feel the same way; that it is sufficiently related to foreign affairs and to the ability of the country to defend itself to be a "political question".

I think the most difficult problem that would be faced in the United States by a plaintiff attempting to bring a constitutional challenge to a missile testing or a bomb testing program would be finding some constitutional ground to rest upon. We do not have a section 7 which just states there are rights to life, liberty and security of the person. We have a due process clause which says that the government shall not deprive anyone of life, liberty or property without due process. The first question would be whether the testing of a missile or a bomb amounted to a deprivation of a citizen's life, liberty or property. (If the bomb was going to kill him I suppose it might be! But that's not the claim here.) The problem would be getting someone who would have standing and who could thus plausibly allege his or her life, liberty or property were endangered by the action of the State. Even if you could find somebody with that standing, not all deprivations of life, liberty and property, even under a "substantive" due process doctrine are unconstitutional, but only those which are unreasonable in some way. And our rules of reasonableness in that area are very, very lax. They permit the government to do virtually anything it wants, so long as it is interfering with life, liberty, or property in a general way.

We have some very highly protected areas like speech, religion, and now privacy. These we protect to a great extent. But mere intrusions on liberty and property — and arguably even on life — are not treated with a very "high level" test. They are treated with a very "low level" test of justification. All the government has to show is some plausible reason for doing what it is doing. I would suspect that the United States government would be able to persuade a court that it had some plausible reasons for

that kind of testing. Therefore the winning of a “cruise missile” type of dispute in a United States court would be very unlikely.

Let me move on to the second point. You have in section 7 a very affirmative sounding statement which we in the United States do not have, namely the first part of section 7: “Everyone has the right to life, liberty, and security of the person.” Then the section goes on to say more or less what our due process clause says in somewhat different words, namely: and the right not to be deprived thereof, except in accordance with principles of fundamental justice. (We should briefly note that the conjunction “and” is used, connecting the two parts as though there were two things.)

Let us concern ourselves with the first part of section 7. What does it mean? It seems to me to have a great potential. In the United States we do not have what I would call affirmative constitutional entitlement; in other words, there is no affirmative constitutional entitlement to public welfare programs. If a person does not have any resources and is perhaps going to starve to death or die of illness or lack of shelter, there is no definitely recognized affirmative constitutional right to have the government provide for that person. Nor is there a right to have the government provide for education. We have those rights by and large, although some of them have been eroded fairly seriously in the last few years, but they are not constitutional rights. They are only statutory rights. That is why they have been eroded in the last few years. It seems to me possible in Canada to read section 7 as providing a core of affirmative constitutional entitlements to basic minimum public services necessary to stay alive — food, shelter, clothing, medical care, police protection, things like that. Undoubtedly you have those things by and large for most people in most places, but there may be exceptions. Some people may be left out because of regulations. Some of those programs may be cut back. It is conceivable — at least to me — that section 7 might have that use in addition to the other uses that have been presented thus far.

The third issue is whether section 7 has any substantive effect. Clearly it has an impact in the procedural area; but does it also place substantive limits upon legislation? Can the court under section 7 say, this legislation is unconstitutional even though it doesn’t affect speech, religion, mobility rights, or language rights, but because it affects liberty, life, or the security of the person generally and because it is to some degree constitutionally unreasonable, or is in violation of principles of fundamental justice?

My initial instincts take me in two directions, and they leave me with a dilemma. On the one hand I have spent most of my life advocating broad constitutional rights and it is very difficult to disassociate oneself from that position. In general I am in favour of broad and judicially enforceable constitutional rights. So these libertarian, rights-oriented instincts tell me to try to read section 7 as broadly as possible and cover as much as possible. Indeed, there might be some very important matters to consider.

For example, I think abortion rights are quite important, and the only place where that issue could be raised under the *Charter* is section 7, if that provision is given substantive significance.

On the other hand, I fear that, especially in the early years, as constitutional rights envisioned by the *Charter* are broadened, there will be a diluting of the standard of protection that is afforded. If you include in section 7 the right to pay your employees the lowest wage you can get them to work for, or the right to work your employees for the longest number of hours you can get them to work for — these are example of things that we included within the substantive due process protection of life, liberty, and property in the *Lochner* era — then virtually all legislation in Canada is going to be subject to challenge under that section. And the question is going to be, is the legislation in conflict with fundamental justice? It seems to me very possible that if you bite off all that and say we're going to scrutinize the constitutionality of all legislation, you may come out with a very weak standard of justification which the government must satisfy. To illustrate this point let us look at an example.

In considering the constitutionality under the *Charter* of a minimum wage law, the courts might only require the government to show that it was a reasonable way to regulate the economy or to serve some other purpose in a matter of concern to the legislature. The risk is that the very weak standard of justification used in such a case might become a single unitary standard applied to all *Charter* rights. If the same low standard that was applied in this hypothetical minimum wage case were to be applied in free speech cases or other cases involving important rights, it might well be too easily met to afford appropriate protection to those rights. The final result might be very few meaningful *Charter* rights at all. It should be noted that in fact, until now, most of the judgments seem to treat section 1 of the *Charter* as an overall standard of justification to be applied against all *Charter* rights.

So there is my dilemma: broad rights on the one hand, but a fear that broad rights lead to very weak standards of justification and may lead to no rights in the long run. My suggested solution — and I think we've done the right thing in the United States — is to do more or less what the United States Supreme Court has done with a similar dilemma in recent years. It has applied different standards of justification to different invasions of liberty, depending upon how fundamental that liberty was. For minimum wage laws and maximum hour laws the standard of justification is very low. The Court has however picked out certain areas (some areas come directly from the constitutional text — free speech and religion — while other areas, such as privacy, have been developed by the Court as it has gone along) to which it gives a strong level of protection; areas in which it feels that there is a general consensus that these rights are enormously important to life in a civilized society.

One kind of area that one might pick out in Canada is criminal responsibility. The standards on which one is going to be able to hold someone criminally liable raises very important issues about life in a democratic society. That is one area where the court might sensibly say: 'Here we will closely scrutinize what the legislature does and we will not let the legislature place criminal liability on people who are not conscious of any fault on their part, unless we find a very strong reason for the legislature to do so'. One might pick out some other areas as well. In the United States, for example, we have not only placed constitutional limits on finding people criminally liable without their knowing or having reason to know that they've done anything wrong, but we have also considered the area of privacy — the kinds of things that affect only that person and are very necessary to the development of his personality.

So it seems to be possible to resolve the dilemma by saying there is some substantive due process under the *Charter*. That doesn't mean that all aspects of liberty and security of the person are so strongly protected under the *Charter* — just those that are fundamental. It will be the task of the courts over the years to decide which things are fundamental, and there will be some shifting and changing as conditions and societal attitudes change.

