THE CHARTER AND THE JUDGES: A VIEW FROM THE BENCH

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The *Charter*[1] has conferred immense power on the judiciary. It has become the ultimate arbiter in Canadian society on *Charter* issues, legally supreme over both the legislative and executive branches of government. While conscious of their new powers, Canadian judges are more concerned with the concomitant responsibilities imposed on them. It is with those responsibilities that I propose to deal.

The formidable number of judicial decisions on the *Charter* will be the basis for much of the discussion at this conference. The Department of Justice estimates that there have been over 600 written decisions on the *Charter* and that some form of redress was granted in over 90 of them. Approximately 60 have been made by appellate courts. The Supreme Court of Canada has not yet based a decision on the *Charter* but has 22 cases listed for hearing. The range of issues covered by these decisions is wide. Many long established rules and practices have been struck down as being inconsistent with the *Charter*.

The early judicial decisions on the *Charter* have dispelled the fear that it would receive the same kind of restrictive interpretation as the *Bill of Rights*. The most obvious reason for the *Bill*'s limited effect is that it lacked the authority of a constitutional document. Chief Justice Laskin described its peculiar nature as "a halfway house between a purely common law regime and a constitutional one; it may aptly be described as a quasi-constitutional instrument".[2]

The spirit of John Marshall pervades the initial *Charter* judgments and his ringing declaration that "this is a constitution we are expounding"[3] inspires them. The famous dictum of Viscount Sankey in the *Edwards* case[4] stands a good chance of becoming the one most quoted in our law. Canadian judges have reiterated that the *Charter* is part of the Constitution planted as a "living tree" in Canada and is not to be "cut down by narrow or technical construction" but rather given "a large and liberal interpretation". In the *Blaikie* case,[5] the Supreme Court affirmed this approach to rights extended in the Constitution and emphasized the need of avoiding overly technical interpretations of constitutional guarantees so as to give them "a broad interpretation attuned to changing circumstances". In my court, Associate Chief Justice MacKinnon relied on an older and more

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1. *Canada Act, 1982* (U.K.), 31-32 Eliz. 11, c. 11, Schedule B, *Constitution Act, 1982*, Part I, *Canadian Charter of Rights and Freedoms*.
2. *Hogan* v. *The Queen* (1978), 48 D.L.R. (3d) 427, at 443 (S.C.C.).
3. *McCulloch* v.*Maryland*, 17 U.S. (4 Wheat) 316, 407, 4 L. Ed. 579 (1819).
4. *Edwards et al.* v. *A.-G. Canada et al.*, [1930] A.C. 124 (P.C.).
5. *Attorney General of Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016, at 1029.

venerable tradition in stating that "... the letter killeth but the spirit giveth life".[6]

Canadian courts have confidently embarked upon the task of applying the *Charter*. They have been strengthened in their approach because they have been able to draw upon the vast storehouse of experience with charters of rights to be found in the statutes and judicial decisions of many democratic countries. The Canadian *Charter* starts from a position which the United States reached only after almost 200 years of experience with its *Bill of Rights*. Although popular discussion of the *Charter* has tended to center on American experience, its scope and wording owes more to the modern charters of rights which have been proclaimed since World War II. These modern charters are based upon the *United Nations Universal Declaration of Human Rights* of 1948 and the *International Covenant on Civil and Political Rights* adopted by the United Nations Assembly in 1966 and ratified by Canada in 1976. These international conventions are the basis for the charters of rights adopted by many Commonwealth countries when they attained independence in the post-war years, as well as the *European Convention on Human Rights* which is enforced by the European Court of Human Rights.

While taking advantage of the experience of other countries, Canadian courts will not slavishly adhere to foreign decisions. This point was emphasized by Brooke, J.A., in *R.* v. *Carter* where he said:

> As to the authorities referred to, no doubt the decisions of courts of the United States of America may be persuasive references in some cases under our new Charter but it is important that we seek to develop our own model in response to present values on the facts of cases as they arise rather than adopting the law of another country forged in response to past events.[7]

Canadian courts have another advantage as they embark upon the interpretation of the *Charter*. The basic legal and personal freedoms enshrined in it are part of our democratic heritage. The broader concepts of equality rights have recently been the subject of extensive federal and provincial legislation. There is already much judicial experience in Canada with all the rights and freedoms protected by the *Charter*.

In addition, judges know that they are not solely responsible for the attainment of the ideals and objectives of the *Charter*. These can only be realized by the cooperative effort of governments, legislatures and the judiciary. Legislative action is required at all levels, federal, provincial and municipal, to bring laws and administrative practices of governments of this country into full compliance with the *Charter*. The importance of this legislative action was recognized by the authors of the *Charter* who delayed the implementation of equality rights for a three-year period to enable all jurisdictions to change their laws to meet the new standards.

6. *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 113, at 123 (C.A.).
7. (1982), 39 O.R. (2d) 439, at 441 (C.A.).

There is a moral as well as a legal imperative on both the legislative and executive arms of governments to respect the *Charter*. Legislative action avoids the unfairness of leaving important issues to be settled only by the hazards of litigation at the expense of individual litigants. It is especially important in relation to the criminal law which, not surprisingly, has been the source of the bulk of *Charter* cases presented to the courts to date. The Canadian position is different from that of the United States where criminal law is under the authority of state governments and judicial intervention under the authority of the *Bill of Rights* has been required to achieve uniform national standards. In this country, the federal parliament has jurisdiction over criminal law which permits it to make immediately the substantive and procedural amendments required to bring our criminal law into fuller compliance with the *Charter*. I am glad to note that the Minister of Justice has acknowledged the importance of this matter and is planning to make proposals for amendment of the *Criminal Code* at an early date.

These general observations lead me to the specific comments which I wish to make about the *Charter* and particularly the responsibilities it imposes on judges. It will be realized that my ability to comment is somewhat circumscribed. No decision of the Supreme Court is available for guidance. Moreover, judges, by the nature of their office, are denied the *Charter* right of freedom of expression enjoyed by their fellow citizens. It is not appropriate for me to speak about the merits of particular decisions nor to offer opinions on specific issues which may arise in the future. Notwithstanding, there are three areas of concern to the bench on which I think it is appropriate for me to comment. They are:

(a) The judicial approach to the interpretation of the *Charter:*

(b) Special problems encountered by the judiciary in *Charter* cases;

(c) Some of the implications of the *Charter* for the judiciary.

I. The Approach to *Charter* Interpretation

Three sections of the *Charter* are of primary importance to its application by the courts. Section 52 provides that any Canadian law is of no force and effect to the extent that it is inconsistent with the *Charter*. Section 24 confers on anyone, whose rights or freedoms are infringed, the right to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. These sections are qualified by section 1 which limits the rights and freedoms guaranteed by the *Charter* in the following language:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 is a uniquely Canadian provision. Charters of rights of other countries impose a similarly worded limitation on some specified rights.

Only in Canada are all Charter rights and freedoms subjected to this limitation.

A two-step methodology is being applied in the *Charter* cases as explained by the Ontario Court of Appeal in the *Rauca* case:

> In our view, the issue has to be approached in two steps. First, it has to be determined whether the guaranteed fundamental right or freedom has been infringed, breached or denied. If the answer to that question is in the affirmative, then it must be determined whether the denial or limit is a reasonable one demonstrably justifiable in a free and democratic society.[8]

The first step requires the applicant to establish that there has been some *prima facie* interference with a right protected by the *Charter*. It is not necessary to prove in addition that the restriction is unreasonable.[9] If the applicant fails to establish that a *Charter* right is affected his case will fail. For example, the Ontario courts have held that the protection against self-incrimination applies only to testimonial compulsion and does not justify a refusal to submit to a breathalyzer test[10] or to give fingerprints.[11]

The second step in the test is no more than a balancing of the infringed right against the "reasonable limits prescribed by law" as prescribed by section 1. The courts have uniformly decided that the Crown has the burden of proving that the limit is a reasonable one.[12] Nor can governments rely on the presumption of constitutionality which is a factor in ordinary constitutional cases involving jurisdictional disputes.[13]

What emerges from the cases is the obvious fact that no rights are absolute. The restrictions themselves are many times negative expressions of other rights which are worthy of protection. The problem for the courts, is to balance these competing rights and determine which should be paramount in any particular situation. This balancing of rights is a familiar practice in the United States where the test of "reasonableness" has been read into the *Bill of Rights* even though not explicitly set forth as it is in section 1 of the *Charter*. The *Southam* case provides an example of the process of balancing opposing interests. There the court noted that:

> ... it is necessary to view the reasonableness of the absolute ban [on press attendance at a juvenile hearing] in light of the purpose of the ban as balanced against the fundamental right guaranteed by the Charter [to have free access to the courts, such being an aspect of freedom of the press].

The court concluded:

> Although there is a rational basis for the exclusion of the public from hearings under the *Juvenile Delinquents Act*, I do not think an absolute ban in all cases is a reasonable limit on the right of access to the courts, subsumed under the guaranteed freedom of expression, including freedom of the press. The net which s. 12(1) casts is

8. *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225, at 240 (C.A.).
9. *Re Southam (No. 1), supra*, n. 6, at 124.
10. *R.* v. *Altseimer* (1982), 38 O.R. (2d) 783 (C.A.).
11. *R.* v. *McGregor*, Ont. C.A., unreported decision, February 1, 1983.
12. *Re Southam (No. 1), supra*, n. 6, at 124.
13. *Ibid.*, at 125.

> too wide for the purpose which it serves. Society loses more than it protects by the all-embracing nature of the section.[14]

The most graphic description of the effect of the *Charter* and particularly of section 1 is provided in the judgment of Chief Justice Deschênes in *Quebec Association of Protestant School Boards et al.* v. *Attorney General of Quebec et al. (No. 2)* where he said that it "turns a new page for the courts" and continues:

> Until now, Canadian courts did not set themselves up as judges of the wisdom of legislation: they respected the ultimate power of Parliament in this area and they recognized that defeat at the ballot-box constituted the only remedy for parliamentary abuse. But, the Charter has radically changed the rules of the game.
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> ....
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> The courts of justice therefore find themselves invested with the power to examine the rationality (the court prefers to use the word "rationality" rather than the dreadful neologism "reasonableness") of a law, and if they judge it to be incompatible with the Charter to declare it inoperative (s. 52). This road has never been mapped nor has the route been marked. Even in good weather the task would be difficult; but here we are attempting the first crossing in a storm.[15]

Judges are invested with a power in *Charter* cases which has not been asserted by common law courts since the seventeenth century. In *Dr. Bonham's Case* Chief Justice Coke struck down part of an Act of Parliament holding:

> because it would be against common right and reason, the common law adjudges the said Act of Parliament as to that point void.[16]

For more than three hundred years, courts have recognized the supremacy of Parliament. In interpreting statutes, they have limited themselves to the ascertainment of the meaning of the statute as intended by the legislature and have not concerned themselves with its political, economic, social or other consequences. Similarly, courts have restricted themselves largely to textual analysis in their decisions on jurisdictional disputes between the federal and provincial governments under the *Constitution Act*. It is the exercise of this new power of passing upon the "reasonableness" of legislation which presents the *Charter*'s greatest challenge to the judiciary.

II. Special Problems of the Judiciary in *Charter* Cases

The major problem for the judiciary will be to develop attitudes and techniques which will enable judges to meet this challenge. Important *Charter* decisions will require judges to make policy choices. To some extent, these policy choices will relate to concepts with which judges are familiar. This will be so in most cases where the *Charter* is applied to criminal law. It may in such cases be possible to label the "policy" involved as "legal" although it may reflect a wide range of other societal values.

14. *Ibid.*, at 134.
15. (1982), 140 D.L.R. (3d) 33, at 52-3 (Que. S.C.); Aff'd 20 A.C.W.S. (2d) 409 (Que. C.A.).
16. (1610), 8 Co. Rep. 113b; 77 E.R. 646.

In other cases — and those which I am prepared to predict will become increasingly important — judges will find little refuge in traditional legal language and concepts. Here they will be cast upon the "uncharted sea" referred to by Chief Justice Deschênes. The Minister of Justice recently said that in *Charter* decisions "courts are no longer assuming that the social objectives behind all laws are reasonable".[17] In assessing the "reasonableness" of legislation in such cases, judges will be compelled to make policy choices between competing social values.

Judges will have to decide what oral evidence and documentary material will be required and should be admitted in this type of case to enable them to make an informed decision. Thus far, judges have adopted a flexible and open attitude to the reception of evidence which they consider relevant and essential for their decision on *Charter* issues. The best example is provided by Chief Justice Deschênes' judgment in the *Protestant School Board* case[18] which represents the most ambitious examination of s. 1 of the *Charter* to date. It shows the vast amount of material that may be marshalled in support of, and against, any position taken during an inquiry into the reasonableness of any enactment. The sources considered were: pre-*Charter* political debates in Canada and England; pre-*Charter* litigation; statements in the Quebec National Assembly; the platform of the Parti Québécois; the P.Q. election victory; six expert witnesses, including sociologists and demographers; demographic statistics on the proportion of French population in Canada; predecessor legislation; United States, Canadian, English, Commonwealth and European case law; and international human rights conventions.

This decision, in my opinion, should be studied carefully because it represents the broad investigation required in *Charter* cases. It also illustrates the different approaches of civil and common law lawyers to issues of this type. Reading it, one senses also how much has been lost, at least on the common law side, by our failure to take advantage of the opportunity of comparative study of the western world's two great legal systems which co-exist in our country.

Charter cases are different from ordinary constitutional cases dealing with jurisdictional disputes between the federal and provincial governments. In the jurisdictional cases, a reasonably simple legal issue is usually presented, often in the terms of an order of reference, and a little factual background or evidence is required. But in charter cases, as I have already indicated, much more evidence and other material may be required. The role of trial courts in *Charter* cases is thus more important than in other constitutional cases.

For counsel, the lesson is clear. Courts will pay scant attention to *Charter* arguments which are not properly prepared and researched. It

17. *The Globe & Mail*, July 19, 1983, at 8.

18. *Quebec Association of Protestant School Boards (No. 2)*, *supra*, n. 15.

simply will not do for counsel, when all else has failed, to "throw in" the *Charter* in a last desperate thrust to salvage a case. The *Charter* is too important to be trivialized by this type of treatment. Judges look to the bar to give it the serious treatment it deserves.

A number of other practical issues will arise, only some of which can be mentioned here. What will happen to the ancient rule prohibiting references to parliamentary debates and other legislative material?[19] To what extent will appellate courts prevent the presentation of "Brandeis" briefs containing necessary background information or legislation?[20] Following the wide opening of the door in the *Borowski* case,[21] how will courts handle the issues of standing and intervention so as to ensure representation of all legitimate interests in *Charter* cases without unduly prolonging them or turning the courtroom into a political battleground?

It is not surprising that at this early stage, in dealing with the substantive or procedural aspects of *Charter* problems, Canadian courts, thus far, have avoided unnecessarily broad statements and the use of unduly restrictive or expansive language. They have limited themselves to deciding the cases before them leaving to the future the distillation of general principles which might apply to a broader range of decisions. This careful approach is illustrated by the policy of not deciding cases on *Charter* grounds when they can be disposed of otherwise.[22]

III. Implications for the Judiciary

The worst possibilities facing Canadian judges as a result of the *Charter* are illustrated by the following story which appeared in Newsweek several years ago:

> When U.S. District Judge W. Arthur Garrity Jr. found that the schools of Boston were racially segregated and ordered a desegregation plan requiring busing, violence broke out at South Boston High School. Dissatisfied by school officials' compliance with his plan, Garrity placed the high school in Federal receivership, much as a bankrupt corporation, and became in effect its principal. He ordered the Boston school board to spend more money than it had in its budget. He required the board to pay the moving costs from St. Paul, Minn., to Boston for a new headmaster he hired. In Federal court one day, Garrity pondered the purchase of tennis balls for South Boston High.

American courts also administer prisons in 32 states. They have revised congressional voting constituencies. These and similar decisions have flowed from lawsuits brought by reformers who have found legislatures slow to act on important political and social issues. They have found that major changes can often be wrought far more quickly by the judiciary. It is a phenomenon described as "judicial activism".

19. See discussion of rule in *Babineau* v. *Babineau* (1981), 32 O.R. 545, by Grange, J., at 548-552.

20. See *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 391 where the Supreme Court of Canada indicated "extrinsic material, bearing on the circumstances in which the legislation was passed" could be considered by the court in determining whether the impugned legislation was constitutionally valid.

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

22. *R.* v. *Westendorp* (1983), 46 N.R. 30 (S.C.C.).

The extent to which Canadian courts may be called on to enforce the *Charter* by mandatory orders requiring governmental compliance in addition to prohibitions against acts infringing it remains to be seen. Whatever happens, it is clear that the role of judges will change, and what is equally important, so will the public perception of that role.

The *Charter* gives an opportunity to ordinary citizens and single issue groups to raise problems which political leaders in their wisdom have sought to avoid. Professor Russell has commented:

> The attempt to settle differences in our society on issues such as obscenity, Sunday closing, abortion, the rights of the elderly and the benefits available to the disabled through the judicial process entails the danger, however the courts resolve these issues, of transforming these matters into technical legal questions and of making the answers to these questions hinge on the outcome of a contest between legal adversaries rather than on a political process more likely to yield a social consensus.[23]

He has suggested that the result will be to "judicialize politics and politicize the judiciary".[24]

In his book, *The Warren Court,* Archibald Cox commented on the problem which arises from vesting what are essentially political decisions in the hands of a non-elected judiciary in the following language:

> In my view, constitutional adjudication presents an insoluble dilemma. The extraordinary character of the questions put before the Court means that the Court cannot ignore the political aspects of its task — the public consequences of its decisions — yet the answer to the question 'what substantive result is best for the country?' is often inconsistent with the responses obtained by asking 'what is the decision according to law?'[25]

It is, of course, not new for Canadian judges to be called upon to adjudicate controversial public issues. The role of law has been transformed in the last generation. It is no longer concerned only with the protection of private rights. Today, the emphasis is on public law and the enforcement of new rights which have transferred to the courts decisions which used to be made by the family, schools, churches, business, unions or other community groups.

Nevertheless, the *Charter* will increase the involvement of judges in public controversy. Their decisions will not please everybody. If the United States experience is any guide, controversy will not be limited to the merits of particular decisions but will extend to the personal and professional background of judges. The privileged and cloistered position which judges have heretofore occupied is likely to be eroded.

The difficulties that judges face in dealing with *Charter* issues are compounded by problems which are all too familiar. Lists are crowded and the facilities, personnel and funding devoted to the justice system in Canada are simply inadequate for all its important tasks. Chief Justice

23. Peter H. Russell, "The Effect of a Charter; Policy-Making Role of Canadian Courts" 25 Can. Pub. Admin. 1 at 32.

24. Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights & Freedoms" (1983), 61 Can. B. Rev. 30 at 51-52.

25. Cox, A., *The Warren Court,* (1968), at 4-5.

Howland, in his address at the opening of the courts in Ontario in January of this year, stated that the delays resulting from these problems almost made a mockery of the new *Charter* provision requiring speedy trials. I think that all Canadian judges are greatly concerned about the possibility of public disillusionment with a judicial system forced to operate slowly and inefficiently when dealing with controversial *Charter* issues and, indeed, all other cases. This is a serious problem. Judges have every right to expect professional, governmental and public support for substantive and procedural law reforms which will make the justice system work more effectively and enhance public confidence in it.

The *Charter* presents opportunities and challenges to the judiciary as well as problems. Judges recognize that the *Charter* is a manifestation of the faith of the Canadian people in them. The people look to judges to defend and advance their rights and freedoms, both ancient and modern. It is the duty of the judiciary to maintain the high standard for Canadian life that has been set by the *Charter*.

Unquestionably judges will have to become accustomed to *Charter* issues or in more fashionable language "sensitized" to them. We will see old laws in a new light. We will compare our laws and legal institutions with those of other countries. Legal studies which have been neglected in the past in Canada will now become more important — jurisprudence, legal theory, comparative law and international law.[26]

It is plain that the *Charter* will broaden the horizons of both the bench and the bar. I stress the special responsibility of the bar. Judges are not omniscient. The ideas which will give life and vigour to the *Charter* must in large part come from the bar in the ordinary course of the adversarial process.

As judges enter the new era, they cannot be unmindful of speculation about their attitudes toward the *Charter*. In some quarters, there is almost eager anticipation of the possible confrontation between judicial activists and Parliament and the provincial legislatures. I think most judges are bemused by this speculation about how they will apply the *Charter*.

It is worth mentioning that the American judicial heroes of my generation were not activists. Holmes, Brandeis, Cardozo and Frankfurter practised judicial restraint and those who intervened to strike down important social laws were not called activists but reactionaries. It is unwise for judges to be concerned with slogans. We are powerless to issue a manifesto about what collectively we will do with the *Charter*. We do not set the agenda. We must await the cases presented to us. When an issue comes to court, judges cannot stand back and wash their hands of the problem but must deal with it. It will be for the future to determine whether Cana-

26. Consultative Group on Research and Education in Law, *Law and Learning* (1983).

dian judges have dealt well or badly with the *Charter*. It is by our works that we shall be known. The counsel of Francis Bacon seems apt for judges hearing *Charter* cases:

> Judges ought to be more learned, than witty, more reverend, than plausible, and more advised, than confident. Above all things, integrity is their portion and proper virtue.[27]

27. Francis Bacon, "Of Judicature" in *The Essays of Francis Bacon*, Peter Pauper Press, Mount Vernon, New York, p. 210.