*AND JUSTICE FOR WHOM?**

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I. Introduction

In the early months following the adoption of the *Constitution Act, 1982*,[1] those of us who had some part in the making of the new constitution were called upon to speak in various forums about the significance of the new *Canadian Charter of Rights and Freedoms*.[2] Virtually all who spoke recognized that it was a momentous legal document. We recognized that notwithstanding the "notwithstanding" clause, which permits legislatures to override the Charter, it represented a significant shift away from legislative sovereignty. Some of us noted that the *Charter* would transfer significant responsibilities for the resolution of society's conflicts and tensions to judges. What we did not foresee was the extent to which the basic rules of society for resolution of a broad range of social, economic and political issues were going to be fundamentally affected by the *Charter*.

A challenge to Sunday closing by-laws was expected; that administration of the *Combines Investigation Act* or the right of trade unions to negotiate a dues check-off or closed shop would also be put at issue in the courts was less expected. Yet there have already been cases on both of these matters. The *Charter* will, it appears, not only be significant in cases involving "human rights" as the term is usually understood in this country. It will also impinge on the political process of accommodation between economic and social groups, between regions and levels of government, in ways which will have profound implications for the future of Canada as a nation.

The extent to which the *Charter* will change Canadian life is not, however, by any means, clear. Many people are expecting genuine reform that will benefit ordinary Canadians and deserving special interest groups. No doubt, when issues involving "classic" civil liberties, such as discrimination on the basis of race and religion, have worked their way through the courts, the *Charter* will have proved to be a valuable weapon against discrimination. But in other matters—matters which do not lend themselves so readily to a traditional civil liberties approach—there is a danger that the aspirations raised by the *Charter* will not be fulfilled.

The *Charter* contains very general language; its protection can be sought by the privileged, as well as the disadvantaged. It will, without doubt, be argued that corporations are entitled to operate without interference of consumer protection legislation; that the *Charter* prohibits political activities by trade unions; perhaps, even, that it is incompatible with progressive taxation. Adjudication of *Charter* issues will take place in the courts. Few important issues will be settled without appeal up the chain of judicial

* This article is based on remarks delivered to the Social Planning Council of Winnipeg on June 11, 1986 and on remarks made at the Canadian Club in Winnipeg, Manitoba on January 21, 1987.

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1. *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

authority to the Supreme Court of Canada. The cost of legal proceedings will be more easily borne by corporations and privileged special interest groups, than by ordinary Canadians, or associations representing the handicapped, welfare recipients, or native people.

The *Charter* can be an instrument for social progress in Canada. But there are difficulties inherent in that effort—difficulties resulting, at least in part, from the nature of the *Charter* itself. There are limits on the political usefulness of the "language of rights" introduced into Canadian political life by the *Charter*. The *Charter* can be an instrument for conservative retrenchment as well as social progress. If we are to prevent that result, if we wish to see it as a tool for social growth, we must understand why it is possible. That is what I wish to discuss briefly today.

II. Scope of Charter Unforeseen

Perhaps the full implications of the *Charter* were not recognized in the early months of 1982 because the *Charter*, like other elements of the *Constitution Act*, was a result of political compromise—raw, hard, political bargaining. The notwithstanding clause (section 33) inserted at the insistence of the dissident provinces, preserves formal legislative supremacy. Section 1 of the *Charter* states that the rights contained in the document are not to be construed as absolutes: legislation can be defended by demonstrating its reasonableness in a democratic society. Some of the expressed statements of rights in the *Charter* are themselves compromises, and thus not perhaps as far reaching in their consequences as some might have hoped—and others perhaps feared.

Equally important, the history of human rights legislation in Canada gave some commentators reason to believe that the judiciary would not exploit in full the authority conferred on it by the *Charter*. In content, the *Charter* is similar to the *Bill of Rights*,[3] a statutory enactment, adopted in 1960. That legislation was not entrenched, and applied only to federal law. The Diefenbaker *Bill of Rights* did, however, permit the courts to strike down legislation. There was a flurry of judicial activism after the *Bill* was passed. In 1970, the Supreme Court of Canada struck down a provision of the *Indian Act* which discriminated against natives by making them subject to special liquor laws not applicable to others in the *R.* v. *Drybones*[4] case.

But the activist phase was short-lived. In 1974, the *Bill of Rights* and the *Indian Act* again came before the Supreme Court of Canada in the now famous *Lavell* v. *Attorney General of Canada*[5] case. It was alleged that the provisions of the *Indian Act* that terminated the status of a native woman who married a non-Indian were discriminatory, since the same rules did not apply to Indian men. The Supreme Court of Canada held that those provisions did not offend the *Bill*.

Most commentators recognized the *Lavell* decision as a signal from the Court that it was reluctant to construe the *Bill* as striking down legislation

3. *Canadian Bill of Rights*, R.S.C. 1970, Schedule III [hereinafter referred to as *Bill* or *Bill of Rights*].
4. (1970), [1970] S.C.R. 282, 71 W.W.R. 161.
5. (1974), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 [hereinafter referred to as *Lavell*].

which reflected the considered policy decisions of Parliament. In this case, a policy had been designed to protect native culture against erosion, which it was feared, would occur when native women married white men and adopted white culture. Many expected that this attitude would be carried forward when the entrenched *Charter* was adopted.

But public discussion of an entrenched *Charter* had created very high expectations of it. The very fact of constitutional entrenchment suggested to the public—and perhaps to the judiciary—that it was to have a more fundamental effect than the *Bill of Rights* or provincial human rights legislation. Former Prime Minister Trudeau painted a picture of the *Charter* that elevated enormously the expectations of the public. As well, the joint Parliamentary Committee further promoted these expectations, as numerous groups and individuals presented briefs to enhance the scope of the *Charter*.

III. Charter Produces Fundamental Change in Political Process

What the high public profile of the *Charter* debate and the process of entrenchment did, I think, was to initiate a fundamental change in the outlook of many Canadians—members of the public, politicians, and judges—toward the political process in this country. Without using the term in an unnecessarily pejorative sense, the *Charter* "Americanized" our political process. Because the American constitution has had, virtually from the beginning, an entrenched Bill of Rights, the "language of rights" long ago infected American political debate more thoroughly than in Canada or Britain. Furthermore, because of the rugged individualism that has long been part of the American political creed, there has been a tendency in the United States to phrase political arguments in terms of individual rights. Consider an example: one can find articles in American law journals concerning the "right to medical treatment." Part of the target of the concern underlying those articles is the fact that private hospitals can turn away patients in need of emergency treatment if they cannot pay. Those people who argue for the right to medical treatment attempt to demonstrate that the protections of "life and liberty' contained in the American *Bill of Rights* should guarantee access to medical treatment. In Canada, we also responded to the same concerns. But our universal medicare program did not result so much from recognition of "a legal right to medical treatment," as from the notion that universal health care is a social good—something which a caring community ought to provide and organize itself politically to attain.

The American attachment to rights also reflects the conception of government which is embedded in the U.S. Constitution—a tripartite system in which the Legislature, the Executive and the Judiciary are equal agencies of government expected to balance one another and to limit the excesses of each other. In the United States, the Judiciary is more expressly a part of the political process than in Canada. Robert Dahl, a distinguished American political scientist, has demonstrated how, historically, the U.S. Supreme Court has functioned self-consciously as a political force. A process of accommodation occurs between the Executive, the Legislature and the policy-minded Court.[6]

6. See, e.g., his "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" (1957), 6 *J. Pub. L.* 279.

The important fact for us to consider is that the political role of the Court in the United States is not concerned simply with the protection of certain rights—it is concerned with a philosophy of government.

The American form of government provides a viable model for a democratic society—but not the only one—and a quite different model from the one we have inherited from Britain and developed in Canada. Our system also operates through political accommodation—but the accommodation occurs in the Legislatures and between regions—not in the courts. The extent to which the *Charter* may, perhaps unintentionally, affect that process of accommodation is a question which will be of central importance in the years to come.

IV. Rights May Obscure Demands of Justice

At this point, I hasten to say I strongly support the evolution and enforcement of rights. All democratic societies must be essentially federal in nature; they must respect the autonomy of the individuals who make them up— respect them as individuals and accord them certain freedoms. Otherwise the system will fail. But there are dangers inherent in the exercise of enshrining rights in an entrenched document which is left to be interpreted by the judiciary, dangers which may create significant problems when an entrenched *Charter of Rights* is introduced into the political culture of Canada.

Let me develop this thought by attempting to identify the strengths and weaknesses of the formalized human rights approach to political discourse. I can, perhaps, do no better than to quote from an English jurisprudential scholar, John Finnis. In his book *Natural Law and Natural Rights*, Finnis states:

> The modern language of rights provides . . . a supple and potentially precise instrument for sorting out and expressing the demands of justice. It is often, however, though not inevitably or irremediably, a hindrance to clear thought when the question is: What are the demands of justice? The aspects of human well-being are many; the commitments, projects, and actions that are apt for realizing that well-being are innumerable . . . when we contemplate the complexities of collaboration, co-ordination, and mutual restraint involved in pursuit of the common good, we are faced with inescapable choices between rationally eligible but competing possible institutions, policies, programmes, laws, and decisions. The strength of rights-talk is that, carefully employed, it can express precisely the various aspects of a decision involving more than one person . . . but the conclusory force of ascriptions of rights . . . is also the cause of its potential for confusing the rational process of investigating and determining what justice requires . . .[7]

What are the demands of justice? What Finnis is saying is that in our pursuit of individual rights we should not overlook the demands of justice.

The *Charter*'s great transforming force is its potential for trumping our society's great social programs, such as Medicare, by its unrelenting focus on individual claims, in the pursuit of individual rights and in oversight of the demands of justice, as a whole.

7. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 210-211.

V. Judges: Are They Best Suited?

This language of rights is to be applied, not by legislatures, but by appointed judges. W.R. Lederman, writing about constitutional decision-making in general, observed that the Constitution can do no more than display logical options. A point is reached, he suggested, when judges are beyond legal issues, and must make their determinations on the basis of political considerations in the broad sense.[8] The "inescapable choices" between "competing possible institutions," referred to by Finnis, will be made by judges. Instead of decisions based on political accommodation—fought out through the democratic process—judges must attempt to divine the choices.

The *Charter* itself and the language of rights which underlies it does not provide a clear direction to the judiciary in making those choices. Rather, judges must apply their own perceptions, informed by their own experience and attitudes. The question is not simply "can we trust judges," but concerns the nature of decision-making about matters of public policy in our society.

In order to better approach this issue, let me consider some relevant cases in Canada. Consider first the disclosure of the names of rape victims. On the one hand, we must recognize the interests of rape victims as well as those many support groups that work to ameliorate the shock and humiliation of rape, and which support victims by working for their rehabilitation. On the other hand, the press seeks full disclosure of information about all crimes for the purpose of maintaining the integrity of the criminal justice system—and, no doubt—for the plain purpose of producing a more exciting newspaper. This issue has already been argued in the courts, and the conflict was resolved in favour of the press.[9]

Or consider the case of *Hunter* v. *Southam*[10] involving the *Combines Investigation Act*. In that case, the interest of the public in maintaining a competitive environment in relation to one of the most important activities of our nation, the press, was placed in conflict with the interests of the owners of a large newspaper chain. The challenged legislation allowed the Combines Investigation Branch to seize company records on the instructions of a member of the Restrictive Trade Practices Commission. The Southam chain opposed seizures made under the legislation. Southam argued that the seizures were contrary to the *Charter* because they were not authorized in advance by a judge. The Supreme Court of Canada agreed notwithstanding the fact that the impugned legislation provided for authorization of seizures by an independent commission. The result can be welcomed as a significant brake on arbitrary searches and seizures. On the other hand, in the actual circumstances of the case, the court's decision may have impeded investigation of monopolistic trends in media ownership. That is a result

8. W. R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981) chapter 14 at 278 ff.

9. *Canadian Newspapers* v. *Attorney General of Canada* (1985), 49 O.R. (2d) 557, 14 D.L.R. (4th) 10.

10. *Hunter* v. *Southam* (1985), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97 (S.C.C.)

which, in the long run, may have a negative impact on free speech and the demands of justice.

The point that I want to make about cases such as these — and there are many others, dealing with issues from abortion to pornography — is that these important questions, questions about which there has already been political debate and political resolution, are now being reconsidered and rewritten by the courts. Is this the place where these important matters should be finally resolved?

There is reason to question whether the courts are the best institution in which to resolve these issues, and whether judges are the people best-suited to make those decisions. The reasons for this are obvious, and have been stated many times.

First, judges are not democratically chosen. Their performance is not subject to review except by other judges. There is no electoral or popular sanction for the way in which they perceive, and alter, our society.

Second, the judicial process does not allow for the effective participation of many persons who are affected by court decisions. Not only do the laws of standing preclude many people from expressing their interests before the courts, the court process itself is, by and large, inaccessible to the public. Most people do not even realize that important rules governing their lives are being altered by decisions made by judges. Indeed, in many cases, the judges themselves do not seem to understand the actual or potential effects of their decisions.

Finally, judges are often seen to be, and sometimes are, insensitive to the interests of certain classes. I know that this is a contentious view and that it is not one that was advanced at the time that the *Charter* was put into place. Rather, it was suggested that the *Charter* would be a great boon to the interests of the poor and dispossessed because it gave more opportunity for the courts to intervene in the public decisions. The theory behind this is that because the courts are separated from the electoral process they are independent of the pressures of business and government. Thus the granting of greater authority to our courts would lead, it was suggested, to a greater respect for the interests of the ordinary citizen.

In my view, it does not necessarily work that way. The life experience of most judges naturally enables them to better understand the interests of the economic and political status quo, and the privileged groups in positions of leadership in that system. Try as they might, judges do not often succeed in distancing themselves from their backgrounds. Consequently, the kind of decisions we have been looking at have tended to reflect the views of the powerful, and to discount the interests of the common person, and the interests of any government which is attempting to create a society in which every individual is equal in reality, not just in theory.

VI. The *Charter* Must be a Vehicle for Justice

It may be that my comments are premature, too pessimistic, and too critical of courts. However, I think we would be shutting our eyes to reality not to recognize that, in its brief history in Canada, the *Charter of Rights* may have done much less for the position of ordinary Canadians than it

has done for those groups which have always enjoyed political and economic power in Canada. Canadian society may be transformed by the *Charter*. We must ensure that it is not going to be transformed to effect a redistribution of political and economic power further away from those who already are lacking such power. How can we prevent this from taking place?

First, the *Charter* must truly become a vehicle for the oppressed, the poor, and the disadvantaged. In this regard, there must be a commitment to support financially and otherwise those individuals and organizations which have as their mandate the advancement and protection of the disadvantaged in our society. Bluntly speaking—this means MONEY. Quite obviously, large corporations have access to the expensive and time-consuming judicial system. While our governments represent the public interest as they define it, it must be acknowledged that they frequently fall short of being fully representative of those ideals that the *Charter* was designed to protect. We must dedicate public funds to all those legitimate groups who see the *Charter* as a bold, new champion of their interests. The Women's Legal Education and Action Fund, LEAF, is an example of the kind of organizational mechanism which might be applied by trade unions, native groups, anti-poverty groups, and similar organizations. Much of the money can come from the subscribers to these causes but obviously, in many cases, additional funds will be needed from the provincial and federal public treasuries.

Second, we must accept the fact that the *Charter*, while an important tool for the advancement of individual human rights, is limited. The *Charter* is an important legal document which seeks to protect and advance equality "before and under the law" but it is not in and of itself a mechanism for solving the social and political problems facing the country. What will it do to solve the problems of housing, education, employment, native rights, and poverty? We must not view the *Charter of Rights* as a panacea, an attitude which I believe is, unfortunately, all too prevalent today. If one sees it as a limited document (*albeit*, an extremely important one) then political action for the resolution of these problems remains extremely vital to our society. The *Charter* has not obviated the political role. In fact, it may heighten the importance of the political process. Only through the political process can we temper any negative interpretations of the *Charter* by our judiciary.

Third, since the courts are now so crucial, we must re-think the manner in which they have traditionally fulfilled their functions. Now, more than ever, there will be an onus on the courts to produce judgments which logically and clearly explain to the public the rationale behind decisions which affect the public. It may be true that a decision of the Supreme Court on the meaning of section 92(A) of the *Constitution Act* with respect to natural resources has as much impact on the public as a decision on pornography; but, in actual fact, it is the latter (and a whole host of other similar issues) which will generate public awareness of the actions and reasoning of the courts. Decisions of this nature will stimulate criticism and debate. Rather than adopting the traditional response of placing the courts beyond criticism, we should be encouraging an open and honest discussion. That discussion can occur without imputing motive or attacking the personal integrity of the judiciary. Perhaps, as well, our society would be well advised

to examine the way in which our judges are appointed, so that we can better evaluate the general philosophical approach of particular judges in advance of their appointments. If judges are to make political decisions, then, society has a stake in ensuring that the opinions of the judiciary reflect the attitudes of all Canadians.

VII. Will the *Charter* Improve Canada?

Finally, will the *Charter* mean a better or worse Canada? Over the years since Confederation, Canada's brand of federalism has permitted variations in policy among the regions in order to meet local conditions. The variety of fiscal arrangements and special constitutional arrangements demonstrates the genius of Canadian pluralism. Diverse views have been accommodated under the rubric of a united nation. The division of powers has afforded the provincial governments the opportunity to create innovative social and economic programs. It might even be argued that the majority of Canada's progressive social and economic policies were first instituted by provincial governments. In Saskatchewan, for example, the establishment of public hospitalization and, later, public medicare, proved to be the forerunner of national programs in this field. Saskatchewan has acted as a kind of "social laboratory" in which a variety of economic and social programs have been devised and enacted. Some have been rejected by other Canadians. Others, like Medicare, have been adopted by the rest of the nation and have now become part of what it means to be a Canadian. Federalism—or divided jurisdiction—permitted these kinds of innovation.

The entrenchment of the *Charter of Rights* raises important doubts about whether this Canadian brand of regional pluralism will remain as viable in the future as it has been in the past. The overall impact of the *Charter* may be to diminish diversity. The only check, heretofore, against the legislative sovereignty of provincial governments was the division of powers between the levels of government. Now, the supremacy of legislation is further bridled by the presence of the *Charter of Rights and Freedoms*. All provincial actions will be measured against this document. Recently, provincial and federal governments reviewed their legislation to ensure that it conformed to the *Charter*. While this is a welcome development in one sense, nevertheless, the overall thrust seems to be to bring disparate legislation, justified by regional necessity, into conformity. Once a formula has been identified which appears to avoid *Charter* problems, all provinces are apt to adopt it. A province which seeks its own unique solution does so at its own risk—and almost certainly with the prospect of protracted litigation. Thus, while the review may improve the protection of some rights, it also has the effect of levelling variations between provincial legislation enacted to suit local conditions. Moreover, the *Charter of Rights and Freedoms* will be interpreted by the Supreme Court of Canada, a federally appointed body. The overall direction of the decisions of the Supreme Court is likely to further buttress this levelling tendency. In the result, if the new constitution acts as a catalyst for conformity, Canada may be deprived of many of the benefits of a flexible federalism. Thus, it is incumbent upon all Canadians to become informed about the *Charter* and its possible impact and to insure that the efficacy of the political process is maintained.

VIII. Conclusion

Our traditional system of federalism is undergoing a major change. We will see individual rights in conflict with legitimate collective rights. These disputes will engender emotional debates and uncertainty for the period of time that it takes for the courts and the political process to adjust. But I am hopeful that we can accomplish that adjustment successfully, that the *Charter* will be an instrument for true social justice and not a door through which class, status, and privilege, can intrude upon our legitimate public objectives. The political values of a nation reach its courts as surely as they reach the Cabinet and the Legislative Assemblies. We will need a thoughtful, vigilant, and informed public.

One thing is certain: April 17, 1982, marked the beginning of the most significant phase in the development of our country since Confederation itself—and presented a challenge no less important.