Parliament and the Charter

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The Canadian Charter of Rights and Freedoms came into force on April 17, 1982. It is acknowledged that the Charter has a wide-ranging effect on fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, language rights and educational rights of all citizens. The purpose of this paper is to explore the impact of this constitutionally entrenched charter on Parliament and parliamentarians in particular.

The Charter and the Member of Parliament

While a constitutionally entrenched Charter of Rights is new for Canadians, our basic rights have been, by and large, protected by the traditions of liberty and political understandings that underlie the Canadian parliamentary democracy. It has been argued that our political freedoms are protected by an "implied Bill of Rights" which includes certain fundamental freedoms such as speech, assembly, association, as well as freedom of the press and religion.

These rights cannot be infringed by Parliament. The doctrine find its basis in the preamble to the *Constitution Act, 1867* which refers to a "constitution similar in principle to that of the United Kingdom", and the establishment of representative parliamentary institutions. It follows, therefore, that the framers of the *Constitution Act, 1867* would not have contemplated the abrogation of free speech by either level of government when it has been traditionally enjoyed in the United Kingdom and when it is fundamental to parliamentary institutions. This theory leads to the conclusion that Canada has the benefit of the British *Bill of Rights of 1688*, the *Magna Carta*, and all other British statutes enacted prior to 1867 which deal with the protection of rights.

The view that rights existed before the Charter is confirmed by Section 26 of the Charter itself which states: "The guarantees in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

It is therefore not surprising that the Charter has little direct effect on the day-to-day life of the individual Member of Parliament. Many of the rights which are specifically referred to in the Charter have been recognized as existing long before the adoption of the Charter and the design of our parliamentary institutions reflects this fact. The procedure of Parliament was developed under the rules of natural justice and remains unaffected.

However the member, in his role as legislator should be constantly aware of the provisions of the Charter. The Charter contains many wide-ranging statements of the main values that should serve as a guide or a potential limit for the legislator. It affects both existing and future legislation. With regard to future legislation, the Charter is a benchmark against which the legislators can measure each item of legislation prior to enactment so as to determine the probability of its sections being adversely affected by the rights and freedoms contained in the Charter.

The application of the Charter to existing legislation may also force legislators to deal with matters which they would not have ordinarily considered. Court decisions which determine that certain parts of existing legislation are of no force and effect because they contravene the Charter may force the legislatures to focus on problems which either they did not contemplate or did not consider to exist. This would be in order to remedy the problems pointed out by the courts in their review of legislation vis-à-vis the Charter. For example, the Supreme Court of Canada in its recent decision in the *Southam*[1] case determined that the section of the Charter which states "everyone has the right to be secure against unreasonable search and seizure" was applicable to the "search and seizure sections of the *Combines Investigation Act*. In this case the court was dealing with the constitutional validity of these sections of this statute. In directing its attention to this legislation, the court held these sections to be unconstitutional. The question which therefore would arise for Parliament to deal with, is whether it should amend the "search and seizure" sections of the *Combines Investigation Act* to bring them in line with the decision of the court, or should it devise some other means to attain the ends desired in this statute.

Court decisions which deal with the effect of the Charter on existing legislation may in a real way contribute to establishing the agenda of legislative business in Parliament and the legislatures.

The Charter and Democratic Rights

The Charter deals specifically with democratic rights. It recognizes the right of every citizen of Canada to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified as a member of these institutions. It also deals with the maximum duration for the length of these legislative bodies requiring that there should be a sitting of Parliament and of each legislature at least once in every 12-month period.

These sections are immune from the legislative override section of the Charter (Section 33) which allows Parliament or a provincial legislature to expressly declare that a provision of an act shall operate notwithstanding certain provisions of the Charter.

Therefore, the applicability and limitations of these sections are subject to the interpretation of the courts and of course to the limitations set out in Section 1 of the Charter whereby the rights and freedoms of the Charter are subject to reasonable limits prescribed by law which can be justified in a free and democratic society.

The *Canada Elections Act* contains a list of persons who are not qualified to vote in a federal election. This list includes, among others, the Chief Electoral Officer and his or her assistant, most

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judges appointed by the Governor-in-Council, and persons disqualified from voting because of corrupt or illegal practices. Also disqualified are persons undergoing punishment as inmates in a penal institution for the commission of an offence and persons whose liberty is restrained or are deprived of the right to manage property by reason of mental disease.

Since the right to vote is now a "constitutional right" the question arises as to whether *any* exceptions to this right can exist. Certainly, the exceptions will have to be examined in light of Section 1 of the Charter in order to determine whether they are acceptable in a free and democratic society.[2]

The last two categories of exceptions mentioned above are particularly troublesome. With regard to people who suffer from mental disease, it should be noted that Section 15 of the Charter which will come into force on April 17, 1985 states that: "Every individual is equal before and under the law and has a right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Presumably this will be used to reinforce arguments which will be made pursuant to Section 1 in order to persuade the courts that this is not a reasonable limitation on the right to vote.

The right of a particular prisoner to vote was dealt with recently by the Federal Court both in the Trial and Appellate Divisions and on appeal in the Supreme Court of Canada.[3] In the Trial Division it was determined that a mandatory interlocutory injunction be issued to compel the Chief Electoral Officer and the Solicitor General to enable the prisoner to exercise his right to vote in the September 4, 1984 federal election. It was pointed out by Madam Justice B.J. Reed that as she was dealing with only one application to exercise the right to vote and not an action commenced on behalf of all prison inmates and because of the strength of the prisoner's case and the balance of convenience, it was in order to apply the Charter right to vote section to this case rather than the restriction in the *Canada Elections Act*. By dealing with the case in this manner, the real issue as to the constitutionality of the limitations in the *Canada Elections Act* would be tried at a later date, but at least the applicant would be able to vote in the September federal election.

On appeal, however, the Federal Court of Appeal in a majority judgment held that the trial court had erred in granting Mr. Gould the vote. The Appeal Court determined that the result of this case affected all incarcerated persons and that the interim remedy sought by Gould should not be allowed by the court without a full hearing of all the issues. The issue to be determined is whether in a free and democratic society the right to vote contained in s. 3 of the Charter can be limited by excluding persons who are imprisoned.[4] This judgment was upheld by the Supreme Court of Canada in a decision rendered on September 4, 1984.

Another case which touched briefly on the "right to vote" section of the Charter involved a challenge to an amendment to the *Canada Elections Act* which purported to prohibit the incurring of "election expenses" during an election campaign by persons who were not candidates, official agents of candidates, or persons acting on their behalf with their knowledge or consent; or by persons who were not registered agents of registered parties acting within the scope of their authority, or other persons acting on behalf of registered parties with the knowledge and consent of an officer thereof. The phrase "election expenses" is defined in Section 2 of the Act. That definition is quite elaborate, detailing how moneys can be spent for various services and various types of advertising for the purposes of electoral promotion. It essentially amounts to money paid or money's worth received "for the purpose of promoting or opposing, directly and during an election, a particular registered party, or the election of a particular candidate."[5]

Although the plaintiffs cited s. 3 of the Charter – the right to vote section – in support of their case, the decision which found these amendments to be of no force and effect was actually based on Section 2(b) of the Charter which guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

This illustrates a point made by Professor Beaudoin who states that the right to vote and the right to be qualified for membership in a legislature are in many ways related to more than one important fundamental freedom, such as freedom of opinion, of expression, of association and of the press. The relationship between these rights is illustrated by the fact that the right to be qualified for membership raises the question of the right of association. While our laws make provision for the existence of political parties, the *Constitution Act, 1867* does not. The existence of political parties is sanctioned by our traditions and our constitutional conventions. The right to be qualified for membership implies the right to belong to a political party which is probably also guaranteed by the Charter right of freedom of association. It also implies quite naturally the right of access to the media.

The Doctrine of Parliamentary Supremacy

The doctrine of parliamentary supremacy as it exists in Canada was imported through the Constitution from Great Britain. In relation to rights and freedoms, parliamentary supremacy means in Great Britain that individual liberty has no constitutional protection. There is no fundamental law and there are no rights which are fundamental in the sense that they enjoy special constitutional and legal protection against interference by Parliament. The *Magna Carta*, the *Petition of Right*, the *Act of Settlement* and the *Bill of Rights* can be changed or abridged by Parliament even though they deal with important principles lying at the base of British institutions. The main safeguards against the abuse of power by the government and Parliament are really not legally enforceable. They are the constitutional conventions and understandings whose observance depends upon the sense of fair play of ministers, the vigilance of the opposition and individual members of Parliament; the influence of a free press and of an informed public; and the periodic opportunity of changing the government through free and secret elections. Therefore, in theory, Parliament can make any law whatsoever, no matter how seriously it curtails a cherished civil liberty.[6]

In Canada, this doctrine, until the coming into force of the Charter, applied but with certain important limitations. As Canada is a federal state, its Supreme Court, unlike Britain's highest court, may disallow a federal or provincial statute on the grounds that it is outside the jurisdictional authority of the enacting legislative body, as set down in the *Constitution Act, 1867*. Therefore, in Canada, Parliament and the provincial legislatures are each supreme with their specified areas of jurisdiction. With the advent of the Charter which applies to both orders of government, a further check on parliamentary supremacy resulted as both new and old laws would not only have to be checked against the authority of the relevant legislature enacting them, but would now have to be measured with respect to their constitutionality against the protections set out in the *Charter of Rights and Freedoms*. Therefore, the Charter, as

well as placing the judiciary squarely in the field of the protection of rights also raises an important question regarding the effect it will have on the doctrine of parliamentary supremacy.

This question has developed a most interesting debate as the *Constitution Act, 1982* provides that any law which is found to be inconsistent with the Charter is to the extent of that inconsistency of no force or effect. This, it is argued, will transfer ultimate public policy making authority from Parliament to the judiciary whose task it is to determine the inconsistency of laws in relation to the Charter.

The framers of the Charter attempted to deal with this argument in both section 1 (which allows a legislature to impose reasonable limits upon rights and freedoms) and section 33 (which allows legislatures to expressly declare that a statute may operate notwithstanding certain sections of the Charter). These are obvious attempts to achieve a balance between parliamentary supremacy and supremacy of the judiciary. There seem to be three schools of thought on the subject of the effect of the Charter on parliamentary supremacy.

First, there are those who maintain that the Charter will have little or no effect on the relative roles of the judiciary and Parliament.[7] It is argued that the Supreme Court of Canada will not attempt to become involved in policy-making as the judges of that Court have consistently taken the position that it is more appropriate for the legislature to make ultimate policy choices than to leave these decisions to the judiciary. This conclusion is based on the reluctance of the Supreme Court of Canada to apply the "Bill of Rights" of 1960 to federal legislation. The Supreme Court attempted to justify its position by stating that the Bill should be given a narrow interpretation both because of its language and its status as a nonconstitutional document. However, these reasons are simply seen as excuses for the non-interventionist role which the Court would have assumed in any event. It is the contention of those who subscribe to this point of view that the judiciary, especially those who sit on the Supreme Court of Canada , view the legislature as the appropriate institution to make ultimate policy choices and to work out the necessary compromises between conflicting societal values, this generally being consistent with the traditions of the Canadian legal system.

A more activist view is envisaged for the judiciary by Professor William Lederman who argues that the entrenchment of the Charter will result in independent courts and democratic legislatures becoming partners and not rivals as the primary decision-makers in a very complex process. This partnership is recognized by the placement of both sections 1 and 33 in the Charter. Together, the judiciary and the legislature will have essentially coordinate status and complementary functions. He does recognize that the Charter will mean an increase in the power of the judiciary but maintains that "these two institutions must continuously seek and find reasonable points of equilibrium between themselves in a spirit of partnership as they perform their respective functions."[8]

This thesis can be stated in another fashion wherein it is contended that the court's aim in statutory interpretation which affects the Charter will be "the ascertainment of the shared community experiences generated by the social policy prescribed as law by Parliament."[9] The policy-making role performed by the courts should conform to the goals being sought by Parliament. If the court decisions are genuinely based upon factors indicative of legislative policy, the courts will remain subordinate to Parliament.

Therefore the entrenchment of a Charter aids the courts because it sets out the fundamental values of the Canadian people and provides criteria to apply when resolving statutory ambiguities. It also requires judges to scrutinize legislation in terms of its compatibility with fundamental values. Parliament will actually exercise more immediate control over judicial discretion because the Charter sets out policies which are to be applied as law. In this view, the Charter, rather than being a threat to the supremacy of Parliament, actually strengthens the ability of Parliament to properly control the development of law in conjunction with the judiciary.

Professor Peter H. Russell of the University of Toronto is typical of a third group who see the entrenchment of the Charter as a golden opportunity for the courts to become even more involved in policy-making than they are at the present time to the point where judicial policy-making may in some instances supplant legislative policy making. He points out that judicial policy-making has always been a built-in feature of our system of government. Policy-making in Canada involves a complex set of interactions among three branches of government – the legislature, the executive, and the judiciary – whose roles cannot be accounted for adequately by the theory that the legislature makes the laws, the executive gives them practical effect, and the judiciary applies them to individual cases. In many areas, the real core of policy is shaped, not by a decisive act of Cabinet or by the legislature, but by the way in which administrators and judges gradually give substance to laws day-by-day and case-by-case.[10] An entrenched Charter will result in a significant shift in policy making authority from the other branches of government to the courts, and especially to the Supreme Court of Canada.

Professor Russell states that judicial interpretation of the Charter will have three distinct features of considerable political importance. First, definitive decisions on the application of the sections of the Charter by the Supreme Court of Canada could put certain policies beyond the reach of both levels of government. Second, the Supreme Court's interpretation of the Charter will necessarily have a centralizing impact on public policy in Canada. When interpreting some of its clauses, especially those pertaining to equality, mobility rights and bilingual education, the Court will be establishing national standards in policy areas which are subject to provincial legislative jurisdiction. Third, enforcement of a Charter entails not only judicial vetoes of legislation and executive actions, but also judicial ordering of actions which governments must take to meet the Court's understanding of the Charter's requirements.

This discussion would not be complete without reference to the decision in the *Harrison* v. *Carswell* case[11] rendered by the Supreme Court of Canada in which it examined the role of courts in the Canadian political spectrum. This case involved a conflict of fundamental values between the private property rights and the free speech rights of picketers. Mr. Justice Dickson, speaking for a majority of six, made the following statement:

> The submission that this court should weigh and determine the respective values to society of the right to property and the right to picket raises important and difficult political and socio-economic issues, the resolution of which must, by their very nature, be arbitrary and embody personal economic and social beliefs. It raises also fundamental questions as to the role of this court under the Canadian Constitution. The duty of the court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the court to act creatively – it has done so on countless occasions; but manifestly one must ask – what are the limits of the judicial function? There are many

varied answers to this question. Cardozo, *The Nature of the Judicial Process* (1921) p.131, recognized that the freedom of the judge is not absolute in this expression of his view: "This judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles."[1]

The contrary view of this was taken by the late Canadian Chief Justice Laskin in his dissent in the *Harrison* v. *Carswell* case:

> This court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decisions ...It seems to me that the present case involves a search for an appropriate legal framework for new social facts which show up the inaptness of an old doctrine developed upon a completely different social foundation.[12]

Therefore, the majority in this case, which is really one of the few in which the court has talked openly about its role vis-à-vis the legislature, took the position that the court could be somewhat creative but not totally so.

Conclusion

This article has attempted to deal with three areas of impact of the Charter upon Parliament and parliamentarians. There is little doubt that if judges in Canada adopt an activist approach when dealing with Charter cases, especially where the Charter conflicts with existing legislation, the result will be a significant shift in the policy-making process from Parliament to the courts. This is not to say that courts have not been involved in policy making previously, but with the Charter in place this role has the potential to grow considerably.

A shift in the direction of the courts from the legislatures in the area of policy will affect parliamentarians. While the nature of their debates will not change substantially, the subject matter may in a significant manner, be dictated by the courts. Subject areas which were considered settled may become active as new solutions have to be found for old problems.

However, while it is interesting to speculate on the development of an intense rivalry between these two institutions it is vital to remember that their activities do not take place in a vacuum isolated from one another.

Perhaps the most realistic, and as well optimistic, view of the relationship between the judiciary and Parliament is the one expressed by Professor Lederman. "They should approach their respective parts in the working of the total justice delivery system in a spirit of partnership rather than a spirit of rivalry ... They should each afford reasonable respect to positions taken by the other and practice restraint accordingly".[13]

If viewed in this fashion, increased judicial power need not be seen as a negative influence on our parliamentary system. It can be regarded as contributing to the good of all as Parliament and the legislatures enact statute law and the courts render judgments, both institutions ideally striving to protect the rights and freedoms enunciated in the Charter.

Notes

1 Lawson A.W. Hunter, Director of Investigation Research of the Combines Investigation Branch v. Southam Inc., Unreported, (S.C.C., 1984).

2 A full discussion of this topic is presented by Professor Gérald-A. Beaudoin, "The Democratic Rights" in *The Canadian Charter of Rights and Freedoms – A Commentary*, W. Tanopolsky and G. Beaudoin, eds., Carswell, Toronto, 1982, p. 220.

3 Robert Gould v. The Attorney General of Canada, The Chief Electoral Officer of Canada, and the Solicitor General of Canada, as yet unreported (Fed. Ct. of Can., 1984).

4 The Attorney General of Canada, and the Solicitor General of Canada v. Robert Gould, as yet unreported (Fed. Ct. of App. 1984).

5 National Citizens' Coalition Inc., Coalition Nationale des Citoyens Inc. and Colin Brown v. The Attorney General of Canada, as yet unreported, (Alta. Q.B., 1984).

6 Anthony Lester, "Fundamental Rights: The United Kingdom Isolated?", *Public Law*, 1984, p. 47.

7 Berend Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter", *McGill Law Journal*, Vol. 28, 1982, p. 31.

8 William R. Lederman, "The Power of the Judges and the New Canadian Charter of Rights and Freedoms", *U.B.C. Law Rev.* Charter Edition, 1982, p. 10

9 Leo Barry, "Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms", *Can. Bar Rev.*, Vol. 60, 1982 p. 237.

10 Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of the Courts", *Can. Public Admin.*, Vol. 25, 1982, p. 14-15.

11 Harrison v. Carswell, 5 N.R. 523 (S.C.C. 1975).

12 Ibid., at p. 534-37.

13 Lederman, *op. cit.* p. 8.