Courts and Legislatures in the Age of the Charter

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After the constitutional resolution was proclaimed in 1982 various symposia and conferences were held to discuss the impact of the new Charter of Rights on the life of Canadians. From the very beginning we all recognized that the Charter represented a dramatic shift in our political system from one based on political accommodation of conflicts to, in effect, a system of judicial intervention. We commented on the effect of the Charter in transferring responsibility for societal conflict from the political the judicial process.

What we did not fully anticipate was exactly how widespread the phenomenon of transfer of authority was going to be. In the constitutional negotiations in 1980 we realized judges would henceforth be dealing with major political issues such as abortion, pornography, Sunday closing and capital punishment. What we did not foresee was the extent to which the basic rules for society, heretofore resolved by the political process — basic rules pertaining to social, economic and political issues would be affected by the Charter. A challenge to Sunday closing by-laws as being unconstitutional was to be expected, but that the administration of the *Combines Investigation Act* or the right of trade unions to negotiate dues check offs or closed shops would also be challenged was less expected. Yet both of those cases have already been dealt with by the courts. It therefore seems that the Charter will be important not only in "traditional" human rights cases but it will have an essential political role in accommodating competing economic and social interests among groups, regions, the provinces and the federal government in ways which will have a profound implication for Parliament and for Canada as a whole.

We must also not overlook some potential problems in the way the Charter will affect Canadian life. Many citizens are expecting genuine reform, through the Charter, when it comes to deserving Canadians, such as handicapped people. In classic civil rights cases, such as discrimination on the basis of race and religion, the Charter, once it has worked its way through the courts, will be a valuable weapon against discrimination and therefore improve our society. But in 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 and the powerful as well as by the disadvantaged. It will be argued, for example, that the Charter protects the right of corporations to operate without interference of consumer protection laws; that it prohibits political activities by trade unions, perhaps even that it is incompatible with progressive taxation. Adjudication of these kinds of Charter issues will now take place before the courts, and will go up the chain of judicial appeals. The cost of the proceedings will be more easily borne by the corporations and privileged groups than by ordinary Canadians, the handicapped, the welfare recipients or the native people.

So the Charter can be an instrument for social progress but it can be something more than that unless we are vigilant as a society and as parliamentarians to make sure that we look beyond the pure black and white of the Charter and ask what kind of society we really want in Canada. We must insure that the kind of a system which has allowed us to develop as a humane, caring society in Canada continues. We have to be vigilant in the shift from the legislatures over to the court rooms.

Let me outline why the scope of the Charter was largely unforeseen. First of all, the Charter of Rights itself is an act of compromise. Section 1, the so-called derogation clause, is an act of compromise which does permit the political process to prevail in certain circumstances. Section 33, the "notwithstanding clause", is also compromise and there are other examples. Perhaps, we thought that because the Charter was a product of compromise, it would be not as far reaching in its consequences as some might have hoped for and perhaps others had feared.

A second reason is the history in Canada in the interpretation of bills of rights. As we know the Diefenbaker *Bill of Rights*, although it applied only to the federal law, permitted the courts to strike down discriminatory legislation. There was a short period where the court was very activist but after the 1974 *Lavalle* decision, the court adopted the position that it would not get into the policy determinations of what was good for our society, policy determinations as set out by Parliament and the legislatures. As a result the Diefenbaker *Bill of Rights* was not given very much life by the courts in Canada. To some extent, some felt that would be the case with the Charter of Rights as well, even though the Charter is an amendment to the constitution and not just an ordinary statute.

The expectations raised by the introduction of the Charter of Rights, however, have unleashed a new and fundamental attitudinal change toward the political process in Canada.

Former Prime Minister Trudeau described the Charter as both a shield and a sword on behalf of the average Canadian. The unleashing of this force has brought what some have described as a kind of "Americanized" search for rights, which makes the Canadian Charter of Rights and Freedoms different from the old Diefenbaker *Bill of Rights*. We have seen in many cases an importation of American jurisprudence. Not in the *acceptance* of that jurisprudence by the courts but in the *advocacy* of civil rights cases by counsel before the courts.

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There is, of course, a distinct difference between American and Canadian society. Let me just give you one example. In the United States where they have had a *Bill of Rights* in the constitution for some two hundred years, the ethos of the rugged individualist is much more imbedded than in Canada. The right to medical treatment in the United States has been frequently raised. In private hospitals in the United States a person who cannot pay for emergency treatment may be turned away. Those who argue for a right to medical treatment in the United States sometimes attempt to demonstrate that the protections in the American *Bill of Rights* to life and liberty should guarantee the access to medical treatment. They seek a remedy through legal action. In Canada, we have responded to the concern about medicare in a political fashion. There is no specific right to medical treatment found in any legal document including the Charter of Rights or the Diefenbaker *Bill of Rights*. There has been a political response to the need for medical treatment which reflects a belief that the community at large benefits if it pursues that particular objective.

My biggest concern about the Charter is that in the search for individual rights unleashed by it we forget to ask what are the demands of justice. I agree with the great English jurisprudential scholar John Finiss who said the conclusory force of aspirations to rights also has the potential to confuse the rational process of determining what justice requires. The question which must be addressed before the Charter can be effectively applied is "what are the demands of justice," as understood and applied to the Canadian ethic and the Canadian body politic.

There are many areas where this is an important and complicated question to answer. The question of trade unions is one. The trade union movement and legislation pertaining to the trade union movement, is susceptible to challenges as a result of the Charter of Rights and Freedoms. We have several cases before the Supreme Court of Canada right now. Trade unions and their causes — the cause of wages, standard of living, poverty, technology, job security — are in varying degrees the issues of all Canadians. Trade union interests embrace not only individual rights but also collective rights. In the determination of the validity of laws permitting closed shops, membership dues and check offs, we have to guard against the total dismantlement of the trade union movement as a positive social force in our community as a whole because of alleged violations of individual freedom of choice.

We may have debates about this issue, but I would argue that other aspects of our society are in the same kind of a situation. If you look at some of the recent Supreme Court decisions, such as *Southam versus Hunter*, where the issues were the right of the public to make sure that the freedom of the press was maintained by breaking down monopolies and due process, the corporate interest won. In the Big M Drug Mart case, where the issue was Sunday closing, the corporate interest won. In the cruise missile case, again a public interest versus a government interest. Who won? Although these cases were concerned with complex legal issues (and I am doing a disservice for dealing with them so summarily), the danger here, in my opinion, is that in the context of the Charter of Rights and the interpretation of it by the courts of our country, we may see a dismantling of the values and the principles, collective and individual, which are the foundation of our society.

This may be a pessimistic view of the Charter, and perhaps too critical of the courts who, after all, are well qualified to decide many of these issues. But in other ways courts are not as well qualified as parliamentarians to ask "What are individual rights all about, and what are the demands of justice"?

The Charter must be a vehicle for justice. In order to ensure that, I would argue we must look for ways and means to support, financially and otherwise, those individuals and organizations which have as their mandate the advancement and the protection of the disadvantaged in our society. Bluntly speaking, this means money. The Charter will be used by the large corporations and the large school boards just as easily as by individuals, in fact more easily. We need to, I think, as an institution fund organizations through mechanisms like LEAF, the Legal Education Action Fund.

Secondly, we must accept the fact that the Charter, while an important tool for the advancement of individual human rights, is limited. It talks about protection and advancement of equality "before and under the law" but it is not in itself a mechanism for solving social and political problems facing this country. There is an important political role for Parliament and the legislatures to play. This role may be anticipatory. It may mean introducing legislation in advance of a court decision thus complying with the provisions of the Charter in a way which thwarts possible negative judicial intervention. It is still the role of politicians to accommodate the interests of the disadvantaged and the needy and to articulate the interest of the collectivity.

And finally what parliamentarians and others interested in the law have to do is to re-think the manner in which the courts have traditionally fulfilled their functions. As you know the courts are responsible to no one, except other judges. They are not elected. Now more than ever their judgements have to be clear, logical, and reasonable in order for us to understand what they mean. Perhaps we should look to a new method of appointing judges. If they are going to be so important in deciding these kinds of political issues than maybe it is time that our parliamentary institutions, in full daylight, if I may put it that way, examine carefully exactly who is going to be deciding these very important, economic and social trade-offs.

I want to make one last point as a "provincialist" if I might. Heretofore in constitutional matters, our courts have been basically dealing with division of powers issues. Does a piece of provincial legislation fall within the scope of the constitutional powers assigned to that province? It has been a great system because it has allowed flexibility. It has permitted people, if I may use my own province of Saskatchewan as an example, to experiment and to do things under our constitutional mandate which have become part of what it means to be Canadian. I use medicare again as an example. We did that under our provincial constitutional powers.

I could cite other examples of the flexible federalism which has permitted diversity within a united nation. I think we want to preserve this kind of body politic. I think we want to make sure that there is not too much uniformity as the result of the court's interpretation of the Charter, and the natural levelling tendency in the interpretation of the Charter. We want to make sure that flexible federalism, which has been the genius of Canadian political life, is maintained. That too will require a very active legislature and Parliament.■