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THE CHARTER : A NEW ROLE FOR THE JUDICIARY?

by

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Eight years ago, Canada adopted the *Canadian Charter of Rights and Freedoms.* It was a change breathtaking in scope, so large that one wonders, in retrospect, how it was accomplished. Since Confederation, Canada had followed the British model. Individual rights and freedoms were important. But their preservation was a matter of tradition and the will of the Legislature. The *Charter* entrenched individual rights and freedoms in our Constitution, and in doing so, turned the tables of power. Before the *Charter*, Parliament and the Legislatures were free to limit individual rights and freedoms as they thought fit, subject only to the check of tradition and public opinion, and the basic requirement that the legislation was within an area of competence under the *British North America Act.* The *Charter* took away that freedom. It became the supreme guarantee of individual rights and freedoms. Parliament and the Legislatures were powerless to limit those rights and freedoms except in accordance with its terms. We had changed from a British system, in which the Crown, acting through the legislative and executive branches, was supreme, to a system more akin to that of the United States, where the law itself was supreme. And since the courts are the ultimate arbiters of that law, the courts assumed a newly important role as the institution which determines what can and cannot be the law.

This new role for the judiciary was predicted and predictable. One had only to look at the American experience to forecast its

inevitability. When the American Bill of Rights was adopted, it was sanguinely predicted that the judiciary is "the least dangerous branch of government." [1] One has only to recall the leading role which the U.S. Supreme Court played in the fight for legal equality and desegregation in the 60's to see the gross miscalculation of that assessment. The Bill of Rights has made the United States Supreme Court an instrument of great and critical power. The *Charter* can lead only in the same direction if, as I shall suggest, with a different outcome.

It is not my intention tonight to debate whether this development is good or bad. I recognize that that debate continues. Only a month or so ago, a law professor in a leading Canadian newspaper[2] bewailed the fact that "the judges have used the *Charter of Rights and Freedoms* to make themselves the final arbiter of what is right and just. They have proclaimed themselves the 'guardians of the constitution'." The fact is that the Constitution, not the judges, compels the courts to act as final arbiters of what is right and just, to stand as the guardians of the Constitution. While the courts may choose between relative degrees of judicial activism, and while the extent to which they defer to the legislative branch may vary, the fundamental fact remains that the courts cannot avoid the new responsibilities and powers which the *Charter* has placed upon them. The question is not whether they do it, but how they do it.

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[1] A. Hamilton, *The Federalist Papers* (1788), No. 78

[2] R. Martin, "Choosing our judges: Judges should be told their task is simply to decide legal cases", *The* [Ottawa] *Citizen* (10 Sep. 1990) A9.

It is the latter question which I wish to address tonight. How should the courts go about discharging the new responsibilities which the *Charter* has placed upon them? What implications does the *Charter* hold for judicial decision-making and judicial remedies? What role does this mandate for judges, and how will the judiciary in the twenty-first century relate to the legislative and executive branches of government?

I sub-divide the central question of how the courts should discharge their responsibilities under the *Charter* into two headings: decision-making and remedies. The nature of the *Charter* is such that it requires judges to address new problems and issues in decision-making. And its impact is such that it requires the courts to consider anew what remedies should be granted where breaches of the *Charter* occur. I will consider each of these issues in turn.

DECISION-MAKING UNDER THE CHARTER

I turn first to the issue of decision-making under the *Charter*. Under this head I propose to discuss the vastly expanded range of subject matter which is being brought before the courts as a consequence of the *Charter*, as well as the actual decision-making process under the *Charter*.

The first thing that judges must adjust to in the post-*Charter* world is the fact that suddenly they are expected to render decisions on matters which they could not have imagined in their law school days. The

Charter's guarantees of rights and freedoms has made litigable a vast range of questions which previously would have been beyond the powers of the courts.

Prior to the *Charter*, the main business of the courts was maintaining the criminal justice system and resolving private disputes. Contract, tort and criminal law, with a smattering of the esoteric by way of trusts or admiralty -- these were the staples of the law. Most people passed their lives without going near the courts or perceiving themselves as affected by them in any way. Today's decision at the Supreme Court of Canada was hardly likely to excite debate at the family dinner table, to say the least.

The *Charter* has changed all that. It has done so by the simple mechanism of saying that laws and government action may not impinge on the fundamental rights and freedoms guaranteed by the *Charter*. Given the wide scope of legislation and government action in the waning years of the twentieth century, the result is inevitable. A whole range of questions touching everyday life which were formerly matters exclusively for the legislators are now fodder for the courts -- Sunday shopping, abortion, mandatory retirement and hate propaganda -- to name but a few issues which have captured recent headlines.

The result has been that judges, particularly at the appellate level, find themselves facing questions which are new and unfamiliar. Many

involve social and moral values, foreign territory to a judge raised on the arid objectivity of contracts and bills of lading. It is not enough to demand, as one writer recently did, that our judges "stop trying to be our moral mentors and get back to deciding cases".[3] As I have already suggested, the proposed distinction between "deciding cases" and engaging in evaluative moral questions is a false dichotomy. There is no way to interpret the *Charter* without making value judgments. The abortion issue which has twice come before our Court provides a graphic example. The courts had no choice but to deal with the issues of criminal law raised by the *Morgentaler*[4] case or the central issue of personal freedom raised in the *Daigle*[5] matters. And faced with those issues, they had no choice but to make what some would label moral judgments. To reject Chantal Daigle's right to an abortion (as did the Quebec Court of Appeal), was as much a moral judgment as to accept it (as did the Supreme Court). The courts can decline to take on questions which are not squarely raised or premature, as did the Supreme Court in the *Borowski*[6] case. But often there is no choice but to struggle with the new and difficult issue. The bottom line is clear -- the *Charter's* introduction of guarantees for individual rights and freedoms means that the courts have no choice but to

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[3] *Ibid.*

[4] *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

[5] *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634.

[6] *Borowski v. Attorney General for Canada*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231.

grapple with a whole range of hitherto unlitigable issues, many of them involving social and moral questions of profound importance and difficulty.

How can we ensure that our courts can best discharge this new task? It is obvious that they must remain in touch with the world about them if they are to render relevant and helpful decisions. It is also obvious that the composition of the courts should reflect insofar as possible the broad mosaic of our society, the better to guard against the predominance of uniform insularity. That judges must be objective, independent and sensitive to prevailing social thought and concern is beyond dispute. Only thus can our courts cope with the wave of new issues which the *Charter* has washed up on their benches.

Quite apart from the increase in the range of litigable issues which it has introduced, the *Charter* has profoundly affected the task of judicial decision making. Three factors contribute to the difficulty judges encounter in making decisions under the *Charter*: first, the absence of precedent; second, the open-textured language of the *Charter*; and third, the necessity of making value-based decisions. I will comment briefly on each of these factors.

To understand the significance of the absence of precedent, it is necessary to contrast the method of judicial decision-making in the common law provinces apart from the *Charter*, with the method which prevails under the *Charter*. The art of the common lawyer -- the essence of what he or

she learns at law school -- is the art of applying precedent. The common law developed incrementally, on a case by case basis. Rules of general application were regarded with suspicion. It was thought safer and better that the law advance by doing what had been done in a previous case, subject to such modification as the distinct facts of the case at bar might demand. Lawyers argue their cases and judges decide them by this method. Even where legislation is involved, previous cases interpreting it hold great importance.

Consider then the sinking feeling that besets a common lawyer upon finding himself or herself confronted by a new document, an amalgam of unfamiliar American and European and who-knows-what-other ideas, without so much as a case to show the way. That is the problem which the *Charter* posed for the judiciary. Where, we asked, do we go for the answers? Do we look south of the border? Surely that cannot be the answer, given the uniqueness of our country and the *Charter*. Do we look to the Canadian Bill of Rights? But that was a totally different document, and not constitutionally entrenched.

Over the past eight years, the courts have been developing precedents on the *Charter*. A trial judge makes a decision. Courts of Appeal ponder it and elaborate. Ultimately, it comes to the Supreme Court of Canada, which lays down the definitive answer, which courts below can then apply.

That is the theory, and in large part it has worked. We now have an emerging doctrine on free speech, pre-trial liberties, equality rights and the methods to balance the state's interest in legislation limiting rights against the right of the individual under s. 1 of the *Charter*. The Supreme Court has struggled to give guidance by laying down general principles, while leaving open questions better resolved in the future. The question of how far to go in formulating a legal structure is always one of difficulty and delicacy. Sometimes, moreover, it is necessary to take a step back and reconsider previous decisions. But by and large the process continues to infuse at least some direction, some small measure of guidance, for future cases.

But the process is not as simple as building up rules and cases which can be mechanically applied. If that were the case, we could envisage a day when the *Charter* jurisprudence was "complete", all vagaries resolved, all lacunae filled. That will never happen, because, as we are increasingly coming to realize, the *Charter* is not a document like other laws, to which common law precedent can be applied with little difficulty. The *Charter* by nature is more akin to the *Napoleonic Code* or the *Quebec Civil Code*, where precedent is at best of limited value. It sets out general principles which constitute the ultimate law. It is these principles, not the cases which interpret them, which are supreme. The cases must always be essentially secondary. The result is that, as new situations emerge, the courts will inevitably disregard precedent to interpret the *Charter* in a way which conforms to the prevailing perception of right and wrong. It is

for this reason that the Supreme Court of Canada has repeatedly stated that the *Charter* must not be viewed as a static document, frozen in time by this decision or that.[7] Any doubt on that matter is resolved by a look at the American experience. In the 19th century the Bill of Rights was interpreted as upholding slavery; in the twentieth, it became a powerful engine for racial equality and desegregation. The Bill of Rights did not change. The old cases remained on the books. What changed was society, and with it the courts' interpretation of what the Constitution meant.

These considerations highlight another reason why precedent cannot operate in the context of the *Charter* as it does in other areas of the law. On non-consitutional questions, Parliament and the Legislatures can pass laws changing the rules which judges make. Judges can follow previous decisions in the confidence that if they were not sound, laws would have been passed to change them. This is not true of constitutional decisions, however. If the courts say that a certain law is unconstitutional, Parliament and the Legislatures must abide by that decision. They cannot change it. It follows that the only means of changing or rectifying constitutional decisions is the courts themselves. Slavish adherence to precedent by the courts would mean that errors or aberrations in constitutional interpretation could never be corrected. For this reason, the highest constitutional courts must be prepared on occasion -- hopefully not

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[7] See, for example, *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 365-67, 9 D.L.R. (4th) 161, *Hunter v. Southam, Inc.*, [1984] 2 S.C.R. 145 at 155-57, 11 D.L.R. (4th) 641, and *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 343-344, 18 D.L.R. (4th) 321.

too often in the interests of certainty in the law -- to reconsider their constitutional decisions. The highest courts in Britain, Australia, the United States and Canada now assert the power to reverse earlier decisions which prove inappropriate, as witness the recent reversal by the Supreme Court of Canada in the sexual discrimination cases.[8]

The result is clear. The absence of precedent is not a temporary void which will be remedied in due course when the courts have pronounced enough decisions. Court decisions will help in establishing parameters and providing guidance in the vast majority of cases. But the *Charter* by its very nature defies the possibility of absolute and permanent interpretational certainty. Judges in 2050 will be searching the *Charter* for the correct answers for the society of their day, just as we do for our society. Viewed thus, the *Charter* poses a continuing and permanent challenge for the judge accustomed to looking to precedent for the answers.

I turn next to the challenges posed by the language of the *Charter*. The language of the *Charter* is extremely open-textured. The guarantees of rights and freedoms are cast in broad terms -- the right to vote, freedom of expression, freedom of association, freedom of religion, the right to life, liberty and security of person, the right to equality and so on. The words hold meaning for all of us, but when we examine that

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[8] See *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321 and *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352, which took a different view of sexual discrimination than had been taken in *Bliss v. Canada*, [1979] 1 S.C.R. 183.

meaning, we find that it is far from precise. When we recite a phrase like "freedom of expression" certain ideas come to mind -- a free press, the right of political expression, perhaps artistic expression. But while the core of these concepts may be solid, the penumbra is vague and indefinite. Should the right of free expression, for example, extend to pornography? To hate propaganda? Similarly with the democratic rights. Does the right to vote comport a certain equality of voting power? If perfect equality is impossible, what degree of equality is required to fulfill the constitutional guarantee? Equally difficult, what is meant by the notion of equality? Equal opportunity? The right of persons similarly situated to be similarly treated? Or a more restrictive notion tied to the concept of discrimination and groups which have traditionally been discriminated against?

It is readily apparent that questions such as these are susceptible to a variety of different answers. It falls to the courts to provide the answers. Where are they to find them?

A final and related challenge to judges lies in the impossibility of avoiding value judgments in *Charter* decision-making. Value judgments are inherent in defining the scope of the rights and freedoms guaranteed by the *Charter*. To say, for example, that free speech extends to a particular form of expression, is to make a value judgment -- a judgment that that form of expression should receive *Charter* protection. But the necessity of making value judgments is clearest under s. 1 of the *Charter*, where courts are required to determine whether a law which limits a right or freedom

guaranteed by the *Charter* is nevertheless "demonstrably justified" as a "reasonable limit" in a "free and democratic society".

The peculiarity of value judgments is that while they may seem rational, they are essentially arbitrary, in the sense that they cannot be proven true or false in the way statements of fact can. Reasonable people can differ on what is good, as the Socratic debates made clear so many thousand years ago, and there is no clear way of demonstrating that one view is right and the other view wrong. Thus, reasonable people may differ on what expression is protected by the *Charter* or what constitutes unacceptable social inequality.

Traditionally, these difficult value judgments have been made by our legislators on the basis of the values of the constituencies they represent. But now, under the *Charter*, judges are required to address them.

There can be only two sources of solutions to the problem of defining the uncertain penumbra of *Charter* rights and addressing the problem of making value judgments. First, judges may look into themselves and base their answers on their own values and instincts. Alternatively, judges can attempt to look outside themselves, basing their judgments on the norms and values they see reflected in society at large.

There can be no doubt that the decisions of judges reflect to some extent their personal values. Nevertheless, the importance of personal beliefs and opinions in judicial decision-making is often over-stated. We frequently hear calls for fuller examination of the personal views of prospective judges. We should have a public process, we are told, where the views of judicial candidates can be explored. The American experience with Senatorial hearings for judicial candidates suggests that such hearings will reveal little of the candidate's beliefs on controversial issues; the standard and correct response to such inquiries is that which Sandra Day O'Connor gave at her confirmation hearings to the question of her views on abortion: I cannot answer because that is a question which may well come before the Court, at which time I shall decide it in accordance with the submissions and evidence placed before me. Sueter, recently confirmed, took the same approach. Do you want, he asked his questioners, a judge who is unprepared to consider arguments, who is governed by inflexible opinion?

But even if such hearings did reveal personal views, it is doubtful how much relevance they would have. The cry for more intensive examination of judges' personal beliefs confuses the judge's private views with the professional discharge of his or her duties. Judges are human. As humans, they cannot but have opinions, sometimes prejudices. But it is their duty to set aside their personal prejudices and views when they make judicial decisions and to found those decisions on an impartial assessment of the evidence and legal authority. And after almost a decade in the