

**THE CANADIAN CHARTER AND THE DEMOCRATIC PROCESS**

by

*The Honourable Madame Justice Beverley McLachlin  
Supreme Court of Canada*

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### I. Introduction

Just over nine years ago, in April, 1982, Queen Elizabeth II visited Canada's capital city to participate in one of the most important ceremonies in our country's history. Her Majesty was in Ottawa for the formal signing and declaration of a new constitution. It was a remarkable day -- the Queen was accompanied by all measure of pomp and circumstance. Politicians turned out in their finest formal wear. Most impressive that day, however, was the wind. It blew fiercely down the Ottawa River and across Parliament Hill, unsettling what would otherwise be a pleasant spring day. And fittingly so. Because the new constitution contained in it a document which itself carried the winds of change, and would in many ways herald a shifting in the constitutional order. In less than a decade, Canada's *Charter of Rights and Freedoms*, our first constitutional rights document, was to alter the constitutional balance of our country and change the respective roles of our legislators, administrators and judges.

Tonight, I find myself in a country in which, like Canada, constitutional reform is being discussed. As we contemplated the possibility of enacting a Charter guaranteeing individual rights, we found ourselves asking two questions -- questions which are no doubt being asked in the Australian context. First, will a charter really change things? Second, will those changes be for the good? It is those two questions which I propose to address tonight. I do not promise pat or even very clear answers. Rather, I propose to offer certain reflections on these questions on the basis of ten years experience with the *Canadian Charter of Rights and Freedoms*, in the hope that you may find them relevant to the concerns you share as Australians.

## II. Will a Charter of Rights Really Change Things?

If the Canadian experience is any indicator, the answer to this question is a resounding "yes". But before getting into the details of how, let me explain how our *Charter* works.

At the heart of every democracy lies an inherent tension between individual and minority rights on the one hand, and the will of the majority on the other. This reflects itself in a tension between the judiciary and the legislative branches of government. As Justice Megarry has remarked, the traditional role of the judge is the protector of minority interests against the tyranny of the majority, which tends to be represented by the elected parliamentarians.<sup>1</sup> As Justice Megarry's comments attest, this is so even in states lacking formal guarantees of rights. But in such states, protection of individual and minority interests may be haphazard and somewhat uncertain. The effect of a constitutional bill of rights is to provide an incontestable foundation for the assertion of individual and minority rights, thus strengthening their position in relation to the majority. Parliament's right to legislate is limited; it cannot override guaranteed rights except as permitted by the constitution, which in turn is interpreted by the judges.

Thus a charter of rights strikes a balance between the will of the majority as expressed through the legislatures and the rights of the individual as defined by law and the courts, between the concepts of legislative supremacy and guaranteed fundamental rights. The Canadian *Charter*, which has been referred to as the "quintessential

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<sup>1</sup> Rt. Hon. Sir R. Megarry, "The Judge" (1983) 13 *Man. L.J.* 189 at 190.

Canadian compromise"<sup>2</sup> effects this balance in a unique, inelegant and -- some would venture -- rather successful way.

The compromise which is the *Canadian Charter* consists, on the one hand, of strong assertions of the fundamental human rights which are guaranteed to every Canadian. Many of these are the sort of classic guarantees that are familiar to western political thought and tradition. Guarantees of freedom of expression, religion, peaceful assembly and association are among the fundamental provisions of the *Charter*. Canadians are also guaranteed democratic rights and mobility rights, and rights of due process directed to the fair exercise of the State's criminal law power, rights against unreasonable search and seizure, rights to a fair trial within a reasonable time, and the right not to be subject to cruel and unusual punishment, for example.

The other side of the compromise resides in three provisions which allow for the potentially uneasy fit of the individual *Charter* guarantees with traditional notions of Parliamentary supremacy -- s.33, s.1 and s.24(2).

Perhaps the most controversial of these provisions is s.33, known as the legislative override or the "notwithstanding clause". Section 33 permits a legislature, provincial or federal, to expressly declare that particular legislation will operate notwithstanding the guarantees of certain fundamental freedoms. Thus, by a simple legislative declaration - - which must be renewed every five years -- a law may be enacted which legislators know is in violation of, for example, the guarantee of freedom of expression or equality.

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<sup>2</sup> P.H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982) 25 *Canadian Public Administration* 1 at 32.

The effect of s.33 is to suspend the operation of the *Charter* in respect of that provision for 5 years.

The s.33 override has not been often used. Governments do not lightly invoke s.33, signalling as it does conscious legislative intention to act in contravention of the fundamental guarantees of the people. Its recent invocation by the province of Quebec to shield a language law from the dictates of the *Charter* provoked considerable anger from Canadians both inside and outside the province, and has led some to call for an amendment to the *Charter* which would repeal the override. Others, however, continue to see the clause as the ultimate safeguard for Parliamentary supremacy against rule by appointed judges.

The second provision of importance to the Canadian *Charter's* constitutional compromise is uniformly referred to among Canadian legal circles simply as 'section 1'. Section 1 states that the *Charter* "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". It constitutes an express recognition that sometimes it is right and just that individual freedoms give way to the greater good as expressed by Parliament or the legislators. (Section 1 operates only where there is a "law" and hence cannot "save" administrative acts which violate individual rights.) As such, it provides a mechanism for balancing individual rights and freedoms against the considered majoritarian view as expressed by the legislators.

Unlike the s.33 notwithstanding clause, section 1 figures prominently in the Canadian constitutional picture. Courts frequently find legislative provisions to violate particular guarantees of the *Charter*, only to be "saved" or justified by the courts under

section, on the ground that they are demonstrably justified in a free and democratic society.

For example, the Supreme Court of Canada recently found that a law making it a criminal offence to wilfully promote hatred violated the *Charter* guarantee of freedom of thought, belief, opinion and expression.<sup>3</sup> The law was "saved", however, under s.1. The majority of the Court held that the hate law, while offending the guarantee of free expression, was justified as a reasonable limit on the freedom of expression. The 4 to 3 split on the Court bespeaks the difficulty of applying section 1 of the *Charter*.

The *Charter* contains yet a third mechanism whereby the impact of breaches of fundamental rights may be attenuated. Section 24(2) permits a court to receive evidence obtained in violation of the *Charter*. The test is whether its reception would bring the administration of justice into disrepute. This permits the courts to weigh the seriousness of the infringement of the right against the majoritarian concern with obtaining a proper verdict.

The inclusion in the *Canadian Charter of Rights and Freedoms* of these three mechanisms for effecting case by case compromises between individual rights and majoritarian concerns, constitutes a fundamental and most important distinction between the *Canadian Charter*, and the *American Bill of Rights*. In the United States such compromises, if they are made at all, must be made in the guise of "reading down" the citizen's constitutional rights. Viewed thus, the *Charter* is much less extreme and much

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<sup>3</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697.

more flexible than its American counterpart.

Against this background, I turn to the first question posed -- how has the Charter changed the Canadian political and legal scene?

A. The Political Scene

I use "political" in the widest sense, to encompass the participation of various individuals and groups in society in the governance and organization of that society.

One way people participate in the governance of a democratic society is through the election of representatives to legislative bodies. Those bodies then enact laws. This, in essence, is Parliamentary supremacy. Because the representatives can be voted out of office at the next election, the system is also called responsible government.

Parliamentary supremacy in a federal state is never absolute. At the very least it is subject to court rulings on whether a particular law is within the competence of Parliament or the legislature in question. A constitutional charter of rights further intrudes on the supremacy of Parliament by permitting judicial review on the basis that the law in question violates the guaranteed rights and freedoms. The charter thus effects an additional transfer of power from elected representatives to judges who are not elected but appointed, usually for life or until retirement. In this sense the Canadian *Charter* has altered the political landscape.

Does this mean that the *Charter* has weakened Canadian democracy? Such a conclusion is far from self-evident. Indeed, the *Charter* has arguably strengthened

Canadian democracy by enhancing the participation of individuals and minority groups in the governance of their country.

A strong case can be made that the adoption of the *Charter* in Canada, far from being a move away from democratic ideals, represents a fundamental step forward in the continuing development of a full and flourishing system of democratic government in Canada. As Commonwealth experience has demonstrated, democracy is not a static concept, nor can its essence be found in a notion of crass majoritarianism. If that were the case, then even a representative system, as opposed to direct democracy, would be considered retrograde. In a recent case before our Supreme Court, my colleagues and I had the opportunity to consider the meaning of democratic rights in the Canadian context, and found that they entailed much more than the simplistic one person one vote notion. Rather, the Canadian tradition is one of "evolutionary democracy", whose guiding principle is "effective representation", not mere numerical equality of voting power.<sup>4</sup>

This is similar to the view of democracy taken in your country. Justice Stephen of the Australian High Court has stated that to focus on precise numerical equality:

is to deny proper meaning to language and to ignore long chapters in the evolution of democratic institutions both in this country and overseas, in which, representative democracy having been attained, its details have undergone frequent changes in response to community pressures but have failed to possess this feature of equality of numbers on which the plaintiffs now insist.<sup>5</sup>

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<sup>4</sup> *A.G. Sask v. Carter*, (6 June 1991, unreported, SCC), at p.14.

<sup>5</sup> *A.G.(Aus.)(Ex. rel. McKinlay) v. Commonwealth* (1975) 135 C.L.R. 1, at p.57.

If the essence of democratic government is the participation and effective representation of all citizens, the *Charter* may be seen as strengthening democracy. It does this in a number of ways.

The first way in which the *Charter* may be argued to strengthen democracy is by sustaining and enhancing values which are essential to the proper working of democracy. The right to free expression and a free press are essential underpinnings of a strong and effective democracy. The same may be said for the guarantee of the right to vote, and the entrenched requirement that national elections be held at least once every five years. The guarantee of equality before and under the law is another example of *Charter* commitment to the essential components of democratic government. If democratic government includes "political participation, equality, autonomy and personal liberty", then the *Charter* enhances it.<sup>6</sup>

From this perspective the *Charter* and judicial review emerge as supportive of democracy, not opposed to it.<sup>7</sup> This is a view that has found its way into our Court's jurisprudence on the *Charter*. The Court has held that the scope of freedom of expression must be based on a recognition of its fundamental value to a free and democratic society. Former Chief Justice Dickson stated that freedom of expression

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<sup>6</sup> J.D. Whyte, "On not standing for notwithstanding", (1990) 28 Alta. L. Rev. 347 at 352. Whyte acknowledges that not all interests in the *Charter* can be justified on the basis that they enhance the democratic process. He also looks to legalism and federalism as two other concepts which justify the role of the *Charter* and judicial review.

<sup>7</sup> Other similar views may be found in J.H. Ely, *Democracy and Distrust* (1980), and Chapter 6 of P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (1987). The opposing view is presented, among other places in A. Petter and A.C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy", (1989) 23 U.B.C. L. Rev. 531.

was constitutionally entrenched "to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. A free and democratic society, he continued, prizes "a diversity of ideas and opinions for their inherent value both to the community and to the individual".<sup>8</sup> The underlying value of the guarantee, deserving vigilant protection, includes the seeking of truth and the participation in social and political decision making.<sup>9</sup>

Thus *Charter*, by enhancing the values and freedoms on which democracy rests, ensures a climate of freedom within which democracy can thrive. But the *Charter* functions as more than a backdrop. A second way in which it supports democracy is by enhancing the participation of individuals and groups within democracy, effectively enfranchising people who in the past may have been excluded from the process of governance and societal change.

Traditionally, the political process in Canada at the national and provincial levels was (and is) driven by the large, mainstream political parties. Participation in this process, apart from voting, was largely confined to lobbying – an activity which requires a great deal of organization, money and grass roots work in the large political parties. In this structure, the political agenda tends to be set by the party in power, supplemented depending on their clout, by the opposition parties. The usual result is that individuals and small interest groups often have little influence in initiating a particular political issue; it is the majoritarian concerns which capture the attention of

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<sup>8</sup> *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at p.968.

<sup>9</sup> *Ibid.*, at p.976.

the governments.

The *Charter* arguably alters the political power equation. Through its inclusive language it creates new "insiders" in the Canadian political and constitutional order. Two groups in particular, women and aboriginal people, are explicitly recognized and have their place in society affirmed in the *Charter*. Similarly, the multicultural nature of the country is constitutionally recognized, as are equality rights regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The provisions of the *Charter*, "by giving rights to citizens and by handing out particular constitutional niches to particular categories of Canadians, such as women, aboriginals, etc., implicitly suggests some citizen role in constitutional change", and indeed, the entire sphere of political activity.<sup>10</sup>

Not only does the *Charter* give new status to particular groups -- it gives formal and visible expressions to interests -- liberty, security of person and equality, for example. The recognition that such interests are of constitutional importance is of great symbolic and practical significance. It encourages individuals to identify themselves more strongly with certain groups and to focus on particular goals -- for example gender equality. The result is increased and broader based participation in debates on public issues.

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<sup>10</sup> A. Cairns, "Ritual, Taboo and Bias in Constitutional Controversies in Canada, or Constitutional Talk Canadian Style", (1990) 54 Sask L.Rev. 121 at 127. Prof. Cairns, a University of British Columbia political scientist, has developed this theme in several lectures and papers, some of which are noted in this article.

By conferring a new legal status on particular groups and interests the *Charter* creates a new tool for the enhancement of participation in public affairs - judicial review. Prior to the *Charter*, the courts in Canada did not function significantly as a means of initiating and participating in political change and action. The *Charter* has changed this, broadening the base of public challenge to government measures. This draws judicial, and eventually legislative attention to areas of the law which may be out of step with the values and aspirations of the country as expressed by the constitution, thus opening up the law reform process.<sup>11</sup> Individuals and groups can influence the agenda of law reform by challenging laws in the courts. Government action may similarly be challenged, and such review may even extend to cabinet deliberations on security.<sup>12</sup>

The *Charter* has altered not only the role of Parliament and the legislators, but that of the courts. The advent of the *Charter* in Canada has elevated judges from a position where they once toiled in relative obscurity, to the level of media figures. Now more than ever before, the contributions made by the courts are seen to so directly and profoundly impact on the everyday life of the country that judgments of the Supreme Court on the *Charter* receive regular and extensive attention from the news media.

And that focus is not restricted to a concern with the substance of the courts' output. There is accompanying increase in public interest in the judges themselves, as

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<sup>11</sup> P.H. Russell, "Political Purposes of the Canadian Charter of Rights and Freedoms", (1983) 61 Can. Bar Rev. 30 at pp. 48-50.

<sup>12</sup> The susceptibility of executive action to review was discussed in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 443.

not only judicial figures but also as people.<sup>13</sup>

The Canadian public in the post-*Charter* era takes the view that it is entitled to know who its judges are. As one columnist recently put it:

In Ottawa, the nine judges on the Supreme Court of Canada are more consequential than all but a handful of politicians at the top of the political process. Yet outside the legal fraternity they remain largely unknown.<sup>14</sup>

Judges at the Supreme Court level find themselves under increased scrutiny of their personal views on certain issues. It has engendered a concern that the courts be representative of the public which they are required to serve; the appointment of women and racial minorities is seen as important. And it has brought calls for a re-examination of the manner in which judges are appointed in Canada.

Judges in Canadian superior courts are presently appointed by the federal government after private consultation with various groups, including the Canadian Bar Association. Traditionally the process of selecting Canada's judges, particularly to the Supreme Court, has been one which eschews partisanship and ideology. This stands in stark contrast to the prevailing view of the American process, where the selection of Supreme Court justices has turned into a highly politicized and complex ideological contest between the President, elected representatives and various national interest groups that sometimes seems to have little to do with getting the best judge for the

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<sup>13</sup> See, for example, Toronto Star (7 July 1991), p. A-3.

<sup>14</sup> J. Simpson, "When Supreme Court judges hear Charter arguments, how do they react?", *The Globe and Mail* (14 August 1991) at p. A16.

