CANADIAN ISSUES
THÈMES CANADIENS

April / Avril 2002

CANADIAN RIGHTS AND FREEDOM
20 years under the Charter

LES DROITS ET LIBERTÉS CANADIENS
Les 20 ans de la Charte

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Sénat du Canada

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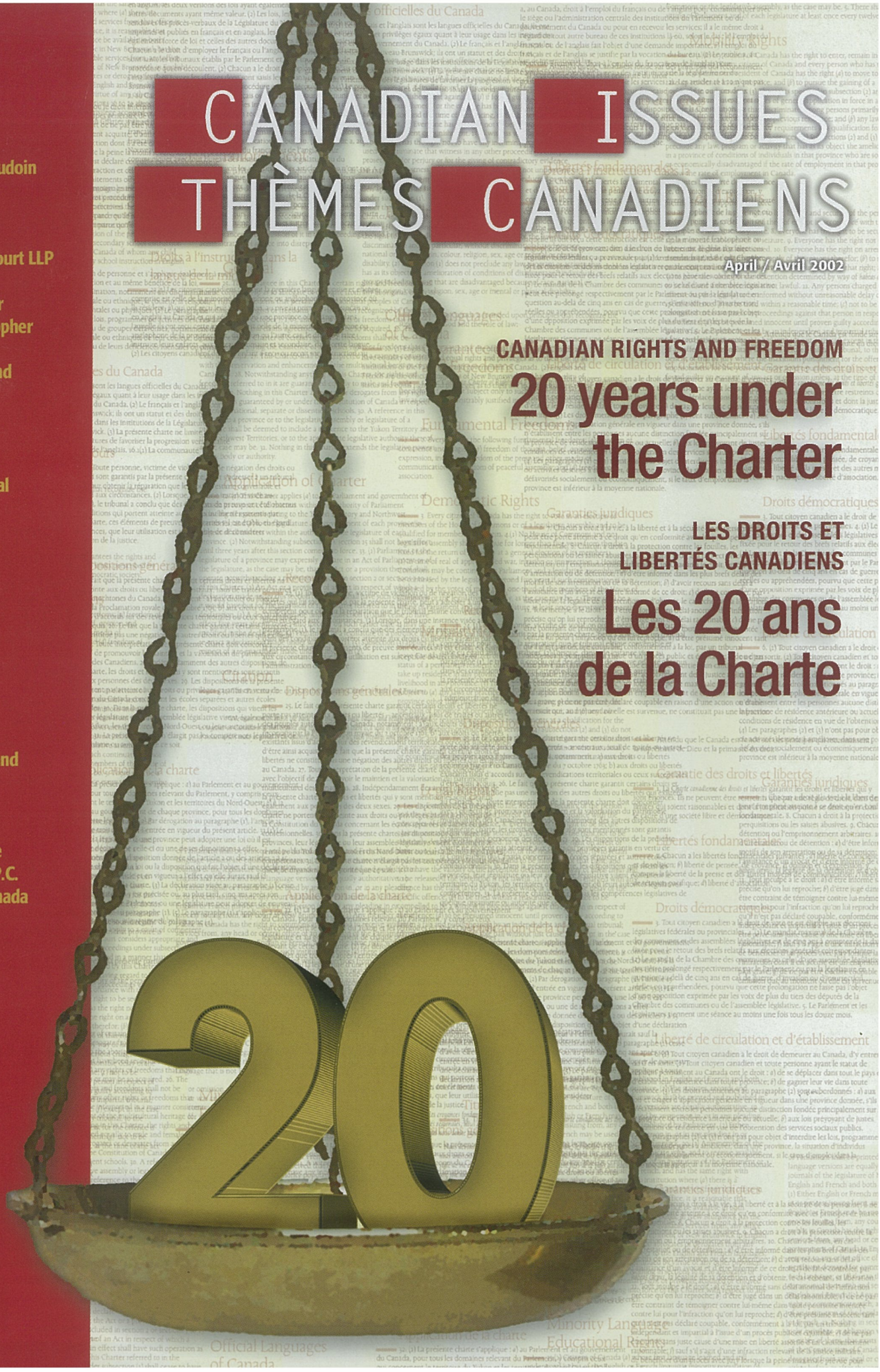

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CANADIAN CHARTER OF RIGHTS AND FREEDOMS

20th anniversary

The Canadian Charter of Rights and Freedoms protects the basic rights and freedoms that make Canada a free and democratic country.

Freedoms

- freedom of conscience
- freedom of religion
- freedom of thought, belief and opinion
- freedom of expression, including freedom of the press
- freedom of peaceful assembly
- freedom of association

Rights

- right to vote
- right to life, liberty and security of the person
- equality rights
- legal rights of persons accused of crimes
- official languages rights
- protection of multicultural heritage

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ARTICLES

CANADIAN ISSUES
THÈMES CANADIENS

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CITC is a bimonthly publication of the Association for Canadian Studies (ACS). It is distributed free of charge to individual and institutional members of the Association. CITC is a bilingual publication. All material prepared by the ACS is published in both French and English. All other articles are published in the language in which they are written. Opinions expressed in articles are those of the authors and do not necessarily reflect the opinion of the ACS. The Association for Canadian Studies is a voluntary non-profit organization. It seeks to expand and disseminate knowledge about Canada through teaching, research and publications. The ACS is a scholarly society and a member of the Humanities and Social Science Federation of Canada. The ACS is also a founding member of the International Council for Canadian Studies.

CITC est une publication bi-mensuelle de l'Association d'études canadiennes (AEC). Il est distribué gratuitement aux membres de l'Association. CITC est une publication bilingue. Tous les textes émanant de l'Association sont publiés en français et en anglais. Tous les autres textes sont publiés dans la langue d'origine. Les collaborateurs et collaboratrices de CITC sont entièrement responsables des idées et opinions exprimées dans leurs articles. L'Association d'études canadiennes est un organisme pan-canadien à but non lucratif dont l'objectif est de promouvoir l'enseignement, la recherche et les publications sur le Canada. L'AEC est une société savante, membre de la Fédération canadienne des sciences humaines et sociales. Elle est également membre fondateur du Conseil international d'études canadiennes.

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WHAT'S INSIDE

THE CHARTER at 20

IT IS A PLEASURE FOR ME TO ASSUME THE POSITION OF GUEST EDITOR FOR THIS SPECIAL ISSUE OF CANADIAN ISSUES DEDICATED TO EXPLORING THE POSITION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS IN THE LIFE OF CANADIANS TWENTY YEARS AFTER IT WAS PROCLAIMED.

A brilliant team of scholars, advocates, judges and legislators examine the *Charter* from a variety of perspectives. I am grateful to all my friends and colleagues for having accepted the invitation to contribute, and for having produced such a rich array of *Charter* analysis. There is much serious thinking in the pages that follow; the reader is in for an intellectual treat.

Senator Serge Joyal begins our examination by recalling vividly the Special Joint Committee on the Constitution of which he was co-chair. This unique committee was a principal architect of the *Charter* and helped to create a new *Charter* politics which has forever changed the political configuration of Canada. Chief Justice Beverley McLachlin then gives a fascinating look at the work of the Supreme Court in an exclusive interview with the magazine's Robert Israel. She explains why the *Charter* requires «a different kind of judging»; particularly because «judges have to be open to policy arguments, they have to consider the impact of what they are deciding and how it's going to play out in the real world, as well as considering the doctrinal implications for what they're deciding».

Gerald Gall and Charlene Hiller review the interesting, but heretofore unexplored literature of speeches by Justices of the Supreme Court. They find that the Supreme Court is discharging a major educational function. Alain Robert Nadeau then considers the position of the Supreme Court as «un catalyseur des rapports sociaux». He clarifies the limits which the court must observe in this role.

Senator Gérald Beaudoin considers five recommended modifications to the *Charter*, some – the right to strike, the right to private life and the utility of the notwithstanding clause – of great consequence. Julius Grey reviews achievements of *Charter* jurisprudence in taming egregious prohibitions on expression. He warns of new dangers to liberty from the recently aroused concern about security and terrorism. Joseph Magnet and Sina Ali Muscati, writing together from perspectives of a Jew and a Muslim, consider why many in the Muslim world harbour resentment against the West, and what the democracies can do to deal with the root causes of terrorist hatred. They then test the new federal anti-terrorism legislation against the discipline required in a *Charter* based democracy.

Marie-Hélène Giroux helps us to think about the relevance of the *Charter* to the increasingly complex notion of democratic citizenship. New dimensions of citizenship, she explains, create tension between the respect for the individual and the group from which the individual nourishes identity. Jack Jedwab offers a statistical rebuttal to those who claim that Quebecers have found the Canadian *Charter* objectionable.

Pierre Thibault examines how *Charter* jurisprudence refines the underpinnings of classical liberalism. He takes us on a tour of what liberty, equality and tolerance have come to mean for the individual in a liberal society. In a very interesting look at the *Charter*'s section 15, Derek Bell reviews how the courts deal with the difficult question of equality rights for the poor. He offers a prognosis about what to expect from the courts in future cases implicating equality rights in cases founded on wealth distinctions. Finally, Catherine Christopher examines the impact of the *Charter*'s section 27 on multiculturalism in Canada.

This special issue of *Canadian Issues* stimulates renewed interest in a host of fascinating intellectual and jurisprudential challenges. The ACS conference *Canadian Rights and Freedoms: 20 Years Under the Charter* in April 2002 will allow for a deepening of the discussion that the distinguished contributors open in the pages that follow.

Joseph Eliot Magnet, F.R.S.C., Faculty of Law, University of Ottawa

LA CHARTE à 20 ans

CELA ME FAIT GRANDEMENT PLAISIR D'ASSUMER LA POSITION D'ÉDITEUR-INVITÉ POUR CE NUMÉRO SPÉCIAL DE THÈMES CANADIENS DÉDIÉ À L'EXPLORATION DE LA CHARTE CANADIENNE DES DROITS ET LIBERTÉS DANS LA VIE DES CANADIENS ET CANADIENNES 20 ANS APRÈS SA PROCLAMATION.

Une brillante équipe d'universitaires, d'avocats, de juges et de législateurs examinent la Charte à partir d'une variété de perspectives. J'aimerais remercié tous mes amis et collègues d'avoir accepté l'invitation et d'avoir produit une série d'analyses riche en contenu. Les pages qui suivent contiennent du matériel invitant à une sérieuse réflexion: le lecteur devrait s'attendre à une surprise intellectuelle.

Le Sénateur Serge Joyal débute notre exploration en rappelant avec vivacité l'existence du Comité conjoint du Sénat et de la Chambre des Communes sur le projet de la Charte, dont il était co-président. Ce comité unique a été l'un des principaux architectes de la Charte et a aidé à créer un nouveau domaine de politiques constitutionnelles qui ont changé à tout jamais la configuration politique du Canada. La Juge en chef Beverley McLachlin nous offre ensuite un regard fascinant du travail de la Cour suprême lors d'une entrevue exclusive avec l'éditeur du magazine, Robert Israel. Elle nous explique les raisons pour lesquelles la Charte nécessite "un différent type de jugement"; en particulier parce que "les juges doivent être ouverts aux débats sur les politiques, doivent considérés l'impact de ce qu'ils décident et de comment ces décisions vont se manifestés dans le monde réel, tout en considérant les implications doctrinales des décisions à prendre."

Gerald Gall et Charlene Hiller font une révision des déclarations intéressantes, mais jusqu'ici inexplorées, des Juges de la Cour suprême. Ils concluent que la Cour suprême exerce une fonction éducative majeure. Ensuite, Alain Robert Nadeau considère la position de la Cour suprême en tant que "catalyseur des rapports sociaux". Il clarifie les limites que doit observée la Cour en jouant ce rôle.

Le Sénateur Gérald Beaudoin recommande cinq modifications à la Charte, quelques unes – le droit de grève, le droit à la vie privée et l'utilité de la clause "nonobstant", – ayant d'importantes conséquences. Julius Grey revoie la jurisprudence de la Charte envers l'allégement des énormes prohibitions sur l'expression. Il nous avertit des nouveaux dangers à la liberté émanants des récentes inquiétudes à propos de la sécurité et du terrorisme. Joseph Magnet et Sina Ali Muscati, écrivant ensemble à partir de perspectives respectivement juive et musulmane, considèrent pourquoi plusieurs personnes du monde musulman entretiennent un ressentiment envers l'Ouest et ce que peuvent faire les démocraties afin de faire face aux causes enracinées de la haine terroriste. Ils testent ensuite la nouvelle législation fédérale anti-terrorisme en l'opposant à la discipline requise dans une société basée sur une Charte.

Marie-Hélène Giroux nous aide à réfléchir sur la pertinence de la Charte face à la notion de citoyenneté démocratique, une notion dont la complexité augmente sans cesse. De nouvelles dimensions de citoyenneté, explique-t-elle, créent une tension entre le respect de l'individu et du groupe à partir duquel il alimente son identité. Jack Jedwab offre une réfutation statistique à ceux qui affirment que les Québécois trouvent la Charte canadienne défavorable.

Pierre Thibault réexamine la manière par laquelle la jurisprudence de la Charte affine les fondements du libéralisme classique. Il explore pour nous ce que la liberté, l'égalité et la tolérance représentent pour un individu dans une société libérale. Derek Bell examine de manière très intéressante la section 15 de la Charte et revoit comment les cours traitent les délicates questions reliées à l'égalité pour les démunis. Il nous offre une prédiction de ce à quoi nous devons nous attendre de la part des cours lors de futurs procès impliquant les droits en matière d'égalité lors de procès fondés sur des distinctions de richesse. Finalement, Catherine Christopher examine l'impact de la section 27 de la Charte sur le multiculturalisme au Canada.

Ce numéro spécial de *Thèmes canadiens* alimente l'intérêt d'une variété de défis fascinants tant intellectuels que jurisprudentiels. La conférence de l'AEC *Les Droits et Libertés canadiens : les 20 Ans de la Charte*, qui aura lieu en avril 2002, permettra une intensification des discussions entamées dans ces pages par nos collaborateurs distingués.

Joseph Eliot Magnet, F.R.S.C.,
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LETTERS

Comments on this edition of Canadian Issues? We want to hear from you.
Write to Canadian Issues – Letters, ACS, a/s UQAM, V-5140, P.O. Box 8888, succ. Centre-ville, Montreal (Quebec) Canada, H3C 3P8. Or e-mail us at <robert.israel@acs-aec.ca> Your letters may be edited for length and clarity.

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THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

PART 1 OF THE CONSTITUTION ACT, 1982

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

1. The Canadian Charter of Rights and Freedoms 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.

FUNDAMENTAL FREEDOMS

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

DEMOCRATIC RIGHTS

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

MOBILITY RIGHTS

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

LEGAL RIGHTS

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

EQUALITY RIGHTS

15. (1) Every individual is equal before and under the law and has the 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.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

OFFICIAL LANGUAGES OF CANADA

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in the Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in section 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

MINORITY LANGUAGE EDUCATIONAL RIGHTS

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

ENFORCEMENT

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

GENERAL

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

26. The guarantee 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.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

APPLICATION OF CHARTER

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate nothwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

CITATION

34. This Part may be cited as the Canadian Charter of Rights and Freedoms.

"IF WE TRAVEL, LET'S GO FIRST CLASS"

P.E. Trudeau, 17 septembre 1980

PAR L'Hon. Serge Joyal

Le Très Honorable Pierre Elliot Trudeau et l'Honorable Serge Joyal, 1982

VOILÀ LA HAUTEUR DE LA BARRE PLACÉE PAR LE PREMIER MINISTRE TRUDEAU LORSQU'IL S'ADRESSA AU CAUCUS DES DÉPUTÉS ET SÉNATEURS AVANT DE DÉCLENCHER L'INITIATIVE HISTORIQUE QUI ALLAIT MODIFIER LES FONDEMENTS DE L'ORDRE CONSTITUTIONNEL CANADIEN. (LE RÉFÉRENDUM DU QUÉBEC VENAIT D'AVOIR LIEU LE 20 MAI 1980.)

Ce commentaire lapidaire qui qualifiait à la fois la démarche et la substance même de l'initiative survenait après près de trois heures de débats internes où tout un chacun, à tour de rôle, au micro venait plaider, qui pour la protection des minorités, qui pour le statut de la femme (comme on référait à l'époque à la condition de la femme dans la société), qui pour la reconnaissance des Indiens (le terme autochtone n'avait pas encore pris racine dans le vocabulaire).

La file au micro s'allongeait, et d'est en ouest les doléances séculaires des groupes étaient déballées, exposées. L'heure était enfin venue de corriger les abus historiques qui hantaient la conscience nationale depuis des siècles. Si nous allions avoir une charte des droits, il fallait qu'elle soit plus «moderne» que la Déclaration des droits des Nations Unies, déclara le Sénateur Lamontagne. Tant qu'à n'en faire une, aussi bien qu'elle ait des dents!

À tour de rôle, nous venions dénoncer les injustices, les abus que l'histoire récente ou lointaine emportait dans ses pages. L'heure avançait, ce mercredi matin là, et la salle, surchauffée par autant de plaidoiries, commençait à devenir incrédule : il y avait tant de torts à redresser et tant de sujets à couvrir que tout à coup s'est mis à flotter un certain sentiment d'irréalité : l'atmosphère était devenue quasi surréaliste, il serait impossible «de répondre à tout ça en même temps».

Trudeau, le premier ministre, avait retiré sa veste : plus les heures s'écoulaient, plus ses yeux devenaient brillants. Contrairement au coureur dont on perçoit la fatigue par la tension évidente des muscles après trois tours de piste, lui prenait de l'alan, semblait se réchauffer, son visage esquissant de temps à autre un effet de surprise lorsque l'intervention au micro soulevait un point qui l'avait piqué.

À la fin, nous n'avions plus de position : assis depuis des heures sur des chaises de simili-cuir vert plastifié, inconfortables, nous attendions le moment magique où Trudeau allait enfin se lever.

Il y avait en fait toujours une chimie qui se développait dans des caucus aussi exceptionnels.

Les points de vue sont si différents, les sujets tellement diversifiés que la somme devient une sorte de magma inqualifiable, et l'autorité morale du Premier ministre tient à sa capacité d'en ré-émerger d'un coup, comme pour un plongeur qui se serait jeté dans les eaux troubles d'un Gange.

Il baissa la tête, regarda la table devant lui, deux ou trois bouts de papier griffonnés, et tout à coup, debout, les manches relevées, le col défait, il nous lança, provocateur, « If we travel, let's go first class! ».

Le signal était donné; comme pour se libérer de toute cette tension chaude, nos rires sonores emplirent la salle. Seuls les anciens Premiers ministres libéraux, figés dans leur cadre sur les murs autour de la salle, retinrent leur éclat de rire...

LA MEILLEURE CHARTE AU MONDE, 5 MOIS PLUS TARD, 12 FÉVRIER 1981

C'était la veille du dépôt du rapport du Comité conjoint du Sénat et de la Chambre des Communes sur le projet de Charte. Auparavant, le 3 novembre 1980, j'avais été nommé co-président du Comité par le Premier ministre Trudeau. Comment et pourquoi, c'est une autre histoire ...

Pendant trois mois et demi, le Comité que je co-présidais avec le Sénateur Harry Hays, un homme jovial et bon vivant, 71 ans, n'avait pas dérougi. Le Comité avait siégé pendant près de 300 heures en 106 séances. Il avait entendu 314 témoins dont les Premiers ministres de 4 provinces et ceux des deux Territoires. La majorité d'entre eux étaient contre une Charte constitutionnelle. Les 10 chartes provinciales suffisaient, selon eux, à protéger les personnes. À lui seul le ministre de la Justice (l'hon. Jean Chrétien) avait témoigné 39 fois, et son suppléant, 9 fois.

Pendant 267 heures d'affilée, les caméras de télévision avaient couvert les séances et les témoignages du Comité. Seulement pour l'étude, article par article, du projet de Charte, le comité avait mis plus de 90 heures.

Sous la lumière crue et blanchâtre des projecteurs, les députés et sénateurs du Comité partageaient avec tous un même objectif : faire de ce projet de Charte des droits et libertés la meilleure Charte qui soit, au monde.

Y ajouter aussi la meilleure formule possible d'amendement à la Constitution, pour s'assurer qu'à l'avenir, on ne soit plus enfermé dans le corset de l'unanimité. Des vetos régionaux assortis d'un référendum national; en cas d'impasse le peuple aurait le dernier mot. La souveraineté du pays serait ainsi formellement remise entre les mains des citoyens. On y était enfin parvenu.

Finalement, le Comité s'était entendu pour apporter 58 amendements au projet initial. Et des amendements substantiels.

La plupart du temps ils étaient l'aboutissement de témoignages passionnés devant les membres du Comité. Des descendants des 20,881 canadiens d'origine japonaise (dont plus de 75% étaient nés au Canada) internés dans des camps pendant la Seconde guerre mondiale. Les parents des étudiants franco-ontariens dont les ancêtres s'étaient battus contre le Règlement 17 en Ontario. Les Métis, ces éternels exclus des négociations entourant les revendications territoriales. Ni blancs, ni Indiens, parias des deux cultures.

Les groupes de femmes, celles-là même que le gouvernement avait combattu jusqu'à Londres, au Comité judiciaire du Conseil Privé en 1929, pour les exclure de la définition de personnes aptes à siéger au Sénat!

La liste s'était allongée : les handicapés; ceux qui avaient souffert de discrimination à cause de leur orientation sexuelle; les citoyens de descendance noire, les juifs, que les politiques d'immigration avaient exclus du Canada pendant l'Holocauste...

Et puis flottait au-dessus de tous ces témoignages, frais à la mémoire de chacun, le dernier référendum du Québec, et la question à trancher : fallait-il faire quelque chose, ou valait-il mieux remballer?

Sous la lumière crue et blanchâtre des projecteurs, les députés et sénateurs du Comité partageaient avec tous un même objectif : faire de ce projet de Charte des droits et libertés la meilleure Charte qui soit, au monde.

C'était donc la définition même du pays qui nous avait occupé l'esprit, soir et matin, matin et soir, pendant tous ces longs mois d'hiver où, chaque matin, à 7 heures, avec les sous-ministres Roger Tassé et Barry Strayer, l'adjoint législatif du ministre de la Justice, Eddy Goldenberg, nous avions révisé assidûment le travail du Comité et supervisé les recherches à faire.

Si nous allions en fait avoir une Charte, ce serait pour toutes les personnes, peu importe l'état, le statut, la condition, citoyen ou pas.

Je relisais mes notes prises pendant les séances, et dans ma tête trottaient ces vers de Victor Hugo appris à une autre époque :

> *«Courbé comme un cheval qui sent venir son maître, ils se disaient entre eux, quelqu'un de grand va naître.»*

Nous avions le sentiment de vivre à un tournant de l'histoire. 20 ans plus tard, il faudrait mesurer si nos espoirs seraient comblés, et nos craintes dissipées.

L'Hon. Serge Joyal c.p., o.c. a été député à la Chambre des Communes du Canada de 1974 à1984. Il a été Secrétaire parlementaire du Président du Conseil du Trésor en 1980, Ministre d'état en 1981, Co-président du Comité conjoint du Sénat et de la Chambres des Communes chargé du rapatriement de la Constitution en 1980-81, Secrétaire d'état de 1982 à 1984. Assermenté au Sénat en 1997 pour le district de Kennebec.

INTERVIEW WITH THE CHIEF JUSTICE OF CANADA

The Right Honourable Beverley McLachlin, P.C.

FOR TWENTY YEARS, THE SUPREME COURT OF CANADA HAS BEEN THE CENTRE OF ATTENTION IN THE STORY OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*. WHILE THE COURT'S LONG HISTORY DATES BACK TO THE 19TH CENTURY, THERE HAS LIKELY BEEN NO OTHER ERA WHEN THE FOCUS ON ITS NINE JUSTICES HAS BEEN SO STRONG.

THE RIGHT HONOURABLE BEVERLEY MCLACHLIN, P.C. WAS APPOINTED TO THE SUPREME COURT OF BRITISH COLUMBIA IN SEPTEMBER OF 1981, ONLY MONTHS BEFORE THE *CHARTER* WAS SIGNED INTO LAW. HER JUDICIAL CAREER SOON MOVED HER TO THE COURT OF APPEAL OF BRITISH COLUMBIA, AND SHE WAS APPOINTED CHIEF JUSTICE OF THE SUPREME COURT OF BRITISH COLUMBIA IN 1988. SHE REACHED THE SUPREME COURT OF CANADA TWO YEARS LATER, AND ON JANUARY 7, 2000 WAS APPOINTED CHIEF JUSTICE OF CANADA.

IN ADVANCE OF THE 20TH ANNIVERSARY OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, CHIEF JUSTICE MCLACHLIN MET WITH THE EDITOR OF *CANADIAN ISSUES / THÈMES CANADIENS* IN HER CHAMBERS TO DISCUSS THE IMPACT THE *CHARTER* HAS HAD ON THE COUNTRY AND ON THE COURT.

Q *You were appointed to the Supreme Court of British Columbia just months before the Charter was signed into law. What are your recollections of that time in Canadian legal history?*

A I remember as a newly-appointed judge going to a seminar aimed at trying to tell us something about this document and what the different rights meant and so on. I found it quite over-

whelming at the time. It was a period of uncertainty since no one was sure just how significant the Charter was going to be. But I think there was a feeling that it would be more significant than the Canadian Bill of Rights had been, since there had been such public participation into its formulation over quite a long period of time.

One has the sense that Canadians are quite ready to avail themselves of the Charter to assert and protect their rights, and I think that's a very positive thing.

Q *Was there a sense at the time that this would confer something new on the Supreme Court?*

A I was just a lower court judge at the time so I didn't do too much thinking about the Supreme Court, but we recognized that there would be new responsibilities. We were going to find ourselves confronted with Charter arguments and we would have to decide on those in order to instruct a jury. So it became evident quite quickly that the courts were going to be implicated in a fairly major way.

Q *Do you remember the first Charter case you presided over? Was there a sense at the time that a new era of Canadian jurisprudence had been ushered in?*

A I can't be sure about the first case, but I do remember a jury trial in B.C. that was a criminal law case involving a particular section of the Criminal Code dealing with proof of a certain charge. For me, it was quite a new experience and one that I found just a tiny bit scary, but there was no alternative and so I instructed the jury accordingly. The verdict came back not guilty and it took a while for that case to work its way up the appeal courts. It finally got to the Supreme Court of Canada, and I was upheld. But certainly there was a sense of a trial judge having to make these rulings without other cases and you simply had to do your best with whatever you had at hand to do the right thing. There just wasn't anything there to help you, so you were left having to just work it out without the benefit of precedent. So that was a real challenge as a judge. I was moved to the Court of Appeals of British Columbia and there I worked on the Andrews case, the first big case on equality that eventually reached the Supreme Court of Canada. They did not accept my approach to section 15, but it was a very interesting process again to try to work this out.

Q *A recent ACS poll reveals that 82% of Canadians believe that the Charter of Rights and Freedoms has had a major positive impact on the protection of their rights and freedoms. Do you believe that the rights and freedoms held by Canadians are significantly stronger under the Charter than they were previously?*

A I do.

Q *In the time you have spent with Canadians outside of the Supreme Court, do you sense that appreciation of the Charter?*

A Oh, I think so. One has the sense that Canadians are quite ready to avail themselves of the Charter to assert and protect their rights, and I think that's a very positive thing.

Q *Une éducation plus prononcée de la Charte devrait-elle être une priorité des institutions académiques?*

R Je préférerais ne pas entrer dans les politiques éducationnelles, mais en général cela serait une excellente idée que tous ceux et celles qui graduent de l'école secondaire aient eu un cours de base sur nos institutions et notre constitution, une sorte d'instruction civique, pour que les citoyens comprennent un peu mieux les détails de leur Charte et de leur constitution.

Q *Les médias ont-ils bien traiter les décisions sur la Charte?*

R Les médias ont réagi de manière très positive aux décisions générales et sur la Charte de la Cour suprême du Canada. Je pense que nous recevons une meilleure couverture médiatique qu'auparavant dans le sens de la couverture de nos procès, et l'image générale qui en ressort demeure assez précise. Par contre, cela serait désirable d'incorporer plus d'analyses d'arrière-plan dans la presse publique afin de rendre plus compréhensible l'histoire et le contexte d'un procès, la raison pour laquelle une telle décision a été prise et les implications que cette décision entraîne dans leur vie. Si j'avais une liste de vœux, j'aimerais peut-être voir un plus grand nombre d'articles introspectifs. Évidemment, l'on ne peut partir d'une culture où la loi n'était peut-être pas aussi importante et aboutir avec une culture où la loi est une importante composante du tissu social, et que ceci soit reflété dans la presse le temps d'une nuit. C'est un processus graduel, et nous procédons présentement.

Q *How has the legal profession responded to the Charter?*

A The response from the legal profession from the very beginning was very positive. They took it seriously, they presented the cases they saw emerging, looking to the rights of their clients. Some areas of the law may have become much more complex under the Charter, particularly with criminal law, and we have longer trials and certain practices have changed, but the Bar has acted very positively and if I may say so, the bench has as well, and people have worked very hard to educate themselves to think about the ramifications of the arguments they're presenting.

Q *How important is an understanding of the Charter for today's law students? Should legal education be altered in any way to properly reflect the importance of the Charter?*

A I don't have any particular criticisms. There are many things that need to be learned in law school and the Charter is a basic required course in virtually all the law schools, so you can't get through law school without understanding quite

a bit about the Charter, and that's the way it should be. In the reality of the practice of law, of course, the Charter is more important to some practices than others, and when you're trying to provide a good legal education, you have to provide knowledge in a wide range of areas.

Q *Has the existence of the Charter changed in any way the kind of judge required to sit on the Supreme Court of Canada?*

A There are considerations under Charter jurisprudence that didn't play a large role in judging before. Whether it requires a fundamentally different kind of person is an interesting question. I think good judges have always been able to look at new issues and examine all sides of them and gage where the law should be heading, and those are the same sorts of skills required in Charter interpretation. I think a case can be made that what we call 'purposive' interpretation – looking at the purpose of the Charter guarantee – is very important, but that was always the fundamental principle of statutory construction too. Values and balancing enter the Charter litigation because at the end of the day you have section 1 and you often have to determine whether something that impinges on a right is justified. That's a different kind of judging. So I think that judges have to be open to policy arguments, they have to consider the impact of what they are deciding and how it's gong to play out in the real world, as well as considering the doctrinal implications for what they're deciding. Fundamental philosophical questions more often come before the Court. I like to think that a good judge was always someone capable of handling philosophical concepts and purposive reasoning and so on, and so if I look at it from that perspective I would say 'no' the kind of judge has not changed. And yet, judging certainly has changed somewhat.

[J]udges have to be open to policy arguments, they have to consider the impact of what they are deciding and how it's gong to play out in the real world, as well as considering the doctrinal implications for what they're deciding.

Q *The legislative construction of the Charter attempted a balance of individual and collective rights. Has this balance been evident in the judicial interpretation of the Charter?*

A Our constitution generally has a lot of collective or group rights in it. Think of the 1867 document and the language rights and the religious protections for minorities; it is clear that this is something we have been living with, going back at least as far as the Quebec Act. We've said for special groups we do special things and this is how we have defined our democracy, so it's not something new with the Charter that we've done this. Of course, it's not an either/or situation. We've basically said that we want a country where we have individual liberties and freedoms, but we also recognize that sometimes individuals have special rights by reason of groups with which they are associated, be they linguistic, religious, aboriginal or otherwise. These two ideas are not necessarily always antithetical. We have to try to make them work out together.

Q *Ressentez-vous qu'il y a eu une "américanisation" de la manière dont on examine nos droits – qu'il y a une préoccupation grandissante sur nos droits individuels au dépens des droits collectifs?*

R Non, je n'ai pas ressenti cela. Nous avons plusieurs procès sur la langue, la religion, les politiques éducationnelles sous l'Acte ANB, ainsi que plusieurs procès autochtones qui reposent sur la section 35. Le multiculturalisme est un facteur important de la société canadienne. Je ne vois donc pas de diminution de l'un au dépens de l'autre.

Q *L'effet de la Charte sur les affaires criminelles est clair. La Charte a par contre été importante dans d'autres régions de la vie des Canadiens et Canadiennes. Pourriez-vous éclaircir justement dans quelles régions l'influence de la Charte a été la plus forte?*

R C'est difficile à choisir. Je pense que la garantie d'égalité est très importante. La liberté d'expression et les différentes libertés démocratiques sont aussi importantes. Elles sont tous importantes, mais celles-ci ont joué un rôle intégral dans plusieurs de nos procès, alors l'on pourrait déduire qu'elles sont plutôt centrales dans notre société.

Q *By most accounts, the Court has taken pains to avoid interpreting the Charter too broadly where such might interfere with the formation of government policy. In particular, many point to a reticence on the part of the Court to use the Charter to alter tax and economic policy. Has this been a particular concern of the justices?*

A Apart from granting leaves and cases that raise issues of national importance, we don't choose our agenda. We take what looks like a good question based on what is put before us. Once we take a case, arguments might be presented that reflect that this is an area where the legislature made a difficult choice, for example between competing policy objectives, and that the courts should be careful before they disrupt that choice. All goes into the mix of the argument. We have indicated that generally when Parliament or the legislature has passed a law and indicated their intentions, unless it is clearly unconstitutional, it is upheld. The

In terms of remedies, we try to be very careful not to do anything too disruptive, that we're not going to require huge amounts of money to be spent, although sometimes a decision can entail that, and if it's necessary we won't back away from it just because of the expense.

democratic principle is very important in our society and we've recognized that in our decisions. Also there are many situations where legislatures are better places to make some of the policy choices than courts are. So we look at it from the point of view of whether the law or government action meets the basic requirement of the constitution in a manner consistent with the Charter, and we have indicated that, particularly in areas of competing social policies, the basic requirement is that Parliament or the legislature has chosen an alternative which is reasonable, but we will defer to some extent to those choices. In terms of remedies, we try to be very careful not to do anything too disruptive, that we're not going to require huge amounts of money to be spent, although sometimes a decision can entail that, and if it's necessary we won't back away from it just because of the expense.

Q *Yet there are some in the country who believe that the Charter has granted powers to an unelected judiciary better left in the legislative branch. Do you at all concur?*

A The same poll you referred to earlier also suggested that the majority of Canadians are very content to see judges deciding these questions as compared with the politically elected, and I think that reflects the fact that the public appreciates that the judges are deciding legal questions that are brought before them as required by the constitution and this does not hamstring Parliament or the legislature from doing their job. If anything, our Constitution allows a very major role for them; indeed we even have an override provision so that if Parliament or the legislatures were to say we don't like what the Court is doing, apart from the basic democratic rights, they could even use that. So I find it difficult to see the argument that judges are somehow taking power away from Parliament or the legislatures.

Q *La Charte a-t-elle rendu le consensus et l'anonymat plus difficile parmi les 9 juges de la Cour?*

R Je n'étais pas là avant la Charte, alors cette question est difficile pour moi de répondre. Mais les questions posées sur la Charte sont souvent très difficiles à répondre. Il y a beaucoup de débat, des conférences, des re-conférences et beaucoup d'allez-retour avec des notes, des conversations et des discussions, pour que l'on puisse avoir le point de vue de tout le monde en essayant de trouver la meilleur solution à un problème en particulier.

Q *Ressentez-vous un grand niveau de respect pour la Charte canadienne des droits et libertés dans d'autres pays?*

R Plusieurs personnes m'ont mentionné cela, et non seulement en ce qui concerne la Charte, mais pour le système judiciaire du Canada en son entier. D'après des études objectives, telles qu'effectuées par le Davos Group par exemple, nous avons un des meilleur système judiciaire du monde – un aspect qui est peut-être inconnu des Canadiens et Canadiennes. De plus, je pense que plusieurs personnes voient la Charte comme étant un excellent document et que plusieurs ont trouvé une assistance dans la jurisprudence de la Charte.

Q *Section 1 of the Charter may be the true 'Canada Clause'. It has been interpreted by the Court as requiring the state to meet a high threshold to limit the breadth of the rights and freedoms held by Canadians. How has section 1 shaped the legal and social landscape of Canada?*

A I'm not necessarily sure that I would agree that we have set the bar very high. I think we have tried to set the bar sensitively having regard to what the problem at stake is, what proof is amenable, the difficulty of the political decisions, the balancing of interests an so on. I suppose where any democracy draws the lines between the public interest on the one hand and an individual's liberties on the other is one of its defining characteristics. Whether you state your rights in absolute terms like the United States does, or you state them in relative terms like section 1 does, in the end rights cannot be absolute. At some point, public interests have to come into play. Lines have to be drawn in every democracy. Section 1 provides a mechanism for drawing those lines, but it doesn't tell us precisely where they have to be drawn, apart from saying that there has to be justification. Our 'Oakes' test was pronounced early on in Charter jurisprudence and its considerations became central to the section 1 analysis. Judges in Canada understand this well, and if a judge is directed by the case law to apply the Oakes factors and works her way through them, she will have considered the things I feel a judge has to consider.

Whether you state your rights in absolute terms like the United States does, or you state them in relative terms like section 1 does, in the end rights cannot be absolute. At some point, public interests have to come into play. Lines have to be drawn in every democracy.

Q *When it comes to Charter appeals that reach the Supreme Court, every case seems to be an important one. What should we look for in the next twenty years?*

A Of course, I don't have a crystal ball and as a I said earlier, we take the cases as they come. So I don't know what Canadians will bring before the court. As an observation, because of the post-September 11 world we are clearly going to see issues that posit security and collective safety against individual rights. I am sure that is something that will come before the courts. Equality continues to be a challenging guarantee and we're seeing new kinds of cases in that area. It really depends on what the people of Canada, and to some extent the governments of Canada, want to make issues and bring before the courts, and that's very difficult to predict.

JUDGES Speak Out II

By Gerald L. Gall, O.C.
and Charlene Hiller

SINCE THE ENTRENCHMENT OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* IN THE CANADIAN CONSTITUTION IN 1982, THERE HAS BEEN MUCH DISCUSSION ON THE CONSTITUTIONALIZATION OF RIGHTS AND THE POLITICIZATION OF THE JUDICIARY. THE LATTER CHARACTERIZATION HAS, IN TURN, GIVEN RISE TO ALLEGATIONS OF JUDICIAL ACTIVISM AND THE COURTS' USURPTION OF THE POLITICAL MANDATE OF ELECTED OFFICIALS. THE HEATED RHETORIC THAT TYPICALLY ACCOMPANIES SUCH ALLEGATIONS OBSCURES THE ESSENTIAL REALITY OF ENTRENCHMENT. IN 1982, EVERY POLITICIAN OF THE DAY AND EVERY JUDGE KNEW THAT PLACING A CHARTER OF RIGHTS IN THE CONSTITUTION REPRESENTED, AMONG OTHER THINGS, A TRANSFER OF POWER FROM PARLIAMENTARIANS TO THE CONSTITUTION AS INTERPRETED BY THE COURTS. THE SO-CALLED ACTIVISM BY THE COURTS IS NOTHING MORE THAN JUDGES FULFILLING THEIR CONSTITUTIONAL MANDATE. MOREOVER, THERE IS NOTHING REALLY NEW ABOUT THIS.

The authors wish to express their appreciation to the judges of the Supreme Court of Canada for their timely co-operation and assistance in providing copies of several of the addresses they delivered over the past while. In marking the 20th anniversary of the Charter, at least two of the judges are preparing papers to be released in the spring of 2002, including two upcoming papers by Chief Justice McLachlin and one by Mr. Justice Iacobucci.

Since Confederation, judges have always interpreted the constitution. In doing so judges have frequently constructed new doctrine in the interpretation process. For example, one can look to the development of an emergency theory under the peace, order and good government clause. The only thing that has changed since 1982 is the obvious increase in the breadth of this mandate and the fact that more contentious issues have come to the fore. Coincidental with this development is the related phenomenon of journalistic and, by extension, public interest in the type of cases being decided by the courts. Some of the more highly publicised cases have dealt with abortion, pornography, Sunday observances and religious instruction in public schools, etc. This naturally ignites media and public interest in both the institutions and the persons deciding these cases. Judges, therefore, have become the focus of media attention during the last twenty years in a heretofore unprecedented fashion. It is not surprising that judges feel, as part of this process, that they have a duty or obligation to share with the public what they do and how they operate. To that end, the judges of Canada's highest court frequently speak to many professionally related organizations (law schools, bar associations, etc.) and to the public at large.

Traditionally, Canadians have concentrated on what judges say in court. The focus here, however, is on what judges say outside of court and, in particular, what Supreme Court of Canada judges say about the *Charter*. In the Spring 2000 edition of this

magazine, on the occasion of the 125th anniversary of the Supreme Court of Canada, the phenomenon of judges 'speaking out' was addressed. Now, on the occasion of the 20th anniversary of the *Canadian Charter of Rights and Freedoms*, this issue is being re-visited in the context of what Supreme Court of Canada judges say, through various addresses delivered to a broad range of audiences, about the *Canadian Charter of Rights and Freedoms*.

Over the last decade, judges of our highest court have delivered addresses to Canadian universities and law schools (for example, Laurentian, York, Western Ontario, New Brunswick, Concordia, Alberta, Calgary, British Columbia and McGill) and foreign universities and law schools (for example, Georgetown, Fordham, Yale, Harvard and the Hebrew University of Jerusalem). They have spoken at conferences in Canada and abroad (for example, in Australia, Malaysia, France and New Zealand). They have addressed conferences and meetings sponsored by various organizations (such as the Canadian Club, L.E.A.F., the Canadian Bar Association, the Law Society of Upper Canada, the Federation of Law Societies and the Canadian Association of Statutory Human Rights Agencies).

The topics of speeches given by Supreme Court judges are diverse, generally, and, with particular emphasis on the *Charter*, have ranged from a discussion of jurisprudence under specific sections of the *Charter* (s.15 most often, but also s.2 and others) to comparisons with the American Constitution (i.e., the U.S. Bill of Rights) to discussions of the *Charter*'s impact on particular areas of the law and on particular aspects of societal activity (for example, family law, bioethics and education). Judges also talk about the approach to *Charter* litigation (i.e., a substantive versus a formal approach and the importance of social context in interpreting the *Charter*). Not surprisingly, judges have responded to criticism directed at the courts in discussions on judicial activism, the role and purpose of the *Charter* and the politicization of rights. Judges reflect on the moral undertones of the *Charter* and how notions of fraternity are intertwined within the *Charter*. Some judges have been noticeably prolific in their discussions of the *Charter* while others have remained somewhat reticent in speaking about the *Charter*.

Two judges who have significantly addressed the *Charter* in their public addresses are Chief Justice Beverley McLachlin (both before and after her elevation to Chief Justice) and Madam Justice Claire L'Heureux-Dubé. In a speech delivered to the Canadian Club in London, Ontario (November of 1998), Chief Justice McLachlin outlines the various '*Charter* myths' that have obscured a clear understanding of the *Charter*'s status in our legal system. She identifies six myths; namely, that "the *Charter* for the first time bestowed individual rights on Canadians", "that the *Charter* created absolute rights", "that the *Charter* has replaced parliamentary sovereignty", "that judges can decline to decide *Charter* issues", "that criminals 'walk' under the *Charter*" and "that courts and Parliament are adversaries." Justice McLachlin then systematically proceeds to debunk these myths in a cogent, effective fashion.

The last of these myths underscores a central theme in the recent book *The Charter Revolution and the Court Party (Morton and R. Knopff* (eds), Broadview Press, 2000) and is countered by Dean Peter Hogg's thesis that *Charter* challenges to legislation and the legislative responses to *Charter* decisions form the basis of an ongoing dialogue between the bench and parliamentarians ("The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter* of Rights Isn't Such a Bad Thing After All)" [1997] Osgoode Hall L.J. 75.). Justice McLachlin, in dispelling these various myths, premises her discussion on the notion that the *Charter*'s effect, although altering Canada's "legal landscape", is less dramatic than generally perceived. She asserts that "[t]he *Charter* represents the continuation of a rights tradition in Canada, not its birth." She further states that it is "precisely because of Canada's pre-existing rights tradition that the *Charter* has assumed its present importance."

Mr. Justice Gonthier, in his public addresses, emphasizes essentially four interrelated themes – morality, community, responsibility and fraternity. At the University of British Columbia (March, 2001), he speaks about the interdependent relationship of law and morality, emphasizing moral order as a foundation for law. Moreover, law "cannot move far beyond the minimum moral consensus [of society] without losing its legitimacy." The *Charter*, he says, "has brought within the realm of the law a vast area where previously the law did not dare tread except within narrow limits, matters which society left to be governed solely by morality ..." In another address to the University of British Columbia (November, 2000) he similarly states that "moral values should find expression in the law ... the *Canadian Charter of Rights and Freedoms* is the highest expression of this."

With respect to community, the *Charter* defines some fundamental values, reflecting both communitarian and liberal principles. Speaking to the McGill Law Journal Alumni Lecture Series (January, 2000), Mr. Justice Gonthier states that the *Charter* is an expression of community-held shared core values. He comments that individuals must fulfil certain duties and responsibilities to each other and to the community. He also recognizes the importance of fraternity. The *Charter*, he says, is a "vehicle for advancing shared values and fostering shared identities." Fraternity entails not only the advancement of shared values and identities to form a community, but also involves the related notions of "commitment, responsibility and inclusion."

Judges, therefore, have become the focus of media attention during the last twenty years in a heretofore unprecedented fashion. It is not surprising that judges feel, as part of this process, that they have a duty or obligation to share with the public what they do and how they operate.

Mr. Justice Bastarache also reflects on the role of the courts in the *Charter* era at the Annual Meeting of the Canadian Jewish Law Students Association (January 2000). He states that "[t]he activity of the courts in the last twenty years has in fact revolutionized public law and transformed the role of the courts in the eyes of society". Moreover, he states that,

> *[t]he constitutional theory on which interpretation rests is one of balance: the court cannot rewrite the law to secure the effective interpretation of the Charter, nor can the court invent law to force Parliament or legislatures to discharge their obligations to implement human rights.*

Later, in Charlottetown (April 2000), Mr. Justice Bastarache remarks that,

> *[m]ore than ever, the courts are the arbitrators of reforms and the judicial process is seen as the way of assuring that they are implemented fairly and consistently with the safeguard of individual rights. While some decry the judiciarisation of society and constant review of political decision-making, others consider it appropriate that a wider range of recourses be available to citizens in a modern democracy.*

As mentioned earlier, some public addresses by our highest jurists focus on particular sections of the *Charter*. Most frequently, their attention is concentrated in respect of s.15, the dominant equality rights provision in the *Charter*. For example, at the Constitutional Cases Conference in Toronto (April 2001), Chief Justice McLachlin speaks about s.15 as constituting the "most difficult" right. In a thoughtful, wide-ranging discussion, she refers to theories and jurisprudence on equality, making reference to writings and case law from a number of jurisdictions. The Chief Justice points out the difficulty in defining equality and discrimination, and reminds us, despite major cases over the last decade, that Canadian equality law remains "in its infancy".

Madam Justice L'Heureux-Dubé also discusses s.15 in a number of public addresses. Justice L'Heureux-Dubé emphasizes equality rights in her various speeches although she also addresses other substantive issues. For example, in one talk, she discusses the fundamental nature of our *Charter* and the Canadian approach to protecting human rights and civil liberties. However, her main focus lies with section 15. She states that s.15 invites a substantive, as opposed to a formal, approach to egalitarianism. She emphasizes the importance of examining the social context of legislation or government action in determining whether it is violative of the *Charter*.

Justice L'Heureux-Dubé also maintains that s.15 not only confers equality in and of itself but also it informs the Court's interpretation of other rights contained in the *Charter*. Section 15, she said at the LEAF Person's Day Breakfast (October 2001), informs the interpretation of other human rights legislation in the sense that "the Court has embarked on a process of unifying the judicial approach to equality issues under human rights codes and under the *Charter*." And further, s.15 also informs the interpretation of legislation in relation to family law matters. She discusses both the genesis and the evolution of s.15 in *Charter* jurisprudence at Sudbury's Laurentian University (October 2001), emphasizing "that equality cannot be defined as equal treatment." Rather, it has been interpreted in such a way so as "to define equality as equal human rights, dignity, and full membership in society." In a similar vein, she exhorts all Canadians to "endeavour to promote a society in which respect for the inherent dignity of the human person, social justice, and equality prevails in every aspect of our lives."

Not surprisingly, judges have responded to criticism directed at the courts in discussions on judicial activism, the role and purpose of the Charter and the politicization of rights.

At the Annual Meeting of the Canadian Jewish Law Students Association (January 2000), Justice Bastarache reviews the jurisprudence in relation to the application of the *Charter* to educational settings. In discussing the Supreme Court's application of the *Charter* in the school environment, he states that

> *[o]ur Court's approach is meant to be consistent with the schools' duty to foster the respect of students for the constitutional rights of all members of society. Learning to respect those rights is essential to our democratic society and should be part of the education of all students. Those values are best taught by example and may be undermined if Charter rights are ignored by those in authority. At all times, the courts must give a contextual interpretation to Charter rights. They must therefore balance the protection of Charter rights and the public or societal interests at stake in the school context.*

He warns, however, that "...the protection of the *Charter* must not result in irrational or unreasonable rules in the context of institutions involving children, where the State has responsibility for their protection." Finally, he concludes that "conflicting policy considerations in the educational setting will continue to give rise to novel applications of the *Charter* in our schools."

Mr. Justice Binnie, in a paper delivered at the University of Auckland, New Zealand (August 1999), also discusses s.15 but, in addition, sets out a rather comprehensive history surrounding the birth of the *Charter*. As well, he addresses the issue of judicial activism versus judicial inertia, concluding that,

> *Prime Minister Trudeau expressed on behalf of the framers a sweeping vision of human dignity, but it fell to the courts to translate the vision into practice. If the result of the Court's judgments has been to produce tight but manageable anxiety in the minds of both critics of judicial activism and critics of judicial inertia in about equal measure, the*

> *judiciary may have performed one of the great navigational feats of modern jurisprudence.*

An excellent discussion of defamation jurisprudence can be found in Chief Justice McLachlin's paper entitled "Speech and Reputation: The Legal Divide" (Liber Amicorum For Gordon Slynn: Court Review In International Perspective Kluwer Law International, 2000). In the paper she sets out the leading cases in the United States, the United Kingdom, Australia, New Zealand and Canada. With respect to the latter, in referring to the case of *Hill v. Church of Scientology of Toronto* ([1995] 2 S.C.R. 1130) in which s.2, freedom of expression is invoked, she concludes that,

> *the Supreme Court of Canada ... under the influence of constitutional guarantees of free speech, ... suggests that the line between free speech and protection of reputation must be a matter not of applying rules, but of striking the right balance.*

SOME GENERAL OBSERVATIONS

Clearly, the judges of the Supreme Court of Canada regularly address a wide variety of audiences on a broad range of topics. Their audiences consist predominantly of law students, other university students, members of the legal community (both judges and lawyers) other professional groups and the public at large. Of the many topics discussed, judges often defend themselves against unfounded criticism by explaining the role of the courts, particularly in the *Charter* era. In examining their addresses, one is left with the distinct impression that judges speaking out represents a major educational function on the part of the Court. Their audiences view the judges not as icon-like beings dressed in judicial garb, but rather as down-to-earth individuals sharing their views in conversational settings. Undoubtedly, this not only enhances the image of our judiciary but also creates a sense of a shared proprietary interest among Canadians in what our highest court does. Judges are sometimes exhorted, by both the media and others, to explain what they meant in given cases. Judges are very reluctant to do so since, theoretically, the cases speak for themselves through their own words. On a rare occasion, this is done through an essentially explanatory decision (*R. v. Marshall, Motion for Rehearing and Stay,* [1999] 3 S.C.R. 533) or through an equally rare public pronouncement on a particular case. In respect of the latter, one might recall Mr. Justice Cory's remarks to the Canadian Institute for Advanced Legal Studies Cambridge Lectures in relation to the *Askov* case ([1990] 2 S.C.R. 1199.). Despite this reluctance to explain judicial decisions, public addresses by judges do contribute to a better understanding of the philosophical underpinnings and attitudes of the judges. This, in turn, leads to a more informed public that is better able to appraise and scrutinize judicial decision-making. In a sense, public speaking by our judges serves in this way as a useful mechanism for greater judicial accountability.

In examining their addresses, one is left with the distinct impression that judges speaking out represents a major educational function on the part of the Court.

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LA RÉFORME DE LA CHARTE : est-ce nécessaire?

Par l'honorable
Gérald-A. Beaudoin

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VINGT ANS APRÈS SON ENTRÉE EN VIGUEUR, LA QUESTION SE POSE : UNE RÉFORME MAJEURE DE LA *CHARTE CANADIENNE DES DROITS ET LIBERTÉS* EST-ELLE NÉCESSAIRE? NOUS NE LE CROYONS PAS. LA CHARTE, SAUF POUR CE QUI EST DES DISPOSITIONS RELATIVES AUX DROITS LINGUISTIQUES ET SCOLAIRES (ARTICLES 16 À 23), EST RÉDIGÉE EN TERMES LARGES ET GÉNÉRAUX, CE QUI EST FORT CONVENABLE POUR UN DOCUMENT CONSTITUTIONNEL APPELÉ À DURER ET DONT LA MODIFICATION NÉCESSITE LE RECOURS À UNE MÉTHODE COMPLEXE PRÉVUE AUX ARTICLES 38 ET SUIVANTS DE LA *LOI CONSTITUTIONNELLE DE 1982.*

La Cour suprême du Canada a eu l'occasion de définir et de préciser la portée de la plupart des dispositions de la *Charte* et, dans l'ensemble, cette interprétation jurisprudentielle est jusqu'à maintenant correcte.

De plus, la Cour suprême du Canada a élaboré de nombreux principes d'interprétation constitutionnelle. Ainsi, la *Charte* doit recevoir une interprétation large, libérale et généreuse. Les rubriques de la *Charte* peuvent servir à son interprétation. L'absence de fondement factuel à l'appui d'une contestation fondée sur la *Charte* est fatale. La *Charte* n'a pas d'effet rétroactif, mais elle s'applique de façon prospective. On peut aussi, en interprétant la *Charte*, avoir recours à l'interprétation croisée, les deux versions officielles faisant également foi. Les droits et libertés garantis par la *Charte* ne sont pas figés à tout jamais, ils évoluent. C'est donc dire que la souplesse est essentielle à l'interprétation de la *Charte*. On ne peut renoncer à un droit ou à une liberté de la *Charte* que de façon claire et expresse, en toute connaissance de cause. L'interprétation doit être faite en fonction de l'objet du droit ou de la liberté en cause. Nous devons

aussi constater que la jurisprudence américaine, riche de plus de 200 ans d'histoire, joue un certain rôle dans l'interprétation de la *Charte*, tout comme, de plus en plus, divers documents internationaux, tel le *Pacte international relatif aux droits civils et politiques.*

Revenons au point de départ; s'il ne nous apparaît pas nécessaire de réformer en profondeur la *Charte*, cinq modifications, à notre avis sont souhaitables. Elles n'ont pas toutes la même importance. Examinons-les à tour de rôle.

L'INCLUSION DU DROIT DE GRÈVE ET DE NÉGOCIER COLLECTIVEMENT

L'alinéa 2d) de la *Charte* garantit la liberté d'association. La Cour suprême a jusqu'à maintenant refusé d'y voir une protection constitutionnelle pour le droit de grève et le droit de négocier collectivement. Incidemment, plutôt que d'interpréter de façon large l'alinéa 2d) et de restreindre cette liberté sous l'article 1 de la *Charte* (limites raisonnables), la Cour a plutôt choisi d'interpréter la liberté d'association de façon restrictive.

La restriction par une loi au sens de l'article 1 de la Charte doit porter le moins possible atteinte à la liberté d'association. En conséquence, cette restriction doit s'accompagner d'un mécanisme de règlement des différends par un tiers, qui permette de sauvegarder adéquatement les intérêts des travailleurs.

Ainsi, pour les juges Le Dain, Beetz et La Forest, dans le *Renvoi relatif à la Public Service Employee Relations Act,* ([1987] 1 R.C.S. 313), la liberté d'association garantie par l'alinéa 2d) de la *Charte constitutionnelle* ne comprend ni le droit de négocier collectivement ni le droit de faire la grève. En soi, la liberté d'association constitue une garantie considérable. De plus, elle importe pour l'exercice d'autres libertés: libertés d'expression, de conscience et de religion. Cependant, le droit de négocier collectivement et le droit de faire la grève ne sont pas des droits fondamentaux. Conclure en ce sens ferait en sorte que la Cour serait appelée à assumer une fonction de contrôle de politiques législatives sous l'article 1 de la *Charte.* La Cour n'est vraiment pas faite pour assumer pareille fonction de contrôle, affirme la majorité.

Un quatrième juge de la majorité, le juge McIntyre, écrit quant à lui que la liberté d'association énoncée dans la *Charte* signifie la liberté d'exercer collectivement des activités que la Constitution garantit à chaque individu. Cette liberté, à son avis, ne confère pas de droits indépendants au groupe. Ce dernier ne peut exercer, au nom de ses membres, que les droits constitutionnels dont ils jouissent individuellement. Selon lui, « le groupe ou l'organisation n'est qu'un moyen adopté par des individus pour mieux réaliser leurs droits et aspirations individuels ». (p. 397).

Il interprète l'histoire dans le sens suivant: les grèves sont fréquentes au Canada depuis plusieurs années; pourtant, le Constituant n'a pas expressément prévu le droit de grève dans la *Charte.* De plus, la *Charte* vise avant tout les droits individuels, politiques et démocratiques; elle se désintéresse des droits économiques et des droits de propriété. On ne peut en conséquence conclure que le droit de grève est implicite dans la *Charte.* Ce n'est que récemment que nos lois ont reconnu le droit de grève; ce droit n'a pas atteint le statut de droit fondamental.

Pour le juge en chef Dickson et sa collègue, la juge Bertha Wilson, la liberté d'association prévue dans la *Charte* comprend non seulement la liberté de former des associations et d'y adhérer mais aussi celle de négocier collectivement et de faire la grève.

Emporte notre adhésion, l'opinion dissidente du juge en chef Dickson dans le *Renvoi relatif à la Public Service Employee Relations Act* ([1987] 1 R.C.S. 313) selon laquelle: « Si la liberté d'association ne protège que la réunion de personnes à des fins communes, mais non l'exercice des activités mêmes pour lesquelles l'association a été formée, alors cette liberté est effectivement légaliste, parcimonieuse et voire même insipide. » (p. 362-363)

Les deux juges dissidents interprètent l'histoire d'une façon autre que le juge McIntyre. Pour eux, les travailleurs se sont associés au cours des ans pour avoir plus de force, pour surmonter leur vulnérabilité individuelle face à l'employeur. Depuis longtemps, la capacité de négocier collectivement a été reconnue comme l'une des fonctions intégrantes et premières des associations de travailleurs. Le droit des travailleurs de faire la grève constitue un élément essentiel du principe de la négociation collective. La nature même d'une grève est d'influencer l'employeur par une action commune qui serait inefficace si elle était exercée par une seule personne. Les restrictions restent soumises à l'article 1 de la *Charte.*

Le juge en chef Dickson consacre une partie de son analyse à la protection jurisprudentielle internationale de la liberté d'association. Il étudie les *Pactes des Nations Unies* sur les droits de la personne et la *Convention no 87 de l'Organisation internationale du travail,* documents auxquels le Canada a adhéré en 1976.

Son analyse de la liberté d'association en droit international l'amène à conclure:

> *« [...] il existe un consensus manifeste au sein des organes décisionnels de l'O.I.T. suivant lequel la Convention no 87 ne se borne pas uniquement à protéger la formation des syndicats mais protège leurs activités fondamentales, soit la négociation collective et le droit de grève ».*

Ceci dit, la garantie des services essentiels est cependant susceptible de restreindre le droit de grève et peut constituer en ce sens un objectif gouvernemental d'importance suffisante pour les fins de l'article 1 de la *Charte.*

Le caractère des services essentiels des agents de police et des pompiers est évident. Il peut être démontré facilement. Par contre, interdire le droit de grève à tous les employés d'hôpitaux et à tous les employés de la fonction publique apparaît trop draconien.

La restriction par une loi au sens de l'article 1 de la *Charte* doit porter le moins possible atteinte à la liberté d'association. En conséquence, cette restriction doit s'accompagner d'un mécanisme de règlement des différends par un tiers, qui permette de sauvegarder adéquatement les intérêts des travailleurs.

Cependant, comme l'explique le juge en chef Dickson, l'équité et l'efficacité du régime d'arbitrage sont compromises lorsque des questions qui normalement pourraient être négociées sont exclues de l'arbitrage.

Le régime d'arbitrage doit prévoir le droit de soumettre un différend à l'arbitrage. Un pouvoir discrétionnaire du ministre ne suffit pas. Ce serait une atteinte injustifiée à l'équité de la procédure d'arbitrage destinée à promouvoir l'égalité du pouvoir de négociation entre les parties.

Il est certes dommage que le constituant n'ait pas constitutionnalisé expressément le droit de négocier collectivement et le droit de grève en 1982. On croyait ces droits néanmoins implicitement garantis par l'alinéa 2d) de la *Charte*. Restreindre ainsi la liberté d'association nous semble aller à l'encontre de l'interprétation large et généreuse des droits et libertés que garantit la *Charte* et qui a guidé la Cour suprême dans ses jugements sur notre *Charte*. Il va sans dire que les motifs des juges dissidents dans le *Renvoi sur la Public Service Employee Relations Act* nous apparaissent plus conformes aux idéaux de la *Charte*.

Notons, par ailleurs, que la Cour suprême semble faire preuve d'un peu plus d'ouverture dans le récent arrêt *Dunmore c. Ontario* (P.G.) (2001 CSC 94), dans lequel la juge L'Heureux-Dubé affirme : « Dans une démocratie constitutionnelle, il ne suffit pas de protéger les libertés fondamentales contre les mesures de l'État : il faut aussi leur assurer un « espace vital » » (paragraphe 148).

Il y aurait lieu, selon nous, de modifier l'alinéa 2d) de la *Charte* en conséquence.

LA VERSION ANGLAISE DE L'ARTICLE 3

L'article 3 de la *Charte* garantit le droit de vote et celui de se porter candidat lors d'une élection fédérale ou provinciale. Le libellé de cette disposition est clair pour ce qui est de la version française. La version anglaise est quelque peu ambiguë car les mots suivants sont utilisés : « right to be qualified ». Le mot « qualified » laisse entendre que le citoyen qui veut être candidat doit satisfaire à certains critères, ce qui n'est pas le cas lorsqu'on lit la version française.

Comme l'explique le juge La Forest dans l'arrêt *Harvey c. Nouveau-Brunswick* (P.G.) ([1996] 2 R.C.S. 876) : « ... bien que le texte anglais manque quelque peu de clarté, le texte français est simple et indique que le droit d'être candidat et de siéger en tant que député fédéral ou provincial devrait être interprété de manière large » (p. 897).

La version anglaise de l'article 3 devrait donc être modifiée afin de bien refléter l'intention du constituant.

LA CONSTITUTIONNALISATION DU DROIT À LA VIE PRIVÉE

La Cour suprême du Canada, dès 1984 dans l'arrêt *Hunter c. Southam Inc.* ([1984] 2 R.C.S. 145), a reconnu que l'article 8 de la *Charte* offre une certaine protection en matière de vie privée. Ce droit a acquis une grande importance depuis, notamment en ce qui a trait aux perquisitions et saisies dans un domicile et ailleurs, l'écoute électronique, les fouilles corporelles et les renseignements personnels.

Les attentes en matière de vie privée varient selon les circonstances de chaque cas. Néanmoins, il existe bel et bien un droit à la vie privée. Sa reconnaissance expresse le mettrait à l'abri d'un virage jurisprudentiel inopportun.

LA MODIFICATION DE L'ARTICLE 30

L'article 30 de la *Charte* fait en sorte que la *Charte* s'applique aux territoires. Cela ne fait pas de doute puisque les territoires jouissent de pouvoirs délégués par l'autorité centrale qui est elle-même assujettie à la *Charte*. L'article 30 mentionne les Territoires du Nord-Ouest et le Yukon. Le 1er avril 1999, le Nunavut devenait réalité. Il suffirait donc de modifier l'article 30 afin d'y ajouter le Nunavut.

Les attentes en matière de vie privée varient selon les circonstances de chaque cas. Néanmoins, il existe bel et bien un droit à la vie privée. Sa reconnaissance expresse le mettrait à l'abri d'un virage jurisprudentiel inopportun.

L'ABROGATION DE L'ARTICLE 33

L'article 33 de la *Charte* prévoit que le Parlement fédéral ou une assemblée législative provinciale peut passer outre à certaines dispositions de la *Charte* et suspendre temporairement leur effet. Il s'agit des articles 2 (libertés fondamentales), 7 à 14 (garanties juridiques) et 15 (droits à l'égalité).

L'usage de l'article 33 de la *Charte* est peu fréquent. Le Québec à quelques occasions et la Saskatchewan ont été les seules provinces à recourir au pouvoir dérogatoire. Le Parlement du Canada n'y a pas eu recours. Généralement, le Parlement fédéral ou l'assemblée législative concerné par une décision de la Cour suprême qui lui est défavorable se plie de bonne grâce et modifie sa législation en conséquence.

Nous sommes d'avis que l'article 1 de la *Charte*, qui prévoit en outre que les droits et libertés ne sont pas

absolus et qu'ils peuvent être limités de façon raisonnable dans notre société libre et démocratique, suffit amplement et qu'un pouvoir de déroger à certains droits et libertés garantis par la *Charte* n'est pas nécessaire.

L'abrogation de l'article 33 ne sera pas facile. À notre avis, c'est la formule générale qui s'applique: il faut le concours du Parlement et de sept provinces regroupant 50% de la population, selon l'article 38 de la *Loi constitutionnelle de 1982*. L'unanimité prévue à l'article 41 de la *Loi constitutionnelle de 1982* ne s'applique pas, non plus que l'utilisation par le fédéral et les provinces, chacun de leur côté, de leur pouvoir unilatéral d'amendement prévu aux articles 44 et 45 de la *Loi constitutionnelle de 1982*.

Si le pouvoir dérogatoire énoncé à l'article 33 de la *Charte* est écarté par un amendement constitutionnel, reste la question du retrait possible d'une, de deux ou de trois provinces et de la rétention par elles de leur compétence législative, en la matière, ainsi que le prévoit la procédure de modification de la Constitution. Si le droit de retrait peut s'exercer en pareil cas, il faut poursuivre le débat. En effet, un pouvoir dérogatoire qui pourrait être utilisé par une ou deux ou trois provinces dans une fédération, les autres y ayant renoncé par amendement, créerait, sur le plan des libertés constitutionnelles, une situation pour le moins bizarre.

Autrement dit, si le pouvoir dérogatoire doit disparaître de la Constitution, mieux vaut que le choix fait en ce sens soit unanime. Sinon, la situation actuelle devrait être maintenue.

CONCLUSION

Comme on a pu aisément le constater, la *Charte canadienne des droits et libertés* ne requiert pas de réformes majeures. On ne peut certes pas affirmer, à la lumière de la jurisprudence émanant de la Cour suprême, que celle-ci a fait preuve d'activisme judiciaire. Elle a bien sûr donné vie à la *Charte* en l'interprétant de façon libérale et généreuse reflétant en cela l'interprétation qu'il convient de donner aux documents de nature constitutionnelle.

Malgré tout, dans un monde idéal, quelques modifications à la *Charte* seraient souhaitables telles que l'inclusion à l'alinéa 2d) du droit de grève et du droit de négocier collectivement, la correction de la version anglaise de l'article 3, la constitutionnalisation du droit à la vie privée à l'article 8, l'ajout du Nunavut à l'article 30 et l'abrogation de l'article 33.

Ces modifications amélioreraient bien sûr notre *Charte* qui est déjà excellente et qui fait l'envie de nombreux pays dans le monde.

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FREEDOM OF EXPRESSION
in the Charter Age

BY Julius Grey

IT IS NOT POSSIBLE TO DOUBT THE IMPORTANCE OF FREEDOM OF EXPRESSION IN THE PANTHEON OF FUNDAMENTAL RIGHTS.

The Supreme Court in Committee for Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139 approved the following passage of Cory J.A.'s judgment in R. v. Kopyto, [1987] 47 D.L.R. 4th 213:

> *It is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.*

In virtually every other case, the Court has reiterated these principles and stressed the need for a liberal interpretation of freedom of expression. In its most recent case, *R. v. Guignard,* [2002] S.C.C. 14, LeBel J.A. put this as follows at p. 15:

> *This Court attaches great weight to freedom of expression. Since the Charter came into force, it has on many occasions stressed the societal importance of freedom of expression and the special place it occupies in Canadian constitutional law. Very recently, in the highly sensitive context of an examination of the provisions of the Criminal Code relating to child pornography, McLachlin C.J. recalled the fundamental importance of freedom of expression to the life of every individual as well as to Canadian democracy. It protects not only accepted opinions but also those that are challenging and sometimes disturbing (R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, para. 21).*

However, the fragility of freedom of expression has remained a constant. If, at the time of adoption of the *Charter*, freedom of expression appeared a particularly important freedom to enshrine because the Supreme Court had, in *A.G. Canada & Dupond v. Montreal* [1978] 2 S.C.R. 770, seemingly repudiated the "implied bill of rights" which had been the basis on which free expression was protected before, it is nevertheless quite apparent that expression is not easier today than in 1982, and that this is so despite years of very liberal jurisprudence.

The very frequency with which cases are brought before the courts is proof that freedom of expression is often honoured "more in the breach than in the observance". Both the state, at all levels, and the powerful lobbies which play such a major role in public life in Canada have shown a marked impatience with free expression and a great desire to limit it in their own areas of endeavour while paying lip service to it everywhere else.

On the one hand, freedom of expression is so accepted as a principle that it has no declared opponents of any importance. On the other hand, it is constantly under fire.

For instance, the business lobby perceives no contradiction in opposing secondary picketing on the one hand and trying to strike down restrictions on campaign spending on the other. A similar contradiction can be found in the position of virtually every powerful lobby. It is always "different" in the case where one is passionately committed.

It must be remembered, too, that although the protection of expression was essential in 1982 and no respectable *Charter* could have omitted it, the political impulse which led to the adoption of the *Charter* was not fuelled principally by concern for expression, but rather by demands for equality on the part of various groups and lobbies, by concerns about abuses in criminal law and, in large part, by a desire to correct some of the excesses of Quebec's language legislation without impairing the policy of promoting and protecting French throughout the country. Yet an unexpectedly significant number of cases proved necessary in order to avoid a diminution in the level of freedom of expression.

There thus exists a surprising paradox. On the one hand, freedom of expression is so accepted as a principle that it has no declared opponents of any importance. On the other hand, it is constantly under fire. Even some activist human rights advocates have a tendency to turn against freedom of expression by enshrining the prohibition of hate speech or pornography as human rights issues. Further, the almost universal acceptance of liberal democracy as our ideology after the fall of communism has not strengthened free expression; in the 1970s when some people continued to dream of a different and more controlled system, speech was at least as easy as it is today.

The protection of free expression can be thus seen as a task of Sisyphus. No sooner do we defeat an attempt to restrict it in the name of some worthy cause, than another attempt comes from a very different and often unexpected quarter.

Since the need for protection is usually associated with unpopular expression, one cannot often count on public opinion as an ally. Views that are generally popular are rarely challenged in the first place and few people display the objectivity of Voltaire who wanted to protect the rights of others to say things which he abhorred.

It is therefore particularly important not to yield to the temptations of self-satisfaction and self-congratulation that the presence of a liberal *Charter* has inspired in many Canadians. Freedom of expression is relatively weak, and despite the Courts' vigorous defence of it, will continue to be weak in an epoch of increasing conformism and concern with security and discipline.

THE NON-LEGAL RESTRICTION OF FREEDOM OF EXPRESSION

What is often forgotten is that the legal restrictions of freedom of expression, those most easily corrected by the courts, are often the tip of the iceberg insofar as limits to free speech are concerned. There are numerous social restrictions, often known under the name "political correctness". There has never been a society without political correctness, nor perhaps can there be. Often, political correctness is a concensus about the very glue that holds a society or class together. In many cases, political correctness and legal restrictions go together. For instance, non-conforming religious attitudes were initially simply politically incorrect in 16th or 17th century Europe; at a certain point they became "heretical" and thus punished by law. Further, political correctness permeates even the writing of the proponents of freedom. Milton, in his defence of freedom to publish, cannot bring himself to extend his reasoning to Roman Catholics, much like many of today's *Charter* activists cannot accept the right to sexist or racist expression, or to fantasies about use of violence.

There is, of course, no charter or code of political correctness in any society. Often one milieu within a society has dif-

ferent rules from another. Political correctness for those who write in the financial pages of our newspapers is neo-liberalism and it is a rare occurrence for a left-wing view to appear there. In the universities, on the other hand, political correctness means rather 'gender-equality' and 'multicultural' views usually associated with the Canadians left. Both constitute a threat against those who do not conform, not in the physical sense, of course, but with respect to their careers and social status. Moreover, views inconsistent with ones we are expected to express are often viewed as ridiculous or idiotic and people fear ridicule more than physical or legal repression, which leaves an aura of heroism around the victim.

Normally, the courts do not enforce political correctness, but sometimes they do. Many cases before our courts turn around discretion, and judges, who are part of our society and have been educated and trained in it, will often resolve such questions in accordance with accepted norms. For example, in deciding whether a particular writing is or is not obscene, judges will be influenced by our moral attitudes and by the society's likely reaction. In *R. v. Sharpe,* [2001] 1 S.C.R. 45, the Supreme Court went as far as it could in protecting free expression by limiting somewhat the scope of the child pornography law. We can all imagine the indignant outcry which would have resulted if it had invalidated the law altogether. Indeed, the use of the notwithstanding clause, and not the strengthening of liberty, would have been the likely end result of such a decision.

This illustrates that the Courts and the laws cannot go far beyond what a society will tolerate without risking irrelevance. Judges are not wrong in staying within the bounds of the acceptable. The *Charter* and the constitution are only tools, very useful tools perhaps, but not ultimate guarantees of freedom.

A number of illustrations can demonstrate this proposition. One concerns 19th century Britain as opposed to 19th century France or Russia. There can be no doubt that Britain was altogether more open to free expression than tsarist Russia and more consistently open than politically unstable France. Yet the frank treatment of adultery and sexuality by Tolstoy, Dostoevsky, Stendhal and Flaubert would not have been tolerated in Britain despite all the pious homilies about freedom and the British way of life.

Because of its sensitivity towards the various groups which compose it, modern Canada is particularly susceptible to political correctness and, in recent years, this problem has grown more acute. As a result, Canadians are careful when discussing ethnic groups, religion, language, native affairs and, indeed, any subject where their interlocutors may become offended. As Baudouin J.A. noted in *Ville de Montréal v. Cabaret Sex Appeal,* [1994] R.J.Q. 2133 freedom of expression includes the freedom to wound. But political correctness and its potentially devastating consequences for transgressors, make Canadians cautious. In the absence of direct political control, conformism and excessive sensitivity perform the same function.

A related problem has to do with the establishment of parliamentary democracy as virtually the only permitted ideology after the defeat of communism. While some of the effects of this ideology have proved beneficial, there does exist a negative side. It now appears that any expression of sympathy for revolution or overthrow of governments or for any form of violence is suspect unless it is limited to events very far back in history. If this were 1860, support for Garibaldi or Juarez would be grounds for exclusion from Canada and for dismissal from sensitive jobs. In fact, history is often rewritten in order to comply with current views of right and wrong. Our epoch has a tendency to exalt itself and to see itself as the culmination of human development. Since one of the main purposes of freedom of expression is to promote change, this ideological complacency is not propitious for it.

Because of its sensitivity towards the various groups which compose it, modern Canada is particularly susceptible to political correctness and, in recent years, this problem has grown more acute.

Of course the *Charter* can be a useful bulwark against those restrictions. What is important is to determine if we have made good use of it.

THE LIMITS

The essential function of the Courts faced with a broad guarantee like freedom of expression is to set the limits. And limits there must be, for no freedom operates in a vacuum and in absolute terms.

Limits are needed to prevent abusive, immoral and extreme applications of rights. For instance, no one has the right to scream "fire" in a crowded cinema, nor the freedom to print state secrets in the media. As we have seen in discussions, *R. v. Sharpe,* limits are also needed to prevent interpretations, even laudable ones, that the society is simply not ready to accept. When courts part company completely with social reality, they risk becoming irrelevant and discredited. It is unlikely that even the most intellectually powerful court could have imposed gender equality, homosexual rights and the abolition of capital punishment in 1800. Courts can and should be a little ahead of the society, but they cannot set themselves adrift and attempt to impose a visionary utopia.

Finally, limits can be necessary because different fundamental rights can clash. Sometimes, a clash is artificially created to reduce the scope of truly fundamental rights like free expression by granting constitutional status to various doubtful claims – victims' rights, the right not to be the subjected to hate literature, and so on. However, there can arise true conflicts, as illustrated by *Dagenais v. CBC,* [1994] 3 S.C.R. 835 where freedom of expression competed with the right to a fair trial. There is even an example – electoral expense limits – where one kind of freedom of expression competes with another and it is necessary to ration the speech of the wealthy in order to protect the rights of free expression of the less affluent.

While limits are necessary, the broad, liberal interpretation of freedom prescribed by the Supreme Court requires that they be as narrow as possible. There is a myth, entirely untrue, that our courts are less protective of free expression than American ones. In fact, our courts have been just as concerned with free expression, but have chosen somewhat different and more appropriate issues. If pornography has been protected slightly less assiduously than in the U.S., political freedom has counted for more and the type of restriction on communist expression permitted in the U.S. would never pass muster. It is true that in *Libman v. A.G. Quebec,* [1997] 3 S.C.R. 569 the Supreme Court refused to follow the U.S. decision of *Buckley v. Valeo,* [1976] 424 U.S. and protect the right to limitless spending in election campaigns but it is the Canadian decision which ensures greater freedom of expression for most Canadians and which protects more effectively the right to advocate major change without fear.

While limits are necessary, the broad, liberal interpretation of freedom prescribed by the Supreme Court requires that they be as narrow as possible.

A number of liberal principles were established. The most important is that no kind of expressive comment other than violent action is a priori excluded from the protection. Soliciting for the purpose of prostitution (*Reference re Prostitution,* [1990] 1 S.C.R. 1123), gross lies, including holocaust denial (*R. v. Zundel,* [1992] 2 S.C.R. 731) and the right of employees to chat with customers (*R. v. Drapeau,* [1999] R.J.Q. 1635) are all protected and the marginality of the expression is relevant only to justification, not to the initial protection. The Supreme Court put it as follows in *R. v. Zundel:*

> *This Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection: Irwin Toy, supra, at p. 970, per Dickson, CJ and Lamer and Wilson, JJ. In determining whether a communication falls under s. 2(b), this court has consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most in need of protection under the guarantee of free speech.*

Secondly, the form and the context of the expression are clearly relevant, but again, only for justification, not to deny protection. For instance, Quebec's language law did not in any way limit the content of expression, only its language. Nevertheless, it was set aside (*Ford v. A.G. Que.,* [1988] 2 S.C.R. 712). In the field of expression, form can be as important as the message.

Third, only extreme manifestations of expression can be prohibited. In *R. v. Keegstra*, [1990] 3 S.C.R. 691, the Supreme Court upheld Canada's legislation outlawing hate propaganda. However, Dickson C.J.C. went on to show just how little restriction the law would tolerate:

> *Noting the purpose of s. 319(2), in my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in* R. v. Andrews, *supra, at p. 179:*
>
> > *Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in s. 319(2)...*
>
> *Those who argue that s. 319(2) should be struck down submit that it is impossible to define with care and precision a term like "hatred". Yet, as I have stated, the sense in which "hatred" is used in s. 319(2) does not denote a wide range of diverse emotions, but is circumscribed so as to cover only the most intense form of dislike.*

Although in this writer's opinion, McLachlin J's dissent in *Keegstra* was stronger than the majority view, it is clear that even the majority was only prepared to criminalize truly shocking words and this was later confirmed both by *Zundel* and by *Attis v. Board of Trustees*, [1996] 1 S.C.R. 825 where the Court did protect a very unattractive racist in his employment and was correct in doing so.

The tendency to limit banning to egregious, marginal and harmful expression is confirmed by the nuances of *R. v. Sharpe* and especially by *Butler v. The Queen*, [1992] 1 S.C.R. 452 where Sopinka J.A. said at p. 485:

> *In making this determination with respect to the three categories of pornography referred to above, the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk or harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.*

He concluded at p. 500:

> *A proper application of the test should not suppress what West refers to as "good pornography". The object of the impugned provision is not to inhibit the celebration of human sexuality.*

Other cases which illustrate our courts' reluctance to restrict expression include *R.J.R. MacDonald v. A.G. Canada*, [1995] 3 S.C.R. 1999 where they decided against the government despite its obviously laudable goal of reducing smoking and a relentless campaign in its favour by the powerful anti-smoking lobby, and *Rocket v. College of Dental Surgeons*, [1989] 1 S.C.R. 927 which struck down advertising bans in the professional world, despite a strong tradition of autonomy for professional corporations.

Perhaps the clearest statement was made by Baudouin J.A. in *City of Montreal v. Cabaret Sex Appeal* when he described as follows the situation where restrictions can occur: "ce n'est que dans l'hypothèse d'abus clair et donc de danger pour le caractère libre et démocratique de la société".

[I]nterpretation of law and even fact must always favour the fulfilment, not the frustration, of protected rights, even when the Charter does not apply directly.

When *Charter* rights clash, the courts will not rank them in order of importance (*Dagenais v. CBC*, [1999] 3 S.C.R. 835). Obviously, the proper equilibrium will depend on the facts of each case. However, even then, the imperative nature of free expression is made clear by Lamer C.J.C. in the following passage:

> *The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.*

Free expression is so vital to our society, that even when it conflicts with other basic rights, there will be considerable judicial reluctance to limit it.

PRIVATE INTERESTS AND FREEDOM OF EXPRESSION

Restrictions made by private interests are, in theory, not the province of the *Charter*. In a series of decisions, the Supreme Court has decided that the application of the *Charter* can only be triggered if there is some government involvement, however indirect (*Eldridge v. British Columbia*, [1997] 3 S.C.R. 624). In practice, that distinction is not as significant as we may think. Firstly, interpretation of law and even fact must always favour the fulfilment, not the frustration, of protected rights, even when the *Charter* does not apply directly. Secondly, provincial Charters have had, since Ford, an effect virtually identical to the Canadian *Charter* and they do apply to private matters. For instance, the *Quebec Charter* was applied to restriction of rights by employers without state participation in *Srivastava v. A.G. Que.*, [2001] R.J.Q. 1111.

In *Les Editions Vice-Versa Inc. v. Duclos*, [1998] 1 S.C.R. 591, the Supreme Court decided to protect privacy and the right to publish pictures of individuals by those who take them. Similarly, libel cases have continued unabated, although the link to freedom of expression has been noted.

In *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130 Cory J. reiterated the importance of a person's reputation.

There is little to dispute about factual falsehoods. A person is clearly entitled not to be falsely calumnied. More delicate is the issue of fair comment and the expression of hurtful or insulting 'opinion' as opposed to 'fact'. There has been no clear Supreme Court balancing of the interests of the victim of such opinion and the necessity of maintaining a vigorous climate of debate. There is no law imposing politeness, amiability, restraint or moderation. Yet Quebec courts have awarded damages both to federal MPs who were described as traitors by the Société St. Jean Baptiste because they supported the repatriation of the constitution and to sovereignist leaders who were compared to Nazis (*Hervieux-Paquette v. Société St.-Jean-Baptiste de Montréal,* [1998] R.J.Q. 131 and *Parizeau v. Lafferty, Harwood & Partners Ltd.,* [2000] R.R.A. 417). Both cases are in appeal and both deal with the limits of freedom.

There is a relative dearth of jurisprudence and therefore the prevailing opinion in our society will often decide which of our values prevails in each case. It is submitted that, in virtually all of these cases, freedom should prevail.

The problem becomes particularly striking when we consider that most federalists consider the "traitor" remark beyond the pale while, in their opinion, the Nazi comparison was a legitimate if excessive political comment. Not surprisingly, most sovereigntists believe the opposite and both groups present subtle, seemingly objective distinctions which justify their views.

This illustrates the principle that few lobbies believe in freedom of expression against their own convictions. But it also shows how the political correctness prevalent in each milieu colours one's analysis of virtually identical situations. The unpopular are more likely to pay damages or to fail to obtain them in a system in which no clear principle governs the limits to freedom of expression by private parties. It is submitted that the notion of libel should be rarely applied to opinion in the absence of bad faith.

However, the issue of private violation of free expression goes much beyond libel. For instance, how far can employers enforce limits to expression? Clearly, they can expect loyalty from employees. However, can they prohibit views which they find totally objectionable? Can a Jewish employer fire an employee who is overly anti-Semitic? Anti-Semitism in such a case may indeed be tantamount to disloyalty. Does this apply to expression of extreme anti-Zionist views, for instance, to a denial of Israel's right to exist? Clearly, such a result would severely restrict political debate. In another context, could a British private rail company dismiss an employee who calls for re-nationalization? Once again, there would be an argument of "disloyalty" on the one hand and freedom on the other.

There is a relative dearth of jurisprudence and therefore the prevailing opinion in our society will often decide which of our values prevails in each case. It is submitted that, in virtually all of these cases, freedom should prevail.

The reason for this is the newly acquired strength of private and especially business interests. Since 1980 the state has been weakened by the neo-liberal political wave and the business lobby has been reinforced. We see business partnerships with universities, with the arts and an increasing power of business against labour. In such circumstances, allowing private interests to limit expression could have major academic and cultural effects and could make most employees very cautious in their speech. For instance, there could be virtually no work for left-leaning economists or for radical artists and this could in turn make them into a rare species to the public detriment.

A recent example of this threat has been the attempt by the owners of most Canadian newspapers to impose a certain degree of orthodoxy with respect to their favourite topics – the market economy, Israel, federalism and so on. In the past, faced with state restrictions on expression, the courts have consistently maintained that the right to receive information was as crucial as the one to communicate it. If this line of jurisprudence is not extended to the private sector when it is clearly dominant, it will lose much of its utility.

It follows that one of the principal tasks of the courts in the coming years will be to set the limits of private control

over expression. The proper solution will surely be to apply such cases as *Butler* and *Keegstra* so as to permit only the most extreme forms of expression to be restrained. It is not possible to permit all expression; as in the public sphere, certain things are simply too unfair and too harmful. But the general principle of freedom prevailing except in extreme cases should be reaffirmed.

WHEN THE COURTS HAVE FAILED

Although in general, in those areas where there has been litigation, Canadian courts have done well, there is one very extremely important issue where the results have been disappointing – that of courts and judges.

In the *Kopyto* case, the Ontario Court of Appeal opened an interesting path by acquitting a lawyer convicted of contempt of court for intemperate criticism on the judiciary. However, the courts have not been quick to authorize contestation of other issues associated with courts. For instance, picketing of court houses has been restrained where other picketing would normally be permitted.

Even more significant has been the series of cases which permitted the disciplining of judges (*Moreau-Berubé v. N.B.*, [2002] S.C.C. 11) and which allowed the removal of judges for non-disclosure of a criminal record after a pardon (*Re: Therrien v. Minister of Justice*, [2001] 2 S.C.C. 35). In these cases, the special nature of the judiciary and the need for total absence of suspicion were cited.

These points are not without merit. Judges should avoid controversial and partisan discussions. The issue of general confidence in judges and respect for them is indeed important. However, these cases went altogether too far.

Judges are called upon to make decisions which will be unpopular and seem politically incorrect to many. Yet it is obvious that words which are likely to place a judge in jeopardy are those which displease a large lobby or which are startling and unusual, whether right or wrong. For instance, in the United States where there is often a recall mechanism and where many judges have to stand for re-election, statements on either side of the abortion controversy or against capital punishment could easily prove fatal. If judges are not protected by the *Charter*, some judges will avoid offending established views and persons best placed to mount a campaign against them. This augurs ill for freedom of expression.

Moreover, as with all restrictions on freedom, the curtailing of the expression will not eliminate the offending thought. Indeed, where an impropriety is fully expressed, its victim has an easier time demonstrating that the judgement should be reversed. It is an error to think that a more effective muzzle will make bad judges into good ones. If the price of the restriction is one which reinforces judicial conformism and political correctness, it is surely one which we should decline to pay.

CONCLUSION

Every epoch has its own problems with regard to expression. It is always tempting to boast about previous successes and to ignore present danger.

We have reduced much of the danger of sexual censorship, of linguistic intolerance, of attempts to limit freedom of information or freedom to express unpopular political views. We have also prevented attempts to use fundamental freedom as a way of advancing sectarian views, notably in *Lavigne v. SEFPO*, [1991] 2 S.C.R. 211.

However, many of these dangers will undoubtedly reappear. For instance there is a new spirit of sexual puritanism which will ultimately have an effect on the jurisprudence with respect to censorship. The increasing Americanization of our political process will mean that the limits on election campaigns, however clearly justified, will remain controversial.

Political freedom faces its greatest challenge since McCarthyism from the new concern about security and terrorism. This is not to say that no concern can be justified. It is precisely when there is a considerable body of evidence justifying some concern, as there was with communism, that the danger to liberty is at its greatest. The new emergency legislation on security will undoubtedly be challenged on a number of fronts, including free expression. These challenges must be carefully studied and analyzed because the preservation of full freedom of expression depends largely on their outcome.

The coming years will also force us to come to grips with private limits to expression. Balancing the various interests involved will also have a major effect, especially in an epoch in which the private sector is relatively strong as opposed to the public.

The one quality which can endanger liberty in the future is complacency, the conviction that our *Charter* has made us both virtuous and free. Complacency is never safe, because it necessarily refers to satisfactory results which have already occurred. Yet the nature of freedom of expression is such that, when a battle is won, the battlefield shifts and a new front is created. We can already see that the appearance of new issues and new concerns will force us to fight new judicial battles all the way to the Supreme Court. We cannot afford to rest on the laurels won in the first twenty years of the *Charter*.

Political freedom faces its greatest challenge since McCarthyism from the new concern about security and terrorism. This is not to say that no concern can be justified. It is precisely when there is a considerable body of evidence justifying some concern, as there was with communism, that the danger to liberty is at its greatest.

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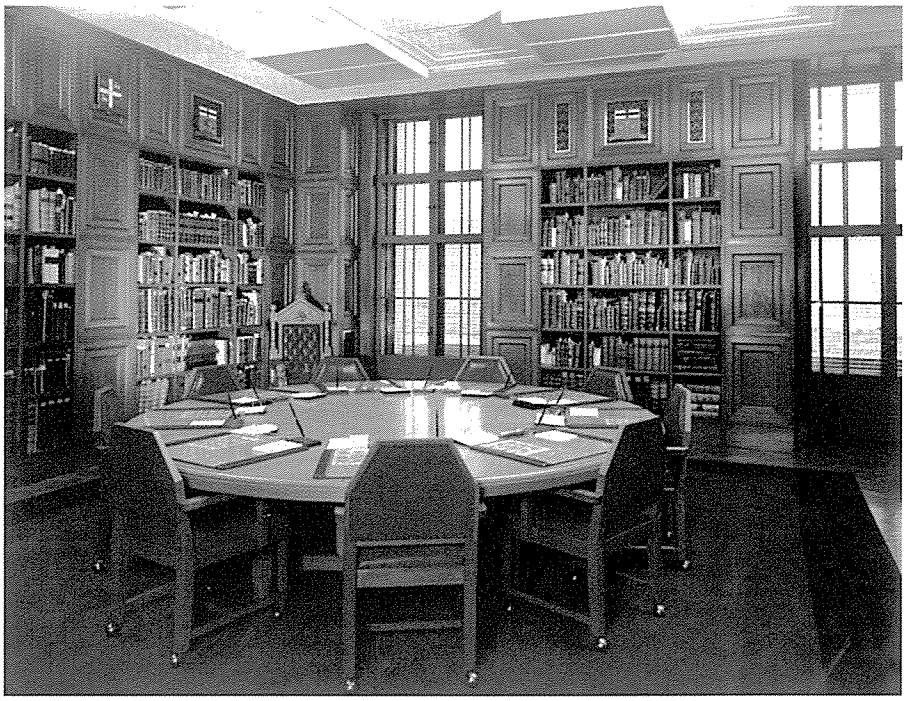
LE CONSENTEMENT COMME POINT D'ANCRAGE
à la doctrine du constitutionnalisme



PAR Alain-Robert Nadeau

« WE HOLD THESE TRUTHS TO BE SELF-EVIDENT, THAT ALL MEN ARE CREATED EQUAL, THAT THEY ARE ENDOWED BY THEIR CREATOR WITH CERTAIN UNALIENABLE RIGHTS, THAT AMONG THESE ARE LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS. THAT TO SECURE THESE RIGHTS, GOVERNMENTS ARE INSTITUTED AMONG MEN, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED. THAT WHENEVER ANY FORM OF GOVERNMENT BECOMES DESTRUCTIVE OF THESE ENDS, IT IS THE RIGHT OF THE PEOPLE TO ALTER OR TO ABOLISH IT, AND TO INSTITUTE NEW GOVERNMENT, LAYING ITS FOUNDATION ON SUCH PRINCIPLES, AND ORGANIZING ITS POWERS IN SUCH FORM, AS TO THEM SHALL SEEM MOST LIKELY TO EFFECT THEIR SAFETY AND HAPPINESS. »

PARAGRAPHE LIMINAIRE À LA *DÉCLARATION D'INDÉPENDANCE* DES ÉTATS-UNIS D'AMÉRIQUE (RÉDIGÉ PAR THOMAS JEFFERSON , LE 4 JUILLET 1776).

Le paragraphe liminaire à la *Déclaration d'indépendance* mis en exergue constitue indéniablement le texte le plus significatif rédigé par Thomas Jefferson sinon de toute l'histoire politique et constitutionnelle des États-Unis d'Amérique. En précisant que l'autorité de l'État repose sur le consentement, il consacre ainsi la *doctrine du constitutionnalisme* et son corollaire le principe de la *primauté du droit*. Depuis l'adoption de la *Charte canadienne des droits et libertés* et son enchâssement dans la Constitution canadienne le 17 avril 1982, il est incontestable que le régime constitutionnel canadien s'est rapproché du modèle américain ainsi que de la tradition libérale. Or, tant en vertu de la doctrine libérale classique que de la *doctrine du constitutionnalisme*, la légitimité du pouvoir étatique et de l'autorité gouvernementale repose sur le consentement.

De fait, depuis le XVIIe siècle, la question de savoir comment un individu libre devient assujetti à l'autorité étatique constitue la question centrale de la théorie politique libérale. Le consentement, en justifiant l'obligation politique d'obéir aux lois, constitue la pierre angulaire sur laquelle reposent les démocraties libérales. C'est là en fait que réside la différence fondamentale qui distingue les régimes politiques libéraux des régimes politiques totalitaires. Alors que les régimes politiques totalitaires reposent sur l'idée que les individus doivent obéir à l'État – qu'ils aient ou non consenti – , les régimes politiques libéraux supposent que les individus jouissent d'une liberté totale, laquelle liberté ne sera restreinte qu'à la suite du consentement donné par les individus.

Des individus libres ne sauraient être contraints d'obéir à un dictateur dans un régime politique totalitaire ou à des lois injustes dans un régime politique libéral. Alors que la désobéissance civile – expression que l'on doit à Henry David Thoreau qui publiait un pamphlet intitulé *Resistance to Civil Government (1849)* lequel deviendra *Civil Disobedience* – constitue un moyen primitif de répudier les actions d'un régime totalitaire ou les lois injustes d'une société libérale, la *doctrine du constitutionnalisme* et son corollaire le *principe de la primauté du droit* constitue le moyen juridique effectif de contrer l'arbitraire dans une démocratie constitutionnelle.

Le consentement, au sens où nous l'entendons, peut être donné expressément – il s'agit alors du *consentement individuel* – et se traduit généralement par la renonciation à un droit constitutionnel ou il peut se révéler implicitement à la suite de l'analyse de la situation examinée – il s'agit alors du *consentement communautaire* – qui se traduit généralement par l'existence d'une disposition législative spécifique ou par la reconnaissance d'une règle de *common law* par les tribunaux. Ainsi, le consentement ne sera valide que dans la mesure où l'immixtion étatique sera conforme au consentement individuel ou communautaire. Le *consentement individuel* ne posant pas de difficulté conceptuelle particulière, nous nous attarderons à la caractérisation de ce que nous qualifions de *consentement communautaire.*

Dans notre système politique, le *consentement communautaire* se traduit essentiellement par la constatation de l'existence d'une règle de droit ou par la reconnaissance d'une règle de *common law* par les tribunaux. Il s'appuie sur les origines, les traditions constitutionnelles – dont les préceptes sont consacrés dans les constitutions et dans les traités du droit international – ainsi que par la doctrine libérale en vertu de laquelle l'individu préexiste l'État et que ses droits fondamentaux ne découlent pas de leur reconnaissance par un État ou par une organisation internationale mais repose sur les attributs de la personne humaine.

La doctrine libérale justifie l'obligation d'obéir aux lois par deux approches conceptuelles. Le premier modèle est ce que le professeur Bickel a qualifié, dans son ouvrage posthume intitulé *The Morality of Consent (1975)* de modèle libéral contractuel (*«liberal contractarian model»*), selon lequel l'obédience d'un individu à l'État repose sur la doctrine du contrat social qui intervient entre les individus et l'État. Le contrat social puise sa source dans le consentement donné par les individus à la communauté qui est seule souveraine. Cependant, si les dirigeants de la communauté violent ce consentement ou ne respectent pas la volonté collective, celle-ci peut retirer son consentement. De fait, le rôle de l'État, constitué par la volonté de tous, consiste à assurer les droits subjectifs préconstitués dès l'état de nature. Autrement dit, le rôle de l'État consiste à préserver les droits naturels des individus. La pensée de John Locke et celle de Thomas Jefferson exemplifient cette approche conceptuelle.

Le second modèle qui est à la base de la doctrine libérale est ce que le professeur Bickel a qualifié de *Whig Model.* Selon ce *modèle whig*, qu'il qualifie aussi de modèle pragmatique, l'obédience d'un individu à l'État se justifie par sa nécessité; le consentement doit donc être imputé tacitement de certaines actions ou certaines omissions d'agir des individus, autrement la société ne pourrait fonctionner adéquatement. La pensée de Thomas Hobbes et celles de David Hume et d'Edmund Burke participent à cette vision.

L'architecture interne de la Constitution – la «structure constitutionnelle fondamentale» pour reprendre l'expression de la Cour suprême – nécessite une interprétation symbiotique des règles et des principes fondamentaux qui sous-tendent la Constitution et, par ce fait même, la démocratie.

Bien que nous estimons que le *modèle libéral contractuel* reflète mieux l'idéologie libérale classique et, surtout peut-être, l'intention originelle des constituants américains, cette distinction entre les deux modèles devient superfétatoire dans la mesure où la doctrine du *constitutionnalisme* et son corollaire le *principe de la primauté du droit* constituent le véritable fondement du consentement dans une démocratie constitutionnelle.

Si la Cour suprême du Canada associait pour la première fois, dans l'arrêt *Caslake (1998),* le caractère limité des immixtions étatique avec le *principe de la primauté du droit*, c'est dans le *Renvoi relatif à la sécession du Québec (1998)*, qu'elle évoquait, en s'y référant explicitement, la *doctrine du constitutionnalisme.* Dans cet arrêt, la Cour indiquait que quatre principes constitutionnels fondamentaux ressortent de la *Constitution :* le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit et le respect des minorités.

Ces principes fondamentaux doivent guider l'interprétation de l'étendue des droits et obligations des individus ainsi que le rôle des institutions politiques. L'architecture interne de la *Constitution* – la *«structure constitutionnelle fondamentale»* pour reprendre l'expression de la Cour suprême – nécessite

une interprétation symbiotique des règles et des principes fondamentaux qui sous-tendent la Constitution et, par ce fait même, la démocratie. Après avoir rappelé que la *doctrine du constitutionnalisme* et le *principe de la primauté du droit* sont à la base de notre système de gouvernement et de notre système démocratique, la Cour a jugé nécessaire de distinguer les deux concepts en affirmant qu'il ne sont pas identiques.

Alors que la *doctrine du constitutionnalisme,* consacrée au Canada par l'article 52 de la *Loi constitutionnelle de 1982,* exigerait que les actes du gouvernement soient conformes à la *Constitution,* la règle de droit *«est une expression haute en couleur qui [...] communique par exemple un sens de l'ordre, de la sujétion aux règles juridiques connues et de la responsabilité de l'exécutif devant l'autorité légale».* De fait, le *principe de la primauté du droit* consacre la stabilité du système juridique en fournissant un rempart contre l'arbitraire de l'État et forme ce que la Cour a qualifié – dans le *Renvoi sur la sécession du Québec (1998)* – de *«principes d'une profonde importance constitutionnelle et politique».*

Cependant, tout en respectant l'opinion de la Cour suprême nous n'estimons pas nécessaire d'apporter cette distinction entre ces deux concepts puisque le principe de la primauté du droit a été expressément incorporé dans le préambule de la *Charte canadienne des droits et libertés.* Et même s'il ne l'avait pas été, comme le soulignait si justement la Cour dans le *Renvoi sur la sécession du Québec (1998),* c'est un truisme que d'affirmer que la *Constitution* comprend tant des règles écrites que des règles non écrites. Parmi ces règles constitutionnelles non écrites se trouve incontestablement celle voulant que l'on respecte le principe de la légalité ou, selon l'expression consacrée, la «rule of law». Cette distinction devient cependant superfétatoire dans la mesure où tant la *doctrine du constitutionnalisme* et son corollaire, le principe de la *primauté du droit,* réfèrent aux mêmes notions, c'est-à-dire la limitation des pouvoirs étatiques – en consacrant la subordination de l'État à la loi – (1.) et le contrôle judiciaire des activités étatiques (2.).

1. LA LIMITATION DES POUVOIRS ÉTATIQUES

Garantie contre l'arbitraire, la *doctrine du constitutionnalisme* et le *principe de la primauté du droit* exige que l'État agisse conformément à la loi et qu'il n'exerce que les pouvoirs qui lui sont expressément conférés par celle-ci. Deux corollaires se dégagent de ce principe fondamental qui consacre la limitation des pouvoirs étatiques : l'exigence de la précision de la loi et le caractère limité des immixtions étatiques.

Le premier corollaire de ce principe est l'exigence de la précision de la loi qui veut que les lois renferment des normes prédéterminées et publiées à l'avance. L'exigence de la précision de la loi et de la doctrine constitutionnelle de l'imprécision signifie essentiellement que la publicité et la diffusion des lois constituent un rempart contre l'exercice arbitraire des pouvoirs étatiques en ce qu'elles visent à garantir que les individus connaissent clairement l'étendue des normes juridiques et des obligations qui en découlent afin qu'ils puissent gouverner leurs conduites en conséquence. Cet aspect de la primauté du droit a été reconnu par la Cour suprême du Canada dans plusieurs arrêts et consacré par la Cour suprême dans l'arrêt *Nova Scotia Pharmaceutical (1992).*

Le deuxième corollaire à ce principe est la reconnaissance du caractère limité des immixtions étatiques. La préservation des droits fondamentaux constitue, on l'a vu, un aspect essentiel de la *doctrine du constitutionnalisme* et de son corollaire le *principe de la primauté du droit.* Elle impose des limites à la capacité de l'État de porter atteinte aux droits et libertés des individus, notamment, à titre d'illustration, aux policiers qui ne sauraient agir à l'encontre ou en l'absence d'une loi.

Avant même la considération des droits constitutionnels garantis par la *Charte canadienne,* le principe judiciaire établi par la Cour suprême, dans la séquence d'arrêts *Colet (1981) – Dedman (1985),* était celui voulant que l'on doive interpréter de façon stricte les pouvoirs d'immixtion de l'État dans la vie privée des individus. Il n'est donc pas étonnant que les jugements qui ont interprété les garanties constitutionnelles relativement à la protection du droit au respect de la vie privée aient été dans le même sens. C'est dans les arrêts *Hunter (1984)* et *Collins (1987)* – incontestablement deux des arrêts les plus importants de la Cour suprême du Canada relativement à la détermination de l'étendue des pouvoirs d'immixtion de l'État dans la vie privée des individus – , que la Cour suprême consacrera définitivement le principe judiciaire voulant qu'une immixtion étatique effectuée sans consentement soit inconstitutionnelle.

En d'autres termes, les arrêts Hunter (1984) et Collins (1987) consacrent le principe judiciaire qui fait de la limitation des pouvoirs étatiques un précepte fondamental du droit constitutionnel canadien.

En somme, et nous ne saurions trop insister sur ce fait, le principe judiciaire fondamental établi par la Cour suprême dans l'arrêt *Hunter (1984)* est celui voulant qu'une immixtion étatique effectuée sans autorisation préalable soit généralement inconstitutionnelle. Trois ans plus tard, dans l'arrêt *Collins (1987),* le juge Lamer précisera les exigences constitutionnelles minimales en ces termes : « *Une fouille ne sera pas abusive si elle est autorisée par une loi, si la loi elle-même n'a rien d'abusif et si la fouille n'a pas été effectuée d'une manière abusive* ». Le non-respect de l'une ou l'autre de ces conditions rend l'immixtion étatique abusive au sens de l'article 8 de la *Charte canadienne des droits et libertés.* En d'autres termes, les arrêts *Hunter (1984)* et *Collins (1987)* consacrent le principe judiciaire qui fait de la limitation des pouvoirs étatiques un précepte fondamental du droit constitutionnel canadien. Ce principe judiciaire fondamental a été réitéré dans l'arrêt *Caslake (1998)* et, plus récemment encore, dans l'arrêt *Law (2002).*

Ainsi, par la séquence d'arrêts *Hunter (1984) – Law (2002),* la Cour suprême énonce les exigences fondamentales

qui circonscrivent étroitement l'étendue des pouvoirs d'immixtion de l'État dans la vie privée des individus. Il s'agit des conditions minimales que l'État doit respecter pour que l'on puisse conclure à la constitutionnalité des immixtions étatiques : *a)* l'immixtion est autorisée par une règle de droit; *b)* la règle de droit est conforme aux garanties constitutionnelles et *c)* l'immixtion de l'État est conforme à la règle de droit.

C'est pourquoi, nous nous expliquons mal – et cela bien que la décision puisse sembler raisonnable *a priori* – les deux décisions récentes de la Cour suprême à propos de l'appariement des banques de données de deux ministères fédéraux. En effet, dans le *Renvoi relatif à la Loi sur les renseignements personnels (Can.) (2001)* et dans l'arrêt *Smith (2001)*, les neuf juges de la Cour confirmaient la décision unanime de la Cour fédérale d'appel en décidant que le maillage des banques de données (qui permettent d'identifier les voyageurs qui sont ausi prestataires d'assurance-chômage) en l'absence du consentement individuel ou d'une règle de droit était conforme aux garanties constitutionnelles. Ces deux décisions, et nous le disons avec respect, nous semblent être en porte-à-faux avec un ce principe judiciaire fondamental selon lequel les pouvoirs de l'État sont intrinséquement limités.

2. LE POUVOIR DE CONTRÔLE DES TRIBUNAUX SUR LA CONSTITUTIONNALITÉ DES LOIS

Historiquement les tribunaux canadiens ont été déchirés entre l'application du principe de la primauté du droit et le respect de la *doctrine de la souveraineté du Parlement* qui empêchaient les juges de statuer que le Parlement ou une assemblée législative provinciale avait outrepassé ses compétences législatives. Dogme fondamental du parlementarisme britannique, le principe de la souveraineté du Parlement niait aux tribunaux le pouvoir d'annuler une loi du Parlement ou encore de la considérer comme nulle ou inconstitutionnelle.

Au Canada, le préambule de la *Loi constitutionnelle de 1867* avait consacré la doctrine de la souveraineté du Parlement. Aussi, la structure politique fédérale du gouvernement s'opposait à cet absolutisme conceptuel et favorisait une atténuation de principe afin de permettre aux tribunaux d'exercer un contrôle juridictionnel de l'activité législative du Parlement et des assemblées législatives provinciales. Plusieurs auteurs de la doctrine, dont Dicey, ont tenté de réconcilier le pouvoir de contrôle juridictionnel de l'activité étatique et le principe de la souveraineté du Parlement, mais on peut expliquer ce pouvoir de contrôle juridictionnel en affirmant simplement que la limitation des pouvoirs de l'État est implicite à la structure politique canadienne. Ainsi, le fédéralisme et l'*Acte relatif à la validité des lois coloniales (1865) [Colonial Validity Act (1865)]* – qui subordonnait les lois canadiennes à la conformité avec les lois britanniques – avaient déjà consacré l'existence du pouvoir de contrôle des lois par les tribunaux.

C'est donc dire qu'au moment de la formation de la fédération canadienne en 1867, le pouvoir de contrôle des tribunaux sur la constitutionnalité des lois constituait déjà un précepte fondamental sur lequel reposait la *Loi constitutionnelle de 1867*. C'est sur cette base que la Cour suprême a déclaré inconstitutionnelles les lois qui visaient à soustraire les activités gouvernementales au pouvoir de contrôle des tribunaux.

La *Loi constitutionnelle de 1982* a expressément enchâssé – dans son préambule et à l'article 52 – le pouvoir de contrôle judiciaire de la constitutionnalité des lois. Si aujourd'hui le pouvoir de contrôle de la constitutionnalité des lois par les tribunaux ne saurait faire aucun doute, son étendue soulève cependant de vives controverses puisque, dans l'exercice du contrôle de la constitutionnalité des lois, les tribunaux doivent de plus en plus faire appel à des considérations qui ne sont pas exclusivement d'ordre juridique. La controverse récente suscitée par les arrêts *Feeney (1997)*, *Vriend (1998)* et *M. c. H. (1999)* suffit à nous convaincre que la population canadienne ne compose que très difficilement avec cette nouvelle réalité qui fait des tribunaux – et plus particulièrement de la Cour suprême – un catalyseur des rapports sociaux.

La question qui se pose à ce point de notre raisonnement est la suivante : y a-t-il des limites au pouvoir de contrôle de la constitutionnalité des lois par les tribunaux? Dans l'affirmative, quelles sont-elles? Nous ne pouvons que répondre par l'affirmative puisque, en plus de la longue tradition de retenue judiciaire – qui reconnaissait le *principe de la souveraineté du Parlement* – qui a historiquement caractérisé l'interprétation des droits constitutionnels par la Cour suprême du Canada, la présomption de la constitutionnalité des lois et la règle du précédent ou du *stare decisis* constituent incontestablement des limites au pouvoir d'appréciation des tribunaux sur la constitutionnalité des lois.

La présomption de constitutionnalité des lois exprime à la fois une idée de retenue judiciaire et de nécessité d'assurer l'ordre juridique en n'invalidant que les lois ou les dispositions législatives qui contreviennent directement à une garantie constitutionnelle. La présomption de constitutionnalité des lois postule que le Parlement ou l'assemblée législative a agi dans les limites de ses compétences législatives. Dans l'arrêt *Metropolitan Stores (1987)*, le juge Beetz , qui s'exprimait pour la Cour, a indiqué qu'en plus de son sens littéral, selon lequel «*[...] une disposition législative attaquée en vertu de la Charte doit être présumée conforme à celle-ci et, en conséquence, pleinement opérante*», la présomption de constitutionnalité avait deux autres sens.

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Elle constitue aussi une règle procédurale selon laquelle il revient à celui qui conteste la constitutionnalité d'une loi, au stade de la confrontation de la mesure législative avec la garantie constitutionnelle, d'en établir le bien-fondé. Ensuite, «*[d]ans un autre sens, la «présomption de constitutionnalité» est la règle d'interprétation selon laquelle une loi contestée doit, autant que possible, être interprétée de manière conforme à la Constitution*». Cela signifie qu'entre deux interprétations possibles, l'une impliquant la validité et l'autre qui l'écarte, le tribunal doit retenir la première qualification. Cela veut aussi dire que lorsqu'une loi est libellée

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en termes suffisamment larges pour englober des objets qui dépassent la compétence du Parlement ou d'une assemblée législative provinciale, le tribunal peut en restreindre le champ d'application – en faisant une lecture atténuée («*reading down*») ou en écartant les aspects inconstitutionnels – de façon à préserver son caractère constitutionnel.

Selon la règle du précédent, ou du stare decisis, les tribunaux sont liés par les principes judiciaires énoncés dans les décisions antérieures qui ont tranché des questions identiques ou semblables à celles faisant l'objet de l'examen du tribunal. On regroupe sous cette appellation deux types de précédents : les *précédents persuasifs* – toutes les décisions des tribunaux britanniques postérieures à 1949 ainsi que celles de la Cour suprême des États-Unis concernant l'application du *Bill of Rights* – et les *précédents obligatoires* – toutes les décisions des tribunaux britanniques antérieures à 1949 ainsi que toutes les décisions des tribunaux hiérarchiquement supérieurs.

La question essentielle qui se pose est celle de savoir si la Cour suprême du Canada est liée par ses propres jugements. Du début du siècle – avec l'arrêt *Stuart (1909)* – à la fin des années cinquante – avec le *Renvoi relatif à The Farm Products Marketing Act (1957)* – , la Cour suprême du Canada s'est considérée liée par ses propres jugements. Aujourd'hui, la Cour suprême se considère tout à fait libre de réviser ou de modifier les principes judiciaires établis par ses décisions antérieures si elle a des «*raisons impérieuses*» de le faire.

L'incompatibilité d'une règle de *common law* avec la *Charte canadienne des droits et libertés*, l'atténuation d'un précédent par des modifications successives, la réforme du droit pour s'adapter aux changements survenus dans la société et l'adaptation des règles procédurales constituent des «raisons impérieuses» qui justifient la modification d'un principe judiciaire préalablement établi. Comme le soulignait le juge en chef Lamer, qui parlait en son nom dans l'arrêt *B. (R.) (1995)*, «*[l]a souplesse des principes qu'elle véhicule [la Charte canadienne] ne nous autorise pas [les juges] à en dénaturer les sens et l'objet véritables, ou encore à forger un droit constitutionnel qui outrepasse l'intention manifeste de ses rédacteurs*».

En d'autres termes, si nous acceptons d'emblée la proposition voulant que les juges ne soient pas liés à la conception originelle de la garantie constitutionnelle examinée, nous estimons néanmoins – comme l'ont d'ailleurs reconnu le juge en chef Dickson dans l'arrêt *Big M Drug Mart Ltd. (1985)* et le juge McIntyre dans le *Renvoi relatif à la Public Service Employee Relations Act (1987)* – qu'ils ne peuvent pas simplement adopter des principes judiciaires qui reflètent leurs conceptions morales ou leurs préférences personnelles; ils doivent, au contraire, s'appuyer sur les précédents et interpréter les garanties constitutionnelles en justifiant leurs décisions par la formulation, la structure et l'historique du texte constitutionnel, les traditions et les philosophies inhérentes ainsi que dans les principes moraux communautaires.

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DE HABERMAS À KYMLICKA : quelques réflexions pour sortir de l'impasse constitutionnelle canadienne

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PAR Marie-Hélène Giroux

JUSQU'À RÉCEMMENT L'EXPÉRIENCE DÉMOCRATIQUE NE SE CONCEVAIT QUE DANS LE CADRE DE L'ÉTAT-NATION. TOUTEFOIS LA MONDIALISATION DE L'ÉCONOMIE ET L'ÉMERGENCE DE SOCIÉTÉS MULTICULTURELLES ONT DÉSTABILISÉ L'ÉTAT-NATION, NOUS OBLIGEANT À REVOIR LES FONDEMENTS DE LA DÉMOCRATIE MODERNE ET À NOUS QUESTIONNER SUR LA PERTINENCE D'UNE STRUCTURE UNITAIRE DE L'ÉTAT, FONDÉE SUR LA SOUVERAINETÉ ABSOLUE DE LA NATION REPRÉSENTANT LA COMMUNAUTÉ MAJORITAIRE, POUR ASSURER UNE COEXISTENCE PACIFIQUE DES ÉTATS MULTIETHNIQUES OU SUR LES TERRITOIRES HABITÉS PAR LES MINORITÉS.

Dans un tel contexte, la citoyenneté apparaît comme un moyen de répondre aux nouveaux défis, comme "une manière de reprendre la question du 'vivre ensemble'" (Audigier). Il existe d'autres cultures et nous devons apprendre à vivre ensemble, tant à l'échelle mondiale que dans le cadre de nos sociétés individuelles.

Le Canada n'échappe pas à ce débat. En effet, autant au Canada qu'au Québec, les discussions soulevées par le concept de citoyenneté sont vives et portent principalement sur l'articulation de la citoyenneté et du pluralisme. Elles soulèvent la délicate question de savoir comment le concept de citoyenneté peut réconcilier des identités multiples tout en évitant les pièges de l'exacerbation nationaliste ou identitaire. En outre, la question engendre chez certains la crainte que la reconnaissance d'une citoyenneté différenciée, plus complexe, encourage des sentiments indépendantistes.

La société canadienne comprend plusieurs groupes ethniques et nationaux : autochtones, minorités francophones et anglophone (au Québec) et minorités d'immigration récente. Ces minorités sont aujourd'hui en quête de leur identité et revendiquent leur place tout autant que leur reconnaissance. La situation canadienne illustre de manière exemplaire comment la diversité culturelle, en progrès constant, remet en question la définition et les fondements même de la citoyenneté. D'autant que notre référence identitaire ne peut se fonder sur une hypothétique nation canadienne. L'exemple du Québec qui revendique la reconnaissance de son identité nationale distincte et (à tout le moins) un réaménagement institutionnel de la fédération sur la base de l'asymétrie est d'ailleurs éloquent. L'unité de l'État et la conception de la citoyenneté qui le sous-tend doivent désormais se construire dans la diversité plutôt que dans l'uniformité. On doit dissocier le concept d'État et de nation, de manière à pouvoir organiser le mieux vivre ensemble au sein d'une société qui, loin d'être homogène est largement hétérogène. C'est d'ailleurs ce qui nous amène à examiner d'autres théories susceptibles de fournir des réponses plus satisfaisantes.

À ce jour, l'initiative fédérale visant à définir la citoyenneté canadienne présente par divers aspects une «affinité élective» avec le concept habermassien de patriotisme constitutionnel. Autant la politique multiculturaliste développée par le Canada que l'inscription dans la Constitution d'une *charte* des droits et libertés sont des tentatives visant à redéfinir notre référence identitaire sur la base des grands principes universalistes relatifs aux droits fondamentaux, tels que les libertés individuelles et le droit à l'égalité. Toutefois, de l'avis de certains observateurs, la *charte* canadienne viendrait renforcer, de manière paradoxale, le mouvement de fragmentation de la citoyenneté en garantissant des droits 'particularistes' visant des groupes spécifiques, tels que les minorités ethniques, religieuses, culturelles, sexuelles, les personnes handicapées, etc.

En fait, il n'est pas évident que la spécificité de la réalité canadienne nous permette de fonder notre référence identitaire, notre citoyenneté, sur le seul patriotisme constitutionnel au sens où l'entend Habermas. Bien que pour plusieurs au Canada anglais, la *charte* représente désormais le fondement même de la citoyenneté canadienne, au Québec la situation est différente, une partie importante de la population ne s'identifiant que très peu à ce document,

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adopté malgré l'opposition de l'Assemblée nationale et souvent confondu par ailleurs avec la *Charte* des droits et libertés de la personne du Québec. Au surplus, on peut douter que la notion de patriotisme constitutionnel, élaborée dans un contexte sociopolitique fort différent, celui de l'Allemagne contemporaine, puisse s'adapter aisément au caractère multinational du Canada. Cette dimension multinationale est ce qui rend particulièrement difficile l'édification d'une identité fondée essentiellement autour d'une *charte* des droits commune à tous les citoyens, d'autant que l'un des résultats escomptés était de promouvoir un nationalisme pancanadien visant, entre autres choses, à contrer le nationalisme québécois.

Or, la nouvelle théorie libérale formulée par Kymlicka selon laquelle les libertés individuelles, fondement de l'idéologie libérale traditionnelle, sont intimement liées à l'appartenance de l'individu à son groupe et voulant que les droits collectifs puissent promouvoir l'égalité entre la majorité et les minorités tend justement à combler ces insuffisances. Cette nouvelle interprétation du libéralisme et de la démocratie inclurait désormais dans l'exigence égalitaire des attentes fortes en matière de reconnaissance publique des identités collectives, notamment d'ordre culturel et permettrait de reconstruire un libéralisme politique transformé par les exigences d'une citoyenneté multiculturelle. Pour reprendre les termes de S. Mesure et A. Renaut :

> *« Dans la phase contemporaine, il s'agit de restituer à l'égal sa différence, et ce, paradoxalement, pour aller plus loin encore dans l'instauration de l'égalité et pour que l'égalisation ne dissimule plus (comme c'était potentiellement le cas sous le régime de l'assimilation) une négation des différences réelles (...) » (Alter Ego. Les paradoxes de l'identité démocratique, Paris, Aubier, 1999)*

Il existe chez les philosophes et les théoriciens de la justice un débat sur la nécessité ou non de reconnaître aux groupes ou aux minorités des droits collectifs. Libéraux et communautariens s'opposent. Les uns ne concevant que le sujet individuel, donc les droits individuels. Les autres ne concevant que le groupe, - l'individu ne pouvant être que par son appartenance au groupe - donc les droits collectifs. Entre ces deux positions divergentes, il y a Kymlicka qui, avec sa nouvelle théorie libérale, a tenté de ré-élaborer la notion même de droits collectifs (ce qu'il nomme «group differentiated rights ») de manière à ce qu'elle n'apparaisse plus contradictoire avec celle des droits individuels. Kymlicka avance que, pour rester dans l'esprit libéral tout en conjuguant une reconnaissance de la différence et de l'identité collective des groupes, il faut, d'une part, compléter les droits individuels par les droits collectifs et, d'autre part, intégrer les droits collectifs et individuels. Ainsi, c'est en assurant aux minorités les droits et les moyens de faire valoir leurs cultures que le libéralisme deviendra véritablement égalitaire. Et c'est en imposant des limites à ces mêmes droits collectifs que le libéralisme évitera de sombrer dans le communautarisme. En effet, la reconnaissance de droits collectifs aux minorités ne doit pas rendre possible la domination de certains groupes par d'autres groupes de personnes, ni permettre à un groupe d'opprimer ses propres membres. En d'autres termes, les libéraux devraient chercher à garantir à la fois l'égalité entre les groupes, et la liberté et l'égalité à l'intérieur des groupes. Nous sommes d'avis que c'est en complétant ainsi la garantie des droits individuels par une protection des groupes exposés et vulnérables tels que les minorités que nous parviendrons à une reconnaissance effective de leurs droits. Ce faisant, les minorités deviennent sujets de droit, leurs droits sont justiciables et l'on pourra désormais créer un véritable État multi-

Plutôt que de définir la citoyenneté par le fait de l'appartenance et de déduire de cette appartenance une capacité à prendre part, on la définit par l'acte citoyen, par la participation.

national. Refuser de reconnaître des droits collectifs aux minorités, c'est enfermer les membres des minorités dans le cadre étroit de l'État-Nation et dans leur statut de minorité.

Renaut et Mesure mettent en garde contre le danger de reconnaître des droits collectifs aux minorités et suggèrent plutôt de développer davantage la notion de droits culturels, d'introduire les droits culturels dans les droits de l'homme et de reconnaître des identités différenciées. Or cette approche est insuffisante et n'est qu'une autre façon de réintroduire l'inégalité et l'oppression, sous couvert du droit à la différence. Il n'y a rien de schizophrénique à ce qu'un individu se reconnaisse en tant que sujet individuel et en tant que membre d'un sujet collectif ; l'unité de son moi n'est pas en danger, contrairement à ce qu'affirment Renaut et Mesure. En outre, argument historique, autant le système de protection des minorités mis en place par la SDN, qui a privilégié les droits individuels en s'efforçant de réduire la dimension collective des droits des minorités que le système des Nations unies basé sur la seule reconnaissance de droits individuels, se sont avérés inefficaces pour résoudre la question de la protection des minorités. Ne serait-il pas temps que l'on se rende à l'évidence en adoptant une approche novatrice qui reconnaîtrait les minorités comme sujets de droit ?

Pour le libéralisme contemporain, tout autant que pour le libéralisme moderne, les règles de droit et les procédures qui institutionnalisent le débat public et l'élection des représentants sont des conditions nécessaires de la démocratie mais ils n'en sont pas une condition suffisante. On ne peut fonder une identité politique, une citoyenneté, seulement à partir des principes universels de l'État de droit et des droits de l'homme. La citoyenneté prend une dimension nouvelle, celle des droits culturels, ce qui permet de rejeter la correspondance entre un État, une société ou nation et une culture et de garantir le respect des droits de tous, majorités comme minorités. De cette dimension culturelle découleront des droits identitaires, c'est-à-dire de droits relatifs à l'identité des personnes et des groupes, à leur définition et au respect de leur patrimoine culturel commun avec tout ce qu'il comporte de traditions et de valeurs. Cette dimension culturelle de la citoyenneté est au cœur de la question des rapports entre minorités et majorités.

Ainsi, on s'éloigne progressivement de l'idée d'une citoyenneté purement statique en vertu de laquelle la citoyen-

neté ne serait qu'un statut légalement attribué à une personne, pour adopter une :

> *«vision plus réaliste d'une citoyenneté dynamique en vertu de laquelle le citoyen est un agent de sa citoyenneté, appartenant à des institutions sociales, économiques, culturelles et politiques à travers lesquelles il participe à l'effectivité plus ou moins grande de sa participation sociale» (Voir G. Rocher dans Droits fondamentaux et citoyenneté. Une citoyenneté fragmentée, limitée, illusoire ?, Montréal, éditions Thémis, 2000)*

La citoyenneté revêtirait donc :

> *«Une nature duale, à la fois statutaire et identitaire : statutaire car fonction de l'attribution d'un statut juridique, de droits spécifiques et d'obligations corrélatives (...), et identitaire, car correspondant à un sentiment d'appartenance à la communauté politique» (Coutu).*

Cette citoyenneté, que certains qualifient de démocratique, appelle la

> *«construction d'une personne libre et autonome, consciente de ses droits et obligations dans une société où le pouvoir de dire la loi, c'est-à-dire les règles de vie commune qui définissent le cadre dans lequel s'exerce la liberté de chacun, et où la désignation et le contrôle des personnes qui exercent ce pouvoir, sont sous la responsabilité de tous les citoyens» (Audigier).*

Plutôt que de définir la citoyenneté par le fait de l'appartenance et de déduire de cette appartenance une capacité à prendre part, on la définit par l'acte citoyen, par la participation. Il s'agit donc d'une conception dynamique de la citoyenneté qui permet de mieux intégrer les valeurs culturelles. Dans cette optique, la citoyenneté démocratique ne saurait s'accommoder de l'exclusion et de la marginalisation, phénomènes qui vont à l'encontre des droits de l'homme. La participation, y compris celle des minorités, apparaît de plus en plus en plus comme un facteur important de la citoyenneté. Il s'agit pour chacun d'être un acteur, de maîtriser son cadre de vie, de trouver sa place dans la société, de s'y engager et de contribuer à son développement.

La citoyenneté démocratique permet donc de reconnaître les identités multiples, la nation comme lieu d'intégration sociale ainsi que la possibilité que certaines activités soient dévolues ou s'exercent concurremment avec d'autres ordres juridiques et repose dès lors sur quatre principes fondamentaux : la disjonction entre État et nation et la reconnaissance du caractère multinational de l'État ; la compatibilité des valeurs qui fondent l'identité politique commune ; l'absence de hiérarchisation entre les diverses identités citoyennes et la légitimité d'établir des régimes juridiques différenciés au sein du même État.

Le développement du lien social, créé par la reconnaissance de la citoyenneté démocratique, permet de contrer le processus de fragmentation sociale en assurant et en développant une meilleure cohésion des sociétés. La notion de citoyenneté démocratique nous permet de dépasser le débat opposant l'universalisme et le particularisme, la conception républicaine à la conception libérale, la république au multiculturalisme radical, en nous apprenant à combiner ces différentes oppositions. Elle nous permet de mieux comprendre qu'intégration et reconnaissance de la pluralité ne sont pas séparables. En fait, loin de s'opposer, l'universalisme et le particularisme peuvent désormais se compléter pour éviter l'hégémonie d'une culture dominante et les dangers de fragmentation sociale liés à la reconnaissance d'un multiculturalisme radical pouvant mener à la ghettoïsation. La citoyenneté démocratique est l'un des éléments constitutifs de l'idéal démocratique du libéralisme contemporain.

La notion de citoyenneté démocratique nous permet de dépasser le débat opposant l'universalisme et le particularisme, la conception républicaine à la conception libérale, la république au multiculturalisme radical, en nous apprenant à combiner ces différentes oppositions.

Une telle conception permettrait peut-être de sortir le Canada de l'impasse constitutionnelle dans laquelle il se trouve en nous éloignant des politiques peu fructueuses du bilinguisme et du multiculturalisme qui nous ont plutôt éloigné du modèle multinational de l'État et de la citoyenneté démocratique. D'ailleurs, les Canadiens anglais utilisent le principe de l'égalité des provinces et des individus pour justifier l'établissement d'une identité commune, d'une nation commune qui tend à exclure les autres identités nationales. En outre, nous l'avons vu, la *charte* canadienne réaffirme l'égalité en droit de tous et sert d'instrument d'unification canadienne en rappelant les valeurs communes qui rassemblent tous les Canadiens.

Or, la citoyenneté est capitale pour une complète insertion dans la société. Seul un projet politique visant la reconnaissance de la citoyenneté démocratique et permettant le dialogue entre les différentes cultures peut concilier les exigences de la diversité culturelle et identitaire dans la sauvegarde de l'unité canadienne. N'est-ce pas là dire qu'il faudrait rouvrir l'Accord du Lac Meech ?

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ARGUING AGAINST THE 'ARGUMENTAIRE'

Quebecers and the Canadian Charter of Rights

BY Jack Jedwab

OVER THE PAST TWENTY YEARS, THE PATRIATION OF THE CANADIAN CONSTITUTION HAS REMAINED A SOURCE OF CONSIDERABLE CONTROVERSY IN QUEBEC. MANY ATTRIBUTE THIS TO THE POLITICAL PROCESS IN WHICH THE QUEBEC GOVERNMENT LED BY PREMIER RENÉ LEVESQUE WAS ISOLATED BY THE LEADERS OF THE OTHER PROVINCES WHO ULTIMATELY CAME TO TERMS WITH THE FEDERAL GOVERNMENT ON A CONSTITUTIONAL AGREEMENT AND THE ENTRENCHMENT OF A *CHARTER OF RIGHTS AND FREEDOMS*. THE CANADIAN CONSTITUTION WAS THUS SIGNED OVER THE OBJECTIONS OF THE QUEBEC GOVERNMENT, AND TO EXPRESS THEIR DISAPPROVAL AN ALL-PARTY RESOLUTION WAS ADOPTED IN THE NATIONAL ASSEMBLY. SINCE THAT TIME THE ISSUE HAS REMAINED CENTRAL TO DISCUSSIONS SURROUNDING THE FUTURE OF QUEBEC WITHIN CANADA, AND IT IS FREQUENTLY NOTED THAT QUEBEC IS NOT A SIGNATORY TO THE CONSTITUTION.

There is a reasonably large consensus amongst Quebec's intellectuals – sovereignist and federalist alike – over the political events in 1981 that culminated in the patriation of the Canadian Constitution. Often connected to discussions of the Constitution is the presumed threat from the *Canadian Charter of Rights and Freedoms* arising in particular from those provisions relating to language and culture. Although little empirical evidence exists to support this assertion, many Quebec intellectuals and politicians contend that the provisions of the Canadian *Charter* are objectionable to the majority of the province's population. They do so despite polling data which consistently reaffirm that the *Canadian Charter of Rights and Freedoms* is popular with an important majority of Quebecers. More recently, a survey conducted by the firm Environics showed that a vast majority of Quebecers believe that the Canadian *Charter* has had a major positive impact on the protection of the rights and freedoms of Canadians.

The Charter of Rights and Freedoms has had a major positive impact on the protection of the rights and freedoms of Canadians.

	QUEBEC	REST OF CANADA
Agree	86 %	81
Disagree	11	16
DK/NA	3	3

All tables: Source: Focus-Environics, 2001-02

The persistence of the idea that the Canadian *Charter* is unpopular and unacceptable to most Quebecers is often presented in the more widely read texts dealing with the issue as a historic statement of fact. This idea can be traced to the views expressed by the late Premier René Levesque in the heat of the patriation debate. Referring to the *Charter* in his memoirs, Levesque pointed out that England had done very well without this legalistic yoke and nonetheless had not surpassed its citizens' human rights, and that Anglo-Canadians were leery of this 'government by judges' that was to be installed above parliament. Moreover, Levesque noted that Quebec possessed its own *Charter*. To further justify his objections to the (Canadian) *Charter*, Levesque referred to the views then articulated by Judge Pigeon to the effect that: 'this American-style project does not at all conform to the logic of our institutions ... having experienced the great slowness of the courts ... this new and complex responsibility will just multiply the delays and confusion' (Réné Levesque: memoirs translated by Phillip Stratford, McClelland and Stewart, 1986).

In this regard, it was neither clear at that time, nor is it apparent today, that Quebecers were more or less leery of the emergence of a 'government of judges' than the rest of the Canadian population. If recent findings are any indication, it seems that the majority of Quebecers do indeed believe that the judiciary should have the final word on fundamental rights.

In your opinion, which branch of government should have final say on questions related to the fundamental rights of Canadians? Should it be Parliament or the Supreme Court of Canada?

	QUÉBEC	REST OF CANADA
Parliament	30	37
Supreme Court	59	55
Both	4	3
Neither	1	1
Other	-	-
DK/NA	5	5

In your opinion, which branch of government should have final say on questions related to the fundamental rights of Canadians? Should it be politicians or judges?

	QUÉBEC	REST OF CANADA
Parliament	25	31
Supreme Court	59	60
Both	4	2
Neither	8	5
Other	-	-
DK/NA	3	2

The idea that Quebecers are opposed to the substance of the *Charter* has since found significant resonance amongst some of the country's leading scholars. Tel qu'indiqué ci-dessus, dans la 'Manifeste des intellectuels pour la souveraineté' le desapprobation de la *charte* canadienne constitue une partie essentielle de l'argumentaire.

L'argument linguistique. Parce qu'une *charte* des droits d'inspiration individualiste s'y trouve enchâssée, la constitution canadienne permet que soient contestées devant les tribunaux les lois du gouvernement du Québec. Les lois linguistiques québécoises ont été constraintes par cette situation.

L'argument constitutionnel. À la suite du rapatriement illégitime de la constitution en 1982, le Québec s'est trouvé exclu de la famille canadienne. Par ce coup de force constitutionnel, le Canada a limité les pouvoirs du Québec en matière de législation linguistique (la clause Canada) et imposé une *charte* des droits essentiellement individualiste qui confie à des juges nommés par l'État fédéral des pouvoirs considérables

However, Quebecers overwhelmingly support the principles enunciated in the Canadian *Charter* with respect to the equality of the English and French languages. That there may be contemporary debate around language policies detracts nothing from the adherence on the part of Quebecers to the *Charter*'s main disposition on language.

English and French should have equal status, rights and privileges in Canada.

	CANADA	QUEBEC	CANADA EXCL. QUEBEC
Agree	78	94	73
Disagree	21	6	26
DK/NA	1	-	1

Pour ce qui est du Québec, Jean-Francois Lisée affirme qu'il « n'est pas anodin que telle ou telle décision soit prise par ses propres élus ou par un pouvoir plus lointain, tributaire d'une autre majorité nationale que la sienne. D'ou sa farouche opposition a cet perte de pouvoir. » (Sortie de Secours, 80-81).

But it remains to be demonstrated that Quebec has indeed suffered a significant loss in power arising from the dispositions of the *Charter*. With respect to language, the majority of Quebecers believe that the provincial government has primary authority over language and whatever perceived encroachments may have occurred, this view has not been shaken by the presence of the *Charter*.

Who has and should have primary authority over language issues in Canada-Quebec respondents? (asked to Quebecers)

	HAS	SHOULD HAVE
Federal	25	27
Provincial	55	57
Municipal	2	2
All/Combination	3	4
DK	13	6

Some have argued that it is the multicultural provisions of the *Charter* that represent a serious concern to the desire of a majority of Quebecers to protect the French language and culture. Again, survey data fail to support this idea. As observed below, the vast majority of Quebecers respond favorably to the formulation of the multicultural provision of the *Charter*.

The preservation and enhancement of the multicultural heritage of Canadians is an objective that the government should support.

	CANADA	QUEBEC	CANADA EXCL. QUEBEC
Agree	82	86	80
Disagree	15	10	17
DK/NA	3	3	3

Moreover while a majority of Quebecers hold concerns about the future of the French language they do not appear to attribute them to the multicultural provisions of the *Charter*.

The preservation and enhancement of the multicultural heritage of Canadians is a threat to the future of the French language in Canada.

	CANADA	QUEBEC	CANADA EXCL. QUEBEC
Agree	25	39	22
Disagree	70	58	74
DK/NA	4	4	4

In the book 'As I Recall: Historical Perspectives', John Meisel and Guy Rocher contend that "the entrenchment of the *Charter* constitutionalized a certain vision of Canada – that of a nation comprising of individuals who enjoy identical constitutional rights – at odds with the 'two founding nations' ideal dear to Quebec federalists." In her essay 'Recognizing Difference', Jane Jenson contends that the capstone of this model of rights-bearing individuals was the *Charter* of Rights and Freedoms entrenched in the 1982 Constitution. It conferred a body of protected individual rights and guaranteed equal treatment, while being "explicitly hostile to diversities on the availability of rights based on province of residence." Through these same decades, the nationalist movement in Quebec (with both federalist and sovereignist wings) was developing another version of liberalism and its legitimate rights claims.

While the debate over the recognition of Quebec's distinct characteristics remains important and legitimate, the Canadian *Charter* neither denies nor curtails difference. In fact in many ways the *Charter* secures the rights to be distinctive. Casting the failure to enshrine recognition of Quebecers' distintiveness should not be construed as 'hostility' on the part of the *Charter*.

Nor is it clear that the desire for recognition of Quebec's specificity implies a collectivist rights orientation on the part of the population that is in opposition to the individualist orientation of the rest of Canada. Both in Quebec and elsewhere in Canada, the conception of rights cannot too rigidly be cast as individual versus collective, nor is public opinion so clear as to such a distinction.

Another view, espoused by David Schneiderman in his essay 'Human Rights, Fundamental Differences? Multiple *Charters* in a Partnership Frame', holds that, located properly within the context of 1982 and subsequent rounds of constitutional reform, the objections to the *Charter* may be better understood as dissenting views about its legitimacy. Imposed without the consent of Quebec politicians, the *Charter* as a whole is therefore rejected as a political project for generating pan-Canadian solidarity and unity. By objecting to the process by which the *Charter* emerged as supreme constitutional law, both Quebec and Aboriginal leaders have been placed in the position of having to question the legitimacy of the text of the *Charter* itself, leading to charges of illiberalism. Schneiderman notes that while some "throw cold water on the Canadian *Charter*, they heap praise upon the Quebec *Charter of Human Rights and Freedoms* – a rights document comparable in many ways... to the Canadian *Charter*."

It is unfortunate that, when it comes to the opinions of Quebecers on the *Canadian Charter of Rights*, assertions are made with no empirical evidence to substantiate them. It is perfectly legitimate for academics and politicians to insist that the Canadian *Charter* is contrary to what they perceive to be in the best interests of Quebecers. However, the ground is far less solid when these same people purport to represent the views of the majority of Quebecers on the *Charter*. When it comes to fundamental rights and freedoms, it is not apparent that the majority of Quebecers are more collectivist in their orientation than other Canadians.

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LES VALEURS LIBÉRALES
d'une société libre et démocratique

PAR Pierre Thibault

LA *CHARTE CANADIENNE DES DROITS ET LIBERTÉS* GARANTIT PLUSIEURS DROITS ET LIBERTÉS. CETTE PROTECTION CONTRE L'ARBITRAIRE DE L'ÉTAT SE SITUE DANS UN CONTEXTE, CELUI D'UNE SOCIÉTÉ LIBRE ET DÉMOCRATIQUE QUI VALORISE LA PRIMAUTÉ DU DROIT. LA *CHARTE CANADIENNE* REPOSE AUSSI SUR PLUSIEURS VALEURS, DONT TROIS NOUS INTÉRESSENT PLUS PARTICULIÈREMENT : LA LIBERTÉ, L'ÉGALITÉ ET LA TOLÉRANCE.

La **liberté** permet aux êtres humains, dans une société démocratique, de se « livrer aux activités inhérentes à l'individu » *(Children's Aid Society)*. La liberté prend plusieurs sens : libertés fondamentales (conscience, religion, expression, association, réunion pacifique, presse), absence de contrainte, liberté de circulation, etc. La liberté constitue en elle-même une valeur inhérente, aussi constitutionnalisée par la *Charte*, qui doit être respectée par l'État bien qu'elle ne soit pas absolue et qu'elle puisse être raisonnablement limitée, l'État étant tenu, le cas échéant, de justifier les limites qu'il impose.

L'**égalité**, dans son acception large, signifie, pour nos fins, des rapports égaux entre individus. Cette égalité, dans le contexte de la *Charte*, implique nécessairement un aspect formel, réel. L'égalité entre les individus n'est pas un vain mot et elle ne doit pas, pour aucune considération, le devenir.

L'article 15 de la *Charte* proclame de façon large et généreuse les droits à l'égalité : le droit à l'égalité devant la loi; le droit à ce que la loi s'applique également à tous; le droit à la même protection de la loi; et le droit au même bénéfice de la loi. L'article 15 est donc une disposition substantielle qui garantit les droits de tous les individus à l'égalité.

La **tolérance**, c'est une attitude nous permettant d'admettre que d'autres personnes agissent et pensent différemment de nous. La tolérance est une valeur au cœur même de l'article 27 de la *Charte* qui prévoit : « Toute interprétation de la présente *Charte* doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens. » Cette disposition a notamment été utilisée pour interpréter l'article 1 de la *Charte* (limites raisonnables), la liberté de conscience et de religion garantie par l'alinéa 2a) de la *Charte (Big M Drug Mart et Edwards Books)*, la liberté d'expression *(Keegstra)* de même que le droit à l'assistance d'un interprète *(Tran)*.

Ces trois valeurs s'inscrivent dans le cadre de notre société libre et démocratique dont fait état l'article 1 de la *Charte*.

L'article 1 de la *Charte* comprend deux volets. Premièrement, il garantit les droits et libertés qui y sont énoncés. Deuxièmement, les droits et libertés ne sont pas absolus, car ils peuvent être limités – de façon raisonnable – dans une société libre et démocratique comme la nôtre. Cette disposition prévoit :

> *1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.*

Cette disposition, délibérément vague, prête à interprétation. Ce que fit la Cour suprême du Canada. À cet égard, la jurisprudence de la Cour n'a rien d'une ligne droite. Au contraire, après avoir énoncé un critère plutôt strict, elle a tergiversé, appliquant ce critère tantôt de façon rigoureuse, tantôt avec souplesse. Encore aujourd'hui, l'expression « chaque cas est un cas d'espèce » conserve tout son sens.

L'article 1 de la *Charte* énonce donc un critère de raisonnabilité. Nous examinerons d'abord quels sont les éléments de ce critère. Puis nous verrons brièvement comment il a été appliqué dans certaines situations, c'est-à-dire dans le contexte des libertés fondamentales (première valeur) et dans celui des droits à l'égalité (deuxième valeur). Nous ferons aussi état de certaines divergences parmi des juges de la Cour suprême. Nous conclurons en disant quelques mots au sujet d'une troisième valeur, la tolérance.

C'est dans l'arrêt *Oakes*, en 1986, que la Cour suprême du Canada a dégagé le critère d'interprétation de l'article 1. La Cour a élaboré le critère suivant : une violation d'une disposition de la *Charte* doit d'abord être établie par la personne qui conteste la loi ou par celle qui est accusée lorsqu'elle soulève l'inconstitutionnalité d'une règle de droit comme moyen de défense. Pour contrer l'inconstitutionnalité lorsqu'elle est établie, le gouvernement doit démontrer que la loi s'appuie sur un objectif important et que les préoccupations qui la sous-tendent sont urgentes et réelles. À cette fin, les moyens employés doivent avoir un lien rationnel avec l'objectif visé. En ce sens, la mesure ne doit pas être arbitraire, inéquitable ou irrationnelle. Il doit donc y avoir une proportionnalité entre la mesure contestée et l'objectif du législateur. Les moyens employés doivent porter le moins possible atteinte aux droits et libertés. Enfin, il doit y avoir proportionnalité entre les effets préjudiciables de la mesure et ses effets bénéfiques.

Ce critère, en apparence strict et rigide, voire formaliste, a été rapidement assoupli dans l'arrêt *Edwards Books*. Dans cet arrêt, la Cour suprême a conféré au législateur une marge de manœuvre en ce qui a trait à l'ouverture des magasins le dimanche et à l'octroi d'un jour uniforme de congé hebdomadaire dans le commerce de détail. Puis, au fil des arrêts, il semble que la portée de ce critère ait été considérablement atténuée; le critère de raisonnabilité qu'avaient à l'esprit les constituants en 1982 est maintenant généralement appliqué par les tribunaux.

C'est dans l'arrêt *Keegstra* que le juge en chef Dickson a fait le point sur l'article 1 de la *Charte* :

> *« Notre Cour a maintes fois confirmé le cadre analytique établi dans l'arrêt Oakes, et pourtant on s'induit dangereusement en erreur si l'on voit dans l'article premier une disposition rigide et empreinte de formalisme n'offrant rien d'autre qu'une dernière chance à l'État de justifier des incursions dans le domaine des droits fondamentaux. D'un point de vue purement pratique, les plaideurs qui invoquent la Charte peuvent parfois percevoir ainsi l'article premier mais, dans le droit constitutionnel de notre nation, cet article joue un rôle infiniment plus riche, un rôle de grande envergure et d'extrême raffinement ».*

Voyons maintenant comment ce critère a été appliqué en matière de liberté d'expression et d'égalité.

Dans le domaine de la liberté d'expression, parmi les décisions les plus importantes, la Cour suprême a confirmé la constitutionnalité des dispositions du *Code criminel* portant sur l'obscénité *(Butler, Sharpe, Little Sisters)*, celles portant sur la propagande haineuse *(Keegstra)* de même que les dispositions de la *Loi sur la protection du consommateur* concernant l'interdiction de la publicité destinée aux enfants de moins de 13 ans *(Irwin Toy)*.

Par ailleurs, elle a déclaré inconstitutionnelles des dispositions relatives à l'affichage commercial *(Ford, Ramsden, Guignard)*, à l'interdiction de certaines formes de publicité *(RJR-MacDonald, Rocket)*, à la restriction de dépenses référendaires pour les tiers *(Libman)*, à la publication des sondages moins de trois jours avant le vote *(Thomson Newspapers)* et à l'interdiction de publier de fausses nouvelles *(Zundel)*.

[L]a jurisprudence de la Cour n'a rien d'une ligne droite. Au contraire, après avoir énoncé un critère plutôt strict, elle a tergiversé, appliquant ce critère tantôt de façon rigoureuse, tantôt avec souplesse.

En matière d'égalité, la Cour suprême a confirmé la constitutionnalité de certaines dispositions de la *Loi de l'impôt sur le revenu* concernant les frais de garde pour les enfants *(Symes)* et la formule déduction/inclusion en matière de pension alimentaire *(Thibaudeau)* ainsi que celles du *Code criminel* en matière d'aide au suicide *(Rodriguez)* et de crimes de guerre *(Finta)*.

Elle a par ailleurs jugé inconstitutionnelles des dispositions ayant trait aux domaines suivants : l'exigence de l'obtention de la citoyenneté pour devenir avocat *(Andrews et Benner)*, l'absence de l'orientation sexuelle comme motif explicite de discrimination *(Miron, Vriend, M. c. H.)*, le refus de tenir compte du handicap physique (surdité) dans la dispensation des soins dans un hôpital *(Eldridge)* et la non-reconnaissance du droit de vote des autochtones hors réserves *(Corbiere)*.

Ce bref survol démontre à quel point il est difficile de prévoir le résultat d'une cause plaidée devant la Cour suprême du Canada. D'ailleurs, il nous apparaît clair que le critère de l'arrêt *Oakes* n'a pas toujours fait l'unanimité parmi les juges de la Cour suprême. Le juge La Forest ne s'en cachait d'ailleurs pas. Dans un article de doctrine publié en 1992, il avouait que :

> *« It is surely no secret, though, that from the beginning I had concerns about the generality and rigidity of the Oakes criteria. I am not talking out of school; that is evident from my judgments. I had little difficulty with the cri-*

teria or the manner in which they were applied in that case ».

Il précisait son point de vue comme suit :

« [...] I think that we have developed increasingly sophisticated techniques for identifying, weighing and balancing the competing social and individual interests section 1 mandates us to do. But there are no easy answers, no infaillibles guides. Oakes provided us with a checklist, guidelines that must be flexibly interpreted in light of all circumstances ». (G.V. LA FOREST, « The Balancing of Interests Under the Charter », (1992) 2 NJCL/RNDC 133-162, p. 139).

La juge Wilson, alors à la retraite de la Cour, déplorait subséquemment le manque de cohérence de la Cour suprême dans l'application du test élaboré dans l'arrêt *Oakes* :

« Now, I want to come back at this point to Oakes because a division had started to develop on the Court as a result of experience with its application in a number of cases. Some members of the Court thought that the Oakes standard of justification was too high and should be replaced with a standard of « reasonableness ». Their thinking was clearly prompted by their concern about the legitimacy of judicial review itself. Although Lamer J. had stated in the Motor Vehicle Reference that adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy, in fact the lingering doubts remained. I think it is now fair to say that, although the Court continues to pay lip service to the strict Oakes test, in many of its judgments it has in fact applied a much less rigorous test.

[...]

I think if you study the decisions of the Court on this subject in the order in which they were handed down you will see the ambivalence on the part of the Court. The Court seems to have concluded that the strict application of Oakes may be appropriate in some cases and the more flexible approach of reasonableness in others ». (B. WILSON, « Building the Charter Edifice : The First Ten Years », dans G.-A. BEAUDOIN (dir.), The Charter : Ten Years Later / La Charte: dix ans après, Cowansville, Les Éditions Yvon Blais inc., 1993, 238 p., p. 96).

Nous vivons dans une société fondée sur la liberté, l'égalité et la tolérance. La tolérance est une valeur qui transcende toutes les autres, qui est au cœur de l'article 27 et qui est implicite dans plusieurs autres dispositions de la *Charte*. Elle fait aussi partie du préambule de la *Charte des Nations Unies* et elle est énoncée à l'article 19 de la *Déclaration universelle des droits de l'homme*. C'est une valeur universelle.

Dès 1689, John Locke, dans sa *Lettre sur la tolérance*, affirmait :

« Ce n'est pas la diversité des opinions qu'on ne saurait éviter, mais le refus de la tolérance qu'on pourrait accorder, qui a été la source de toutes les guerres et de tous les démêlés qu'il y a eu parmi les chrétiens, sur le fait de la religion. »

Voltaire, dans son célèbre *Traité sur la tolérance*, publié en 1763, mène un combat de tous les instants pour la liberté et rend hommage à Jean Calas, un protestant erronément accusé et injustement condamné au supplice de la roue, qui mourut en 1762. On le soupçonnait d'avoir pendu l'un de ses fils qui voulait se convertir au catholicisme. Il était innocent, mais la foule réclamait vengeance. Dans le chapitre XV, intitulé « Témoignages contre l'intolérance », Voltaire réfère à Saint Athanase (livre 1er) et écrit : « C'est une exécrable hérésie de vouloir attirer par la force, par les coups, par les emprisonnements, ceux qu'on n'a pas pu convaincre par la raison » (p. 109). L'universalité de cette cause juste ne fait point de doute.

Dans une société libre et démocratique, la tolérance est souvent une valeur que l'on tient pour acquise en temps de paix. Cette valeur est parfois mise à rude épreuve en temps de crise.

Le 16 novembre 1995, les pays membres de l'UNESCO ont signé la *Déclaration de principes sur la tolérance* et se sont notamment engagés à « prendre toutes les mesures nécessaires pour promouvoir la tolérance dans nos sociétés... » Quant à la signification de la tolérance, la Déclaration prévoit, à l'article 1.3 :

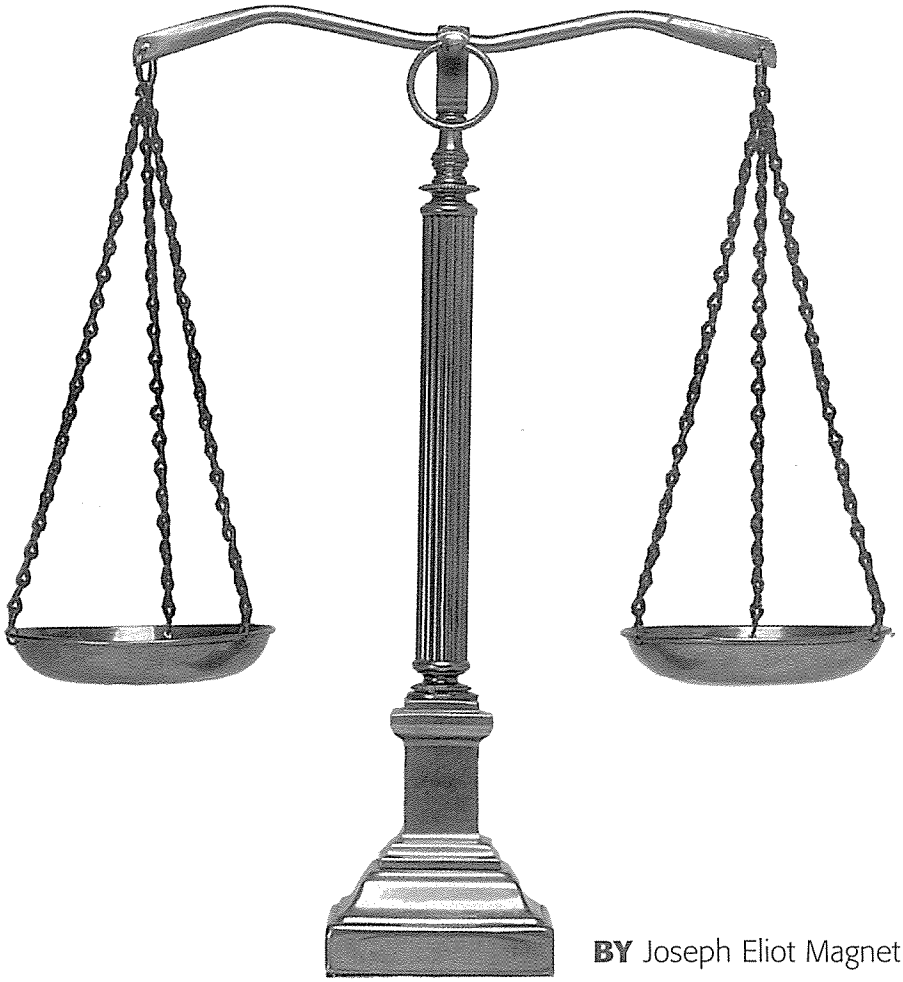
« 1.3 La tolérance est la clé de voûte des droits de l'homme, du pluralisme (y compris le pluralisme culturel), de la démocratie et de l'État de droit. Elle implique le rejet du dogmatisme et de l'absolutisme et conforte les normes énoncées dans les instruments internationaux relatifs aux droits de l'homme. »

L'article 2.1 de la Déclaration précise que la tolérance exige de l'État « la justice et l'impartialité en matière de législation, d'application de la loi et d'exercice du pouvoir judiciaire et administratif ... ». La ratification des conventions internationales relatives aux droits de la personne est un moyen de promouvoir la tolérance (article 2.2 de la Déclaration).

Dans une société libre et démocratique, la tolérance est souvent une valeur que l'on tient pour acquise en temps de paix. Cette valeur est parfois mise à rude épreuve en temps de crise. Nous devrions pourtant constamment la chérir si nous voulons faire partie d'un peuple heureux.

Pierre Thibault est avocat et membre du Barreau du Québec

FIGHTING TERRORISM
in a Free Society



BY Joseph Eliot Magnet and Sina Ali Muscati

«OUR WAR ON TERROR IS WELL BEGUN, BUT IT IS ONLY BEGUN.» THIS WAS PRESIDENT BUSH'S STERN STATE OF THE UNION MESSAGE LAST JANUARY. HE SINGLED OUT IRAN, IRAQ AND NORTH KOREA AS STATES THAT «CONSTITUTE AN AXIS OF EVIL». IS THIS CHARACTERIZATION VALID? IS THERE ANY JUSTIFICATION FOR EXTENDING THE WAR ON TERRORISM TO THESE STATES? WHAT SHOULD CANADA DO?

The terrorists of the 1970s and 1980s hijacked and kidnapped to compel us to negotiate with them about quite limited objectives – release of political prisoners, broadcast of messages, ransom, safe passage. The September 11th suicide bombers do not want to negotiate. Their goal is to destroy our system. Mass casualty against civilians is their means. They have launched acts of war against us – more precisely, war crimes.

As the threat from war paradigm terrorists is different, so must be our response. War paradigm terrorists require zones where they can develop, plan and train for military action. Some of these zones are formally sovereignties – gangster regimes like the Taliban; some exist within normal sovereign nations as anarchic «no man's land». We are right to use military action to eliminate or shrink these zones. The justification for military action is active self-defence. To protect ourselves, we must destroy zones of anarchy that provide breeding grounds for war paradigm terrorists.

Potentially, as President Bush has made clear, this anti-terrorism doctrine goes very far. American military operations in the Philippines, targeting Abu Sayyaf militants with alleged links to Al-Qaida is an example of extending the war on terrorism to true sovereignties that include anarchic zones of no man's land beyond control. So too is the deployment of American military advisers to Georgia and Yemen, where Al-Qaida militants are suspected to be hiding. The anti-terrorism doctrine could carry the fight to Somalia, Sudan or Colombia. What about countries on the U.S. list of state sponsors of terrorism? We are now rattling the sabre at Iran, Iraq, and North Korea. What about Cuba, Libya, and Syria?

Most of these governments differ markedly from Afghanistan. The Taliban regime was the most condemned and isolated government in the world. It was possible to build an international coalition against it. The same coalition probably cannot hold together for action against Iraq and certainly not against Iran. Iran recently re-elected moderates and is opening up to much of the world. Iran vehemently opposed Taliban rule in Afghanistan from the start.

Extending military action to the «axis of evil» will draw us into conflict with military powers significantly stronger than the Taliban militia. It also threatens to break up the international coalition allied to fight terrorism. European and Arab allies already have expressed concern over President Bush's «axis of evil» comments. So has Canada's Deputy Prime Minister. The consensus so far has been to fight Al-Qaida, an internationally condemned terrorist organization. Extending the war to «evil» states with whom the U.S. has personal grievances is an entirely different matter. The Taliban campaign is a poor guide to the risks or costs inherent in quick resort to the military option.

The truth is Canada is unlikely to exert overwhelming influence in decisions to extend the military campaign to other zones. We are not a major power, and cannot strut as if we were. We should concentrate our efforts where we can make a difference. We can work through diplomacy to deepen our network of common interests and understandings with moderate elements in states on the fringes of the community of nations. We need dramatic improvement in our counterterrorism measures. This includes enrichment of our capability to gather intelligence, particularly from abroad. Our infrastructure has to be hardened against major security lapses, such as the September 11th highjackings. We must crack down on the domestic funding of terrorism. We need to strengthen safeguards against the theft, manufacture, and sale of biological and nuclear agents, and the equipment needed to weaponize them. Terrorists needed to be rooted out, prosecuted, and punished.

We need to address the causes of terrorist hatred.

Why do so many in the Middle East resent us? Some perceive that our policy towards the region continues the oppression of the Islamic by the Christian world. They observe that those countries listed as state sponsors of terrorism are almost exclusively Muslim nations. Those Muslim countries we count as our friends are usually authoritarian and repressive Arab regimes. We prop up with our power dictatorial Arab regimes that repress the majority of Arabs. We support Israel, a kindred democracy. Israel is embroiled in conflict with Arab regimes and its own Palestinians – conflicts not of Israel's making alone. All of this leads some Muslims to perceive, erroneously, that our policies and power are targeted against them. John Kennedy noted in 1951 what remains true today: we have failed to deal with these perceptions by messaging or action. The rough edges of our foreign policy breed resentment of us. Propaganda of the Bin Laden variety nurtures that resentment into hatred.

Military action abroad will not deal with terrorism at home. Canadians propose to do that with the highly controversial Bills C-36 and C-42. Some have defended these measures as «human rights legislation», arguing that they protect our most basic rights to life and security, which terrorism threatens. This is turning language upside down. C-36 is an awesome intrusion into liberty. It derogates from the fundamental legal principle that ordinary citizens are under no legal obligation to assist the state in criminal investigations, a task that is the responsibility of the police; (Shaffer, p. 200). C-36 allows police to detain suspected terrorists without charge for up to a year. Powers of arrest without warrant are extended to situations where the police believe it would be necessary to prevent the commission of terrorism (s.83.3(4)). Suspects can be investigated by police and compelled to talk – investigations where they may be implicated. They may also be brought before a judge and forced to answer questions on pain of fine and/or imprisonment (s. 83.28). Such powers fly in the face of the right against self-incrimination and the right to silence. These rights are fundamental constitutional commitments in the democracies. They have hitherto been strenuously protected in Canada by judicial elaboration of section 7 of the *Canadian Charter of Rights and Freedoms.*

C-36 allows private communication to be intercepted without judicial authorization. The Canadian security apparatus can listen on conversations of Canadian citizens and track correspondence to or from a location outside Canada. Where judicial authorization is obtained, wiretap periods are extended from 60 days to 1 year. Secret evidence can be used against individuals. The Attorney General is empowered to issue certificates that prohibit the disclosure of information on the grounds of «protecting international relations» or «national security» (s. 38.13). These grounds are vague and difficult to con-

The truth is Canada is unlikely to exert overwhelming influence in decisions to extend the military campaign to other zones. We are not a major power, and cannot strut as if we were. We should concentrate our efforts where we can make a difference.

trol post-facto in the courts.. The disclosure of information prohibitions override the *Access to Information* and *Privacy Acts*. These statutes are fundamental pillars in the democratic edifice; they protect the essential democratic machinery of public accountability and the right to privacy; (Cotler, p. 125).

The potential incursions into the citizen's privacy are worrisome. Respect for the individual's privacy is necessary for the achievement of personal autonomy. Without privacy, citizens would become slaves to public opinion and social pressures. It is in our private lives that we can think or act outside the box of sometimes stultifying social convention – where desire is whispered, beauty born. These deep sources of the self may are not fit for public consumption, but free people recognize that they are the foundation of what gives life depth and meaning. Our Supreme Court helped us to understand that «privacy is at the heart of liberty in a modern state;» (*R. v. Dyment*, [1988] 2 S.C.R. 417 at p. 427).

C-36 shrinks the zone of private life by allowing the state increased scope for wiretapping. We have to recognize the cost of these intrusive measures and the direction in which they go. Free people have to resist creating a society patrolled by thought-police. The cost of increased wiretapping is the sense in greater areas of the citizenry that «they are listening,» greater self-censorship, less private space. The risks of advancing towards thought control were described by U.S. Supreme Court Justice Louis Brandeis as long ago as 1928, when he commented that

> *«The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government [...] will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions;» (Justice Brandeis, dissenting in Olmstead v. U.S., 277 U.S. 438 (1928)).*

C-36 provides a definition of terrorism similar to that found in the United Kingdom *Terrorism Act*. That *Act* was designed around the Northern Ireland question. There is no comparable context in Canada. The definition is also outdated in that it addresses a form of terrorism that is based on intimidation and coercive diplomacy. This runs at a tangent to the «war paradigm» inhabiting the mentality of modern terrorists. C-36's definition of terrorism is vague and liable to discriminatory application. This problem from the difficulty and lack of consensus regarding the meaning of the term «terrorist». The Senate Special Committee on Terrorism and Public Safety identified some 109 definitions of terrorism. The fluidity of the term 'terrorist' concentrates power in the bureaucracy to determine who is a terrorist, inviting the use of ethnic stereotypes and discriminatory application, particularly in the current racially-charged climate.

C-36's definition of terrorism is unnecessarily vague. It talks about acts or omissions committed in part for political, religious or ideological objectives with the intention of intimidating sections of the public and causing damage to health, safety or property. This concentrates too much power in the bureaucracy to determine what acts are sanctionable. A statement such as «Do not vote PQ or you will risk a substantial civil conflict», for example, may be deemed terrorism under this definition. The broad sweep of the definition ignores the fact that public protests are very frequently accompanied by the commission of unlawful acts, including civil disobedience, property damage or trespass. It is hard to see that free speech activists who trash the office of a University official deserve the label of «terrorists», with all the stigma that it entails.

Another problematic part of the definition relates to interference with «an essential service, facility or system», an inclusion that actually goes beyond what is covered by the UK *Terrorism Act* (s. 83.01(1)(b)(ii)(E)). This could mean that various forms of protest, such as road blockades by Aboriginal protesters, become terrorist activity. The definition does not distinguish between terrorist activity and legitimate acts of resistance. The commentators have shown how icons such as Nelson Mandela or Louis Riel could be classified as a terrorist under this Bill. Both led groups that engaged in violent resistance to repressive state policies.

Bill C-36 incorporates Bill C-16, the *Registration of Charities Act*, which provides that groups accused of sponsoring terrorism may be stripped of their charitable, tax-exempt status.

(Bill) C-36 is an awesome intrusion into liberty. It derogates from the fundamental legal principle that ordinary citizens are under no legal obligation to assist the state in criminal investigations.

CSIS or the RCMP are allowed to use classified intelligence to inform the government of evidence that a charity is raising money for terrorists. Once the charity is deregistered, the case is reviewed by a federal court judge in private. Details about the classified information used may be excluded. Charities have no due diligence defence for funds that mistakenly end up with groups deemed to be terrorist. This is problematic because many charities operate in politically unstable regions of the world, where careful delivery and monitoring of funds and/or supplies can be difficult. Unduly limiting the work of these charities will stymy their mission of helping to alleviate poverty and lack of education – conditions where terrorism breeds (Duff, p. 331).

C-36's definition of terrorism will impact on other legislation that deals with terrorism but does not define it. This includes Bill C-11, Canada's new immigration legislation. Clause 34(1)(c) of C-11 renders inadmissible to Canada those permanent residents and foreign nationals who engage in acts of «terrorism». The wide definition of C-36 will likely be read in here, vesting huge discretionary power in the bureaucracy. C-11 already has problems in this regard: clause 43 allows for a definition of terrorism to be created by regulation, without any requirement for parliamentary review. C-36 complicates the problem.

Bill C-36 provides for creating a list of terrorist groups, and criminalizes membership in them. This has raised concerns that people will be deemed guilty by simple association, rather than by the commission of actual criminal acts.

Worst of all, C-36 is unlikely to be effective. Our most important vulnerability is lack of intelligence. C-36 is not responsive to that problem. C-36 is tough, but not where needed. It seems to be doing something, but not what needs to be done. And it has potential to undermine our free society.

Bill C-42 raises similar concerns. Clause 260.1(1) gives the Defence Minister authority to order the creation of temporary «military security zones». These zones can be established if, in the Minster's opinion, they are necessary for «the protection of international relations or national defence or security» – grounds similar in vagueness to those that allow for prohibiting the disclosure of information under Bill C-36. Under clause 260.1(5), «any authorized person» is empowered to remove forcibly any «person found in a military security zone without authorization, and any...thing under the person's control».Who are these authorized persons? C-42 does not say. The Minister need not consult Parliament before creating a 'military security zone'. Nor is there any requirement for an emergency before such an order can be made. The extent of the discretion conferred, coupled with the vagueness of the provision, has potential for broad and abusive application. This threatens the structure of constitutional liberty, which will be suspended within these security zones.

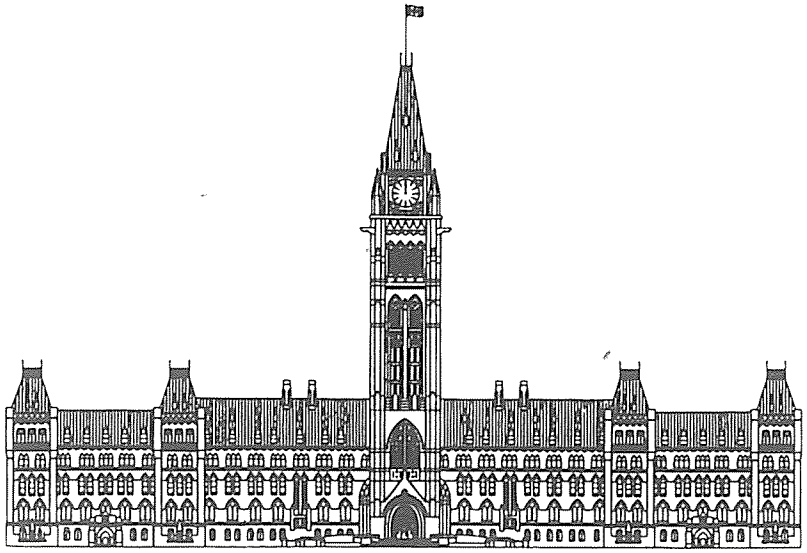
How does C-42 address these concerns? Subsection (2) (a) - (d) lists those properties in relation to which a military security zone may be designated. These include any property, place or thing «that the Canadian Forces have been directed to protect in order to fulfil a duty required by law». This opens the Bill up to potentially unlimited application. The designation of any property as a military security zone under C-42 would itself create the condition of «a duty required by law»; (www.savedemocracy.ca). Court control of these broad ministerial powers is limited and theoretical. Clause 260.1(9) relieves government against accountability because «no action for loss, damage or injury lies by reason only of the designation of a military security zone or the implementation of measures to enforce the designation».

It is hard to see that egregious application of these extraordinary powers will be tempered by the Canadian Charter of Rights and Freedoms. The fact is that the complexity involved in measuring risks to national security and the effectiveness of counter-terrorism practices is in most cases beyond the capability of the courts.

There is a long-term danger that the executive branches of government may grow accustomed to using the powers conferred to them by these Bills (Gross, p. 50). This might mean that exercising these powers might someday become the norm rather than the exception. The broad scope of these powers may serve to legitimize previously-used emergency measures that are less-drastic, but nevertheless intrusive.

It is hard to see that egregious application of these extraordinary powers will be tempered by the *Canadian Charter of Rights and Freedoms.* The fact is that the complexity involved in measuring risks to national security and the effectiveness of counter-terrorism practices is in most cases beyond the capability of the courts. Quite properly, courts view security decisions of the executive with considerable deference, regarding the executive as more qualified to decide security matters (Stewart, p. 229). Even if a *Charter* right is found to be violated, courts are likely to relax the conditions for justification under section 1 of the *Charter*, when confronted with a government plea of 'national security necessity'.

It is hard in these anxious times to sound notes of caution. The threat of mass destruction is real. Nevertheless, we need to focus on and calculate our interests carefully. We need to communicate better who we are to the Muslim world. We need to deepen our diplomatic contacts and shared interests with moderate elements. We need better sources of intelligence. We need to prepare for possible military action, implement modern counter terrorism measures and harden our infrastructure against terrorist attack. We need to balance domestic espionage with our commitment to constitutional liberty. Most of all, we have to find a proper equilibrium between security and the freedom that makes us the envy of all.



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WHERE JUDGES FEAR TO TREAD:
The Analogous Ground of Poverty?

BY Derek J. Bell

POVERTY AND THE CHARTER – CAN THE FEDERAL OR PROVINCIAL GOVERNMENTS TREAT CANADIANS AT DIFFERENT INCOME LEVELS DIFFERENTLY? CAN WEALTHY CANADIANS BRING A *CHARTER* CHALLENGE TO THE *INCOME TAX ACT*, BECAUSE IT IMPOSES A HIGHER TAX RATE ON HIGHER INCOMES? CAN INDIVIDUALS IN A POORER COMMUNITY CHALLENGE THEIR LOCAL GOVERNMENT FOR FAILING TO MAINTAIN THEIR ROADS AT THE LEVEL OF A RICHER COMMUNITY? DO ALL CANADIANS HAVE A RIGHT TO ATTEND UNIVERSITY OF TORONTO'S LAW SCHOOL? AND, PERHAPS MOST IMPORTANTLY, DO GOVERNMENTS HAVE CONSTITUTIONAL OBLIGATIONS TO PROVIDE SOCIAL SERVICES TO POORER CANADIANS?

These are not easy questions, and whenever they have been posed to Canadian courts, the courts have tended to answer them in the negative. The reasons are likely rooted in policy: the courts fully understand the political ramifications of extending constitutional protection to groups on the basis of income status, especially if the *Charter* would impose a positive obligation on the government to provide certain services to low-income groups.

The question has most recently been posed to the Supreme Court in *Gosselin v. Quebec*, a case that asks whether it was unconstitutional for the government of Quebec to require persons from the age of 18 to 30 to work or receive training in order to receive social assistance. The thought of an appointed judiciary forcing fiscally-conservative governments to provide social services is perceived to be abhorrent to some: one Calgary journalist described Gosselin as a hero "to hundreds of thousands of chronically unemployed Canadians lying on their couches, waiting for the cheque to arrive, [who will] raise a beer to her name if she claims supreme victory". To others, recognizing a constitu-

tional right to a certain standard of living is no more than a recognition of Canada's existing obligations under international law.

I propose to examine the legal framework for a claim to constitutional recognition of rights by low-income individuals, and assess whether such rights would be available under Canadian law. The conclusions I reach are based on precedent, policy and pragmatism: it is unlikely that section 15 provides constitutional protection on the grounds of 'income status', and for the Supreme Court to rule otherwise would require a substantial re-engineering of the Court's equality jurisprudence. And, perhaps most importantly, the Court is fully cognizant that it has no legitimate role in reviewing the budgets of elected governments; for this reason alone, the Court would be unlikely to find "poverty" as an analogous ground under the *Charter*.

[T]he courts fully understand the political ramifications of extending constitutional protection to groups on the basis of income status, especially if the Charter would impose a positive obligation on the government to provide certain services to low-income groups.

"GROUNDS-BASED" RIGHTS UNDER THE CHARTER

The equality rights contained in section 15 of the *Charter* are both general and specific. On the one hand, the rights guaranteed are very broad: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." However, the drafters realized the dangers in leaving the text this broad, and consequently gave the judiciary some direction by adding: "and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Two aspects of section 15 are immediately apparent. First, the "enumerated" grounds of distinction relate to a characteristic, rather than a group: it refers to the characteristic "age" rather than the group "elderly people". Section 15 does not cloak groups of Canadians with constitutional protection; rather, it prevents governments from discriminating against Canadians on the basis of certain physical or otherwise significant characteristics. Drafted in this way, the protection would extend to the young as to the old, men as to women, whites as to blacks. In this way, section 15 was drafted to be the height of egalitarianism, rather than a tool of mobilized groups of people.

Second, the drafters did not close any doors. The list of constitutionally impermissible grounds of discrimination was not closed; rather, the enumerated list is only provided for "particularity". Employing age-old techniques of statutory interpretation, the Supreme Court quickly realized that this same constitutional protection should be extended to laws that differentiate in *other* ways that are analogous to the enumerated list. If the drafters intended to *only* extend protection to these particular groups, why would they have used the words "in particular"? The text demands a broader interpretation.

The Supreme Court has been unwavering in its willingness to find "analogous" grounds, under this broader interpretation, even where such analogous grounds were expressly rejected by the drafters of the *Charter*. Notwithstanding a clear vote by the drafters to remove "sexual orientation" from the enumerated list, the Court found in 1995 that sexual orientation constitutes an analogous ground of discrimination. Since then, a handful of other analogous grounds, ranging from the obvious (marital status) to the curious ("aboriginality-residence") have been identified by the Court.

ESTABLISHING AN ANALOGOUS GROUND, 1980-1999

The analytical importance of identifying an enumerated or analogous ground of discrimination has varied over the past twenty years. At one point, it could have been strongly argued that, to find an "enumerated or analogous ground of discrimination" was the end of the analysis: if the Court found that a government treated a claimant differently, and that such differential treatment was based on an enumerated or analogous ground of discrimination, section 15 would have been infringed. It was sometimes said that legislation did not violate the *Charter* if such differentiation "fell outside the scope of the enumerated (or analogous) ground of protection". As such, the courts tended to analyse a wide range of factors to determine whether a type of differentiation constituted an "analogous ground."

To many, the Supreme Court's jurisprudence on equality was bewildering: one Federal Court of Appeal judge lamented, in *Lavoie v. Canada*, "I have always felt an intellectual malaise when confronted with a case involving section 15 of the *Charter* and admit to having always had difficulty mastering the teachings of the Supreme Court." Justice Marceau was not alone, and after almost a decade of division on the proper analytical approach, the Court cleaned up its equality jurisprudence in 1999, in *Law v. Canada*.

In *Law*, the Supreme Court clearly made a finding of an "enumerated or analogous ground" to be a necessary step in the analysis, but not the only step. Additionally, the Court required a claimant to show that such differential treatment, based on an enumerated or analogous ground, constituted an affront to his or her "human dignity", by analysing a wide range of "contextual factors". In *Corbiere v. Canada*, the Court ruled that "[t]he enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case."

What then, was necessary to find an "analogous ground"? In *Corbiere*, the Court cast aside decades of jurisprudence requiring a lengthy analysis of various factors to locate an analogous ground (most of these factors now being subsumed into the "dignity" analysis), and ruled quite simply:

> *It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.*

IS POVERTY "IMMUTABLE"?

The underlined passage is key for answering the question about whether "poverty" constitutes an analogous ground of discrimination (it might be noted that the proper term would be "income status", as section 15 tends to be neutral with respect to the enumerated grounds, as discussed above). It would be a decidedly sad commentary on the human spirit if we were to conclude that the poor are forever doomed to their fate; the "American Dream" speaks to the contrary. Simply stated, it is difficult to say that poor people *cannot* change their economic status (that said, as discussed below, L'Heureux-Dubé J. has stated as much in one recent decision). However difficult it may be, and nobody can dispute that it is very difficult, it is certainly not impossible, as it could be said for race, national origin or sex.

IS POVERTY "CONSTRUCTIVELY IMMUTABLE"? GOSSELIN V. QUEBEC

What then, of the underlined passage: is "poverty" a characteristic which the government has no legitimate interest in expecting individuals to change? It is this question that has been posed to the Court in *Gosselin v. Quebec,* a decision that is expected from the Supreme Court shortly. *Gosselin* involved a challenge to Quebec's social assistance regulations, which required persons from the age of 18 to 30 either to work or take employment training in order to receive welfare benefits. Gosselin challenged the legislation on a number of constitutional grounds, including equality grounds. Her action was denied at the Quebec Superior Court and at the Court of Appeal, although one judge of the Court of Appeal wrote a powerful opinion in dissent, relying on a wide range of international law materials.

[I]s "poverty" a characteristic which the government has no legitimate interest in expecting individuals to change?

It might be immediately asked how Gosselin's claim could have anything to do with establishing an "analogous ground of poverty", as the real differential treatment here was on the basis of age – people under the age of 30 must work or take training to receive training, while people over the age of 30 do not have to work or take training. The differentiation, it would seem, is on the basis of age, not on income status. Gosselin, aided by the *Charter* Committee on Poverty Issues ("CCPI"), argued at the Supreme Court, among other things, that the issue was the

failure of the Quebec government to provide a certain level of assistance to a group of people who were poor: in other words, the *Charter* imposed a positive obligation on the Quebec government to meet certain needs, and the failure to do so engaged this group of poor people's dignity interests. CCPI put the issue in its factum as follows:

> *The formal or differential treatment is between those under thirty in need of social assistance, who are denied the higher rate, and those thirty and over who receive it. However, the substantive violation of equality – "the more fundamental one" – arises from the failure to provide an adequate benefit to the younger group.*

Gosselin and CCPI argued that the interests engaged were fundamental to Gosselin's "human dignity", and section 15 was thus engaged. However, what of that pesky first step – the finding that poverty constitutes an "analogous ground"? Again, can it truly be said that the government has "no legitimate interest in expecting us to change [our economic status] to receive equal treatment under the law"? We might understand how the State has no interest in telling us what religion to practice, or

what sexual orientation to have (although others may disagree with the latter), but can it equally be said that the State has no interest in requiring individuals to change their economic status to receive equal treatment?

The answer to this question is unlikely to be answered by the Supreme Court in *Gosselin*, as the case probably should be resolved on the "age" grounds of distinction (the legislation makes an active differentiation on the basis of the age, and the Court has consistently stated that one must look at the actual basis of the differentiation). Or, it is possible that the Court might resolve the question by only considering the Quebec *Charter*, which Gosselin has also raised. However, if the question were to be answered, it is difficult to see (without a substantial facelift to the *Corbiere* requirement of "immutability" or "constructive immutability") how poverty could constitute an analogous ground.

Simply stated, there are very good arguments that the government does have a legitimate interest in expecting Canadians to change their economic status in order to receive equal treatment under the law. Unless one is willing to romanticize poverty, it might be safely said that it is a reasonable governmental objective to eliminate poverty: international treaties have been signed in furtherance of that goal. It might also be said that it is reasonable to use the traditional tools of governmental action, namely, legislation that encourages or discourages certain behaviour, to help eliminate poverty. And, if the government chooses to enact legislation that discourages poverty, then such should be a laudable achievement.

Perhaps more directly in the judiciary's mind on this issue, it might be said that the very heart of politics is the allocation of resources, and the encouragement, and discouragement of certain behaviours. Smokers pay substantially more tax on cigarettes than on a can of peaches, because the government seeks to discourage smoking while remaining indifferent on the consumption of peaches. Similarly, commuters pay less than fair market value for the cost of taking a subway to downtown, because the government seeks to encourage that behaviour and discourage driving. Politics is all about making these types of choices and it is said that the courts have neither the institutional competence nor the political legitimacy to make these choices – or to second-guess them. In a case that was later overturned (on other grounds), Mr. Justice Sharpe reflected:

> *There are many forms of injustice in our society, particularly those resulting from uneven distribution of wealth, that cannot be remedied by the courts through interpretation of the Charter and that must be remedied through the legislative process.*

[I]f the question were to be answered, it is difficult to see (without a substantial facelift to the Corbiere requirement of "immutability" or "constructive immutability") how poverty could constitute an analogous ground.

In *Egan v. Canada*, Sopinka J., writing for himself, similarly stated:

> *[G]overnment must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all.*

On the other hand, it could be argued that it is facile to consider the "analogousness" of poverty in the abstract in this manner; rather, it is necessary to look at the particular distinction first. In other words, to determine whether the government has a "legitimate interest" in asking a person to change their status, one must first ask *why* the government is so asking. Therefore, it might be said that imprisoning an individual for being poor does not advance a 'legitimate interest' (a candidate for the leadership of the Ontario Conservative party advanced this idea recently). It could be said that such actions do not advance any legitimate interest in eliminating poverty, but rather constitutes *ex post facto* punishment for being poor (of course, such action would more likely engage section 7 of the *Charter* in any event).

However, the Supreme Court has quite clearly stated that, once a ground is found, it shall always remain an analogous ground: *Corbiere* states that a ground remains a "constant marker". Therefore, it is necessary to look at the question in the abstract, and ask, whether income-status constitutes an immutable, or "constructively immutable" characteristic. Would governmental activity that differentiates between different income groups give an immediate "whiff" of illegitimacy? If governmental differentiation on the basis of economic status constitutes an analogous ground, the door is opened for such persons to bring s. 15 claims, provided that such differentiation is also shown to be discriminatory.

The question has yet to be resolved, as the Court recently ducked the question in *Dunmore v. Ontario*. In that case, all but two members of the Court refused to consider the equality challenge brought by (mostly poor) agricultural workers who were excluded from a collective bargaining regime, instead dealing with the issue under the freedom of association provision of the *Charter*. As for the remaining two members of the Court, L'Heureux-Dubé J., writing for herself, found that agricultural workers (not "poor people") were an analogous "group", whereas Major J., writing for himself, squarely ruled that economic disadvantage does not constitute an analogous ground. Like the *Dunmore* case, it is unlikely that *Gosselin* will resolve the question either.

However, as the Court has drafted the framework for section 15 cases, it seems very difficult to establish poverty as an analogous ground, for the reasons stated above. Whether this difficulty arises as a mere consequence of the analytical framework, or whether the analytical framework was designed to create this difficulty, is a matter best left to be debated by legal historians.

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THE IMPACT OF THE CHARTER on Multiculturalism

BY Catherine Christopher

AN UNDERSTANDING OF THE CANADIAN POLITICAL LANDSCAPE INVOLVES A BALANCING OF THE COMPETING AND, AT TIMES, DIAMETRICALLY OPPOSED, IDENTITIES AND INTERESTS. THESE COMPETING IDENTITIES AND INTERESTS INCLUDE THE QUEBECOIS, ENGLISH SPEAKING CANADIANS, FRENCH SPEAKING CANADIANS, ABORIGINAL PEOPLES AND THOSE WHO CONSIDER THEMSELVES TO BE OF OTHER ETHNIC ORIGIN, AND WHO ARE AT TIMES REFERRED TO AS THE DIVERSE COMMUNITY. THE BALANCING OF THESE IDENTITIES AND INTERESTS IS MORE APPARENT IN SECTION 27 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (THE "CHARTER") THAN IN ANY OTHER SECTION OF THE *CHARTER*, FOR SECTION 27 HAS SERVED TO ADVANCE THE POSITION OF A NUMBER OF COMPETING INTERESTS IN A VARIETY OF SITUATIONS. IN THE PROCESS, IT HAS CREATED ALLIANCES WHERE HISTORICALLY NONE WOULD EVER HAVE BEEN CONTEMPLATED, SUCH AS THE ALLIANCE BETWEEN MINORITY LANGUAGE EDUCATION RIGHTS AND MULTICULTURALISM OR THE ALLIANCE BETWEEN ABORIGINAL JUSTICE INITIATIVES AND MULTICULTURALISM.

Section 27 states that the *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada. Section 27 is a seemingly insignificant section in the *Charter*, included without the tremendous debate and anticipation that accompanied, for example, section 7 or section 15. Initially, section 27 was criticized and downplayed. However, over the past twenty years, it is arguable that section 27 has fulfilled its mandate. The presence of section 27 in the *Charter* has prompted the inclusion of a constitutional value of multiculturalism in subsequent proposals for constitutional reform, and it has facilitated federal and provincial legislation addressing multiculturalism. Section 27 has also brought together a diverse and seemingly unrelated cast of litigants including pastors, penitents, Athapaskan Indians, a British born lawyer, retail book, video and pharmaceutical stores, Christian and non Christian parents and those who seek to carry ceremonial daggers in provincial court to shape various *Charter* rights.

This article will discuss the impact of the *Charter* on multiculturalism since 1982. Preliminary to this, however, it is important to address the historic origins of multiculturalism and how multiculturalism came to be included in such a significant document as the *Charter*. Within the context of its historic origins, multiculturalism can be understood as an ideology that replaced the norm of anglo conformism, (Palmer, H., 1976) a federal policy and, ultimately, as a constitutional value. For the greater part of Canada's history, anglo conformism provided the benchmark, defining English speaking Canadians. This was a beneficial situation for those who really did have British origins. However, for those people who had other ethnic origins, such as people of colour, the situation was not positive. The history of Canadian civil liberties is littered with incidents of overt racism, such as the

$500.00 head tax that was imposed on Chinese immigrants in 1903 and the arrest, dispossession and internment of the Japanese Canadian living on the West Coast in the 1940s.

There were a number of intangible factors that contributed to the weakening of the strictures of anglo conformism and, ultimately, the recognition that Canada had evolved into a pluralistic society. Internationally, these factors included the wide spread horror over the concentration camps and other atrocities that arose out of racism during the Second World War and the American struggle over race relations and civil liberties. In Canada, the diverse community was growing in numeric strength and this was accompanied by increasing economic and political power.

As a result, when former Prime Minister Lester B. Pearson created the Royal Commission on Bilingualism and Biculturalism in 1964 to examine conflict between the French and English in Canada, he also directed the Royal Commission to consider the contribution of "other" ethnic groups in Canada. Book IV of the Report of the Royal Commission on Bilingualism and Bilculturalism, entitled *The Cultural Contribution of the Other Ethnic groups*, was released in 1969. Book IV made a number of recommendations, such as the recommendations that the teaching of languages other than English and be initiated in primary schools. Almost 20 years later, this recommendation was to surface in the form of the heritage languages rights provisions of the federal *Multiculturalism Act*.

In 1971, Prime Minister Pierre Trudeau introduced the policy multiculturalism to the House of Commons. The objectives of the official policy of multiculturalism were as follows: to provide financial assistance to ethnic groups to aid in growth and development; to offer assistance to members of ethnic groups to overcome barriers to full participation in Canadian society; to promote exchanges between ethnic groups to strengthen national unity; and to assist immigrants to Canada to acquire one of Canada's two official languages. A senior government official expressed the view that the government was concerned by the potentially unstable dichotomy posed by bilingualism and biculturalism, and hoped that the concept of 'unity in diversity' would provide a stabilizing factor. (Jaworsky, 1979, p. 57)

The reaction to the official policy of multiculturalism was mixed. The official policy of multiculturalism was equated with a policy of Balkanization by *Le Droit*. (October 9, 1971) Robert Bourassa, then premier of Quebec, stated that multiculturalism: "seems scarcely compatible with the facts of Quebec, where the predominant population groups is linguistically and culturally French, where a large minority is linguistically and culturally English, and where there are many minorities having other linguistic and cultural origins. In a word, with the federal government assuming responsibility for all the cultures which are to be found in Canada, Quebec must take on within its own territory the role of prime defender of the French language and culture." (Palmer, H., 1975, p. 152)) Outside of Quebec, the reaction to the official policy of multiculturalism was mixed. For example, the concern was expressed that the policy was mere window dressing that would encourage folk dancing and Easter egg painting at the expenses of the public purse. Despite these criticisms, the federal government created the position of Minister of State for Multiculturalism under the auspices of the Secretary of State. The Multiculturalism Directorate is responsible for carrying out policy initiatives at the direction of the Minister of State for Multiculturalism, such as program analysis. Subsequently, a number of provinces introduced official policies that recognized and facilitated the existence of multiculturalism within that province.

Thus, there were a number of developments, such as the weakening of Anglo conformity and the emergence of an official policy of multiculturalism, that provided a background for section 27 of the *Charter*. A review of the literature and reports surrounding the origins of the *Charter* indicate that initial drafts of the *Charter* did not include any reference to multiculturalism. However, after a number of submissions to the Special Joint Committee on the Constitution by organisations such as the Polish Canadian Association or the German Canadian Council of Kitchener Waterloo, section 27 was included in the final draft. Section 27 was criticized by a number of commentators. Some were concerned that the inclusion of section 27 was an overt political move intended to appease ethnic groups and garner their vote. This may have been the case; however, there were political undertones and covert political bargaining in any number of other proposed constitutional amendments at that time. This did not lessen the wisdom of including those sections in the constitutional reforms that were passed. Other commentators expressed concern over the wording of section 27. Section 27 is an interpretive section only. It confers no positive or absolute rights; there is no right to be or to exist in a multicultural state. The concern expressed was that, absent any substantive right to multiculturalism, section 27 would carry no weight. For example, the German Canadian Council of Kitchener Waterloo urged the Special Joint Committee to adopt the following wording: "All Canadians are guaranteed the right of choice in the preservation and development of cultural and linguistic heritage" which is considerably stronger than an interpretive statement regarding the enhancement and preservation of one's multicultural heritage. *Charter* scholars have now had the benefit of 20 years of case law to assess whether section 27 as an interpretive

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aid has been less significant than section 27 would have been as a substantive section conferring rights. With the benefit of the past 20 years, it can not reasonably be said that section 27 as an interpretive aid has carried no weight and has not had a significant impact on Canadian society. This is clear from a brief review of the case law.

Section 27 does not confer any substantive rights, (*Roach v. Canada* (1994) 113 D.L.R. (4th) 67(Ont. C.A.)) nor does it apply to private litigants. (*Saleh v. Reichert* (1993) 104 D.L.R. 384) Section 27 has been used in the interpretation of fundamental freedoms, including freedom of conscience and religion in section 2(a) and freedom of thought, belief, opinion and expression in section 2(b); equality rights in section 15; minority language education rights in section 23; and in certain legal rights, such as the right to an interpreter in one's own language. Section 27 has, in theory, the potential to advance claims for Aboriginal justice initiatives; however, Aboriginal peoples do not consider themselves, rightly, to be another ethnic group, and have not relied on section 27.

With respect to fundamental freedoms, section 27 was argued in conjunction with freedom of conscience and religion in section 2(a) in *R. v. Videoflicks*. ((1994) 5O A.C. 1) This case involved a challenge to the Sunday closing legislation, which mandated that businesses be closed on Sunday. This was offensive to those faith groups that did not adhere to the Christian understanding that Sunday was a day of worship but rather considered Saturday, for example, as a day of worship. The Ontario Court of Appeal stated that: "a law infringes freedom of expression if it makes it more difficult and costly to practise one's religion, [and this] is supported by the fact that such a law does not help to preserve and certainly does not serve to enhance or promote that part of one's culture which is religiously based." (at p. 25) *R. v. Videoflicks* has been applied in other decisions striking down Sunday closing laws, including *R. v. Big M Drug Mart*, ((1985) 1 S. C.R. 295 (S.C.C.)) *R. v. W. H. Smith* ((1983) 5 W.W.R. 235 (Alta. P. C.)) and *Edwards Books and Art Ltd. v. The Queen*. ((1987) 35 D.L.R. (4th) 1 (Ont. C.A.)) However, in *Re Zylberberg et al*, the court refused to find that Jewish and other non Christian school children's right to freedom of religion had been compromised by the *Ontario Education Act*, which compelled all children to read the Lord's Prayer. (55 O.R. (2d) 749 (Ont. H. C. J.))

Elsewhere, in *R. v. Gruenke*, the accused person argued on appeal from her conviction for first degree murder that her confession to her pastor and a lay counsellor at the Victorious Faith Centre Church was privileged and should not have been admitted into evidence, relying on the established rules of evidence. ((1991) 67 C.C.C. (3rd) 289 (S.C.C.) The Supreme Court of Canada called for a case by case analysis, as follows:

In applying the Wigmore criteria to particular cases, both section 2(a) and section 27 must be kept in mind. This means that the case-by-case analysis must begin with a "non-denominational" approach. The fact that the communications were not made to an ordained priest or minister or that they did not constitute a formal confession will not bar the possibility of the communications being excluded. All of the relevant circumstances must be considered and the Wigmore criteria applied in a manner which is sensitive to the fact of Canada's multicultural heritage. This will be most important at the second and third stages of the Wigmore inquiry. (at pp. 305 - 206)

Section 27 has been argued in conjunction with various legal rights. In *Hothi v. R.*, a Sikh person accused of assault sought to carry his kirpan, which is a four inch ceremonial dagger, into the courtroom. ((1985) 3 W.W.R. 256 (Man. Q.B.)) The judge refused to allow his application to carry the kirpan into the courtroom. On appeal, this decision was upheld by both the Manitoba Court of Queen's Bench and the Manitoba Court of Appeal, on the basis that the denial was an infringement that was justified by section 1 of the *Charter*. In *R. v. Fatt*, the accused person was an Athapaskan Indian who argued that his right to be tried for murder by a jury of his peers under the *Criminal Code* meant that the jurors who all speak his dialect. (*R. v. Fatt* (1986) N.W.T. 388 (S.C.C.))This argument was accepted by the Supreme Court of the North West Territories, which stated that section 27 was a mandate for; "the preservation of the pluralistic society and especially, it would seem in he north, with vast distances and vast differences. It would direct us not to use the judicial system, as it were, as a tool for integration but rather to recognize as best we can the distinct culture and community of this unique Chipewayan group of the Dene." In *R. v. Pinch and R. v. Kent, Sinclair and Gode*, the accused Aboriginal persons argued that based on section 7 and section 27, they had a right to a jury comprised of the same race, culture and language group. (*R. v. Kent, Sinclair and Gode* (1986) 21 C.R.R. 372 (Man. C.A.)) This was rejected by the Manitoba Court of Appeal on the basis that to do so would be contrary to the multicultural heritage of Canada and would result in the imposition of inequality. Section 27 has the potential to assist in the development of Aboriginal justice initiatives, although Aboriginal peoples resist any interpretation that places them within the multicultural fabric of Canadian society.

For the some of the same reasons, the relationship between official language rights enumerated section 16, minority language education rights enumerated in section 23 and section 27, is a strained one. Commentators from Quebec did not respond in a positive manner to the emergence of the official policy of multiculturalism or the inclusion of section 27 in the *Charter*. However, for those isolated and remote French language communities outside of Quebec, the situation is dire. Studies of French language communities point to such significant assimilation rates of 43.6% in Manitoba, 49.6% in Saskatchewan and 51.2% in Alberta. In *Re Societe des Acadiens du Noveau-Brunswick v. Association of Parents for Fairness in Education*, Wilson, J., in dissent, recognized this strained relationship, as follows: "I do not believe that section 27

was intended to deter the movement towards the equality of status of English and French until such time as a similar status could be attained for all the other languages spoken in Canada. This would derogate from the special status conferred on English and French."

Section 27 has historically been argued in conjunction with section 23 to advance minority language education rights; however, the case law is clear that official language rights and minority education language rights are not easily reconciled with Canada's multicultural heritage. In *Mahe v. Alberta*, applicant parents sought the right to establish and supervise French language schools in Alberta. In granting the parents the right to establish and supervise schools, the Supreme Court of Canada commented on the differences between section 23 and section 27, as follows:

Section 23 provides a comprehensive code for minority language education rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in section 23. Beyond this, however, the section is, if anything, an exception to the provision of sections 15 and 27 in that it accords these groups, the English and the French, special status in comparison with all other linguistic groups in Canada. (1990 1 S.C.R. 342 at p. 369 (S.C.C.))

In the 1996 Supreme Court of Canada decision in *Alder v. Ontario*, section 23 and section 27 of the *Charter* were argued in support of the applicant parent's right to establish their own Christian school systems. ((1996) 3 S.C.R. 609(S.C.C.)) Partly in dissent, McLaughlin, J., (as she then was), addressed the relationship between section 23 and section 27, as follows:

The decision to fully fund public secular schools while denying any funding to independent religious schools (other than the constitutionally mandated funding for Roman Catholic schools) is at base a political decisions. Its objective, the record shows, is to foster a strong public secular school system attended by students of all cultural and religious groups. Canada in general and Ontario in particular is a multicultural, multireligious society. A multicultural, multireligious society can only work, it is felt, if people of all groups understand and tolerate each other. According to the *Shapiro Report* (Report of the Commission on Private Schools in Ontario (1985), submitted in evidence, "the public school represents... the most promising potential for realizing a more fully tolerant society. Children of all races and religions learn together and play together. No religion is touted over any other. The goal is to provide a forum fore the development of respect for the beliefs and customs of all cultural groups and for their ethnic and moral values. (at p. 718)

With respect to legislation, it was only after section 27 of the *Charter* was passed that any legislation addressing multiculturalism came into existence. In 1977, six years after the official policy of multiculturalism was introduced in the House of Commons, there was an unsuccessful attempt to introduce a reference to multiculturalism into the preamble of the *Immigration Act*. This was followed by Bill C-28, entitled *An Act Respecting Multiculturalism*. The Liberals were defeated in the 1984 general election and Bill C-48 was not passed. In 1988, six years after the *Charter* came into force and effect, *An Act for the Preservation and Enhancement of Multiculturalism in Canada*, known as *The Multiculturalism Act*, came into force.

In addition to the federal legislation, a number of provinces have passed legislation intended to facilitate multiculturalism. Legislation such as the Manitoba Inter-Cultural Council Act (Manitoba), the Saskatchewan *Multicultural Act* and the *Department of Culture and Multiculturalism Act* (Alberta), share common features by establishing an administrative framework to facilitate multiculturalism and by facilitating program development through funding and other initiatives.

What has been the impact of the *Charter* on multiculturalism from the perspective of the other ethnic groups, the diverse community whose heritage section 27 was intended to preserve and enhance? Here, it is difficult to measure the impact in any tangible manner. Some diverse communities thrive; some communities falter; identities are retained at the same time they evolve into something not likely contemplated at the place of origin. In terms of practical results, the other ethnic groups may be less concerned in an abstract way with the competing identities and interests of the Quebecois, English speaking Canadians, French speaking Canadians and Aboriginal peoples. However, the position of the other ethnic groups is shaped and perhaps enhanced, whenever section 27 is invoked.

Commentators from Quebec did not respond in a positive manner to the emergence of the official policy of multiculturalism or the inclusion of section 27 in the Charter. However, for those isolated and remote French language communities outside of Quebec, the situation is dire.

In terms of the perception by the other ethnic groups of the impact of the *Charter* on multiculturalism, a cartoon drawn by Frank Cotham in the December 17, 2001 edition of the *New Yorker* may be illustrative. In this cartoon, two old time prospectors are walking together, dressed in period costume and leading mules carrying their packs. One prospector remarks to the other that he out for the gold; he is not really interested in nation building. To an extent, this is representative of the impact of section 27 of the *Charter* on the other ethnic groups.

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