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HUMAN RIGHTS AND THE COURTS IN CANADA

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HUMAN RIGHTS AND THE COURTS IN CANADA

INTRODUCTION

Although universally embraced in principle, the concept of "human rights" evades a precise definition and is subject to a general lack of consensus on how it should be approached. Certainly, the term "right," in and of itself, is confusing. It is sometimes construed as being something natural or inalienable (i.e., possessed simply by virtue of being human). In other instances, it is viewed in a strict legal sense as being something created and therefore, removable or alterable (i.e. by contract or statute) – the right-holder is entitled to something that another has a corresponding duty to provide.

The prevailing contemporary notion of human rights flows from an acceptance of "natural rights" theory as expounded by such liberal philosophers as John Locke. Some generalizations can be made in this regard. Human rights tend to represent individual and group demands for access to wealth and power and for mutual respect. These rights are both legally and morally justifiable, and they apply to all persons simply because they are human beings. Most rights are qualified or limited in some way, usually on the basis that with the privilege of rights comes the responsibility to tolerate the rights of others.

Underlying these generalizations are debates about the precise nature of human rights. There is still the question of whether civil and political rights should take primacy over economic, social and cultural rights.(1) Arguments are ongoing between those who view human rights as purely individual and those who see them as collective or group-based. There are also contentions that too much emphasis is put on individual rights and not enough on relationships or duties to others in the human community. Finally, there is the matter of whether rights are trans-cultural or vary from culture to culture. Obviously, none of these issues will ever be

(1) After the Second World War, it was the inability of the United Nations to reconcile these rights into a single comprehensive human rights covenant that led, instead, to the creation of two covenants: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

resolved to everyone's satisfaction and this, in and of itself, can thwart the advancement of human rights. This may not be inevitable, however. For example, tensions between "universal ethics" and local cultures may always exist, but they need not necessarily be viewed negatively. A positive approach to this issue might be the recognition that universal human rights principles often evolve out of local experiences, beliefs and customs.(2)

The promotion, protection and implementation of human rights are matters of public policy. Controversies about human rights issues, such as those illustrated above, are rarely resolved by applying traditional legal principles. The public policy of human rights has tended to divide rights into four broad categories: (1) political rights, which traditionally include freedom of association, assembly, expression, the press, conscience and religion; (2) legal rights, such as equality before the law, due process of the law, freedom from arbitrary arrest, the right to a fair hearing, and access to counsel; (3) economic rights, which include the right to own property and freedom to contract; and (4) egalitarian rights, such as the right to employment, education, accommodation, facilities and services without discrimination on the basis of race, origin, age or sex etc. Generally, the public policy of human rights has tended to take a hierarchical approach to different categories of rights, and indeed to specific rights within categories. Human rights are commonly priorized as being either fundamental or non-fundamental.

Our perception of human rights is coloured to a large extent by variables specific to time and culture. In the seventeenth and eighteenth centuries, for example, the protection of liberty, security and property was championed in such documents as England's *Bill of Rights*, France's *Declaration of the Rights of Man and of the Citizen* and the U.S. *Bill of Rights*. "Negative rights," showing resistance to state interference or oppression, have been classified as "first generation rights." In the twentieth century, emphasis has been more on the right to self-determination, work, food, clothing and shelter – economic, social and cultural or "second generation rights." Known as positive rights, because their implementation is dependent on state intervention, these collective rights pursue social equalization. First and second generation rights have largely been recognized in international and national human rights instruments; however, they have yet to gain universal acceptance or practical application. Arguably, in an era of massive globalization, there is emerging a third generation of rights – which might go under the

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(2) For more on this point, see Wolfgang Koerner, "Human Rights: Toward A Common Understanding," *Background Paper*, Library of Parliament, Ottawa, 1996.

heading of global solidarity. These include rights to a healthy environment, peace and development and to a fair distribution of wealth and go beyond first and second generation rights. Third generation rights require the interest and co-operation of every element of society (individuals, social and cultural groups, the industrial and economic community, local and national governments and the entire international community).(3)

The evolution of Canada's human rights system has been a mix of the British liberal tradition of relying on ordinary law and elected parliaments, and the American liberal tradition, which places reliance on a written constitution and judicial review. In order to reflect adequately the different sets of mechanisms used to protect human rights in Canada, it is useful to divide the Canadian experience into three time periods.

During the first period, from Confederation to 1960, the federal and provincial legislatures had the primary responsibility for safeguarding the human rights principles inherited from the United Kingdom. The judiciary played only a minor role through its responsibility for upholding the common law principles that had developed to protect these rights. Despite the existence of legal bases for action, the courts and the legislatures both evidenced a general reluctance to address issues of human rights except as a peripheral matter. The second period began with the advent of the *Canadian Bill of Rights* and the enactment of human rights codes at both the provincial and federal level. During this period, the courts were therefore expressly invited by the legislatures to take on a more active role in settling controversial human rights issues. The invitation was, however, basically rejected. It was not until the third period, beginning in 1982 with the *Canadian Charter of Rights and Freedoms*, that the judiciary was accorded the constitutional mandate it had felt was necessary to rule on the substantive validity of legislation, which it now does to ensure compliance with the rights and freedoms granted by the Charter.

FROM CONFEDERATION TO THE BILL OF RIGHTS

At the time of Confederation, it was decided that Canada would adopt the parliamentary form of government that had evolved in the United Kingdom. One of the dominant principles underlying that system was the doctrine of parliamentary supremacy, which

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(3) For greater detail on the generation of rights theory, see Pierre Arsenault, *Human Rights and Canadian Solidarity*, paper prepared for the National Conference on Human Rights and Canadian Solidarity, Human Rights Research and Education Centre, Ottawa, December 1990.

held that the legislative branch of the government could determine the powers of the other two branches: the executive and the judiciary. Canada inherited this principle of legislative supremacy by way of the preamble to the *British North America Act*, now referred to as the *Constitution Act, 1867*. This stated that Canada would have a constitution "similar in principle to that of the United Kingdom." This meant that the Canadian Constitution embraced the elements of the unwritten British constitution, including the notions of the rule of law and parliamentary supremacy. Legislative supremacy could not, however, apply in Canada exactly as it did in the United Kingdom; as Canada was a federal country, no single legislature was supreme. Instead, the federal and provincial legislatures were supreme only within constitutionally designated areas of jurisdiction.

The *Constitution Act, 1867* also made provision for the establishment of a federally appointed judiciary charged not only with the traditional judicial tasks of settling disputes between individuals and interpreting statutes with a view to the intent of the legislators, but with a third task arising out of the new country's federal nature – adjudication on the constitutional division of powers between the federal and provincial legislatures. Thus, at the time of Confederation, the relationship between the courts and the other branches of government was clearly defined. The federal and provincial legislatures made the law, the executive implemented and enforced the law and the judiciary was responsible only for interpreting the law that the others had made and enforced. Moreover, until 1949, the Judicial Committee of the Privy Council in England, rather than the Supreme Court of Canada, served as Canada's final court of appeal.

The *Constitution Act, 1867* makes no specific reference to human rights or fundamental liberties. While section 92(13) accords the provincial legislatures the power to make laws affecting "property and civil rights," there is no reference to any civil rights of individuals. The Act does guarantee some group rights with respect to the establishment and operation of schools by Roman Catholic or Protestant minorities and with respect to the use of the English and French languages; however, it is fair to say that these guarantees saw little in the way of judicial enforcement until quite recently. It was the opinion of some jurists by the beginning of the twentieth century that the preamble to the Act bestowed on Canadians the benefits of the tradition of civil liberties that had developed in the United Kingdom before 1867 and which formed part of that country's unwritten constitution. As will be seen, however, the courts were reluctant to interpret the Constitution in this way when it was not clear that such had

been the intent of its framers and when the principle of parliamentary supremacy had by that time taken on almost sacred proportions.

As a rule then, judges in this period felt that they were powerless to prevent legislative violations of human rights unless the law that caused the violation offended the federal division of powers. In 1899, for example, the Judicial Committee of the Privy Council in London struck down a British Columbia law that prohibited anyone of Chinese origin from working in mines on the basis that the provincial law interfered with federal jurisdiction over "naturalization and aliens." On the other hand, the Judicial Committee upheld British Columbia legislation that denied the vote to Canadians of Asiatic origin as being within the proper bounds of provincial jurisdiction. In both instances, the Judicial Committee noted that, in accordance with the principle of legislative supremacy, judges could not consider the policy or impolicy of such enactments.

The courts were more than content to leave all policy decisions to the legislatures, even in those areas untouched by Parliament and which had been subject to purely judge-made, or so-called "common law." Without express legislative direction, the courts were not prepared to find human rights violations to be either immoral or illegal. Thus, in the area of race discrimination, the Supreme Court of Canada consistently advanced the principles of freedom of commerce and contract, no matter how flagrant the discriminatory result. In *Christie* v. *York Corporation*, [1940] S.C.R. 139, a black man who had been refused service in a tavern claimed damages for humiliation on the basis of the common law of tort. The Supreme Court dismissed the man's claim and held that, on the basis of the principle of freedom of commerce, merchants are free to deal as they choose with an individual member of the public. In that same year, the British Columbia Court of Appeal also held that anyone "may conduct a business in the manner best suited to advance his own interests," even if that meant discriminating against patrons solely because of their race or colour.

Beginning in the 1930s, however, some judges attempted to use the preamble to the Constitution as a means of establishing a new route, over and above the established common law, for protecting human rights in Canada. In the *Alberta Press Bill* case, the Supreme Court of Canada was asked by the federal government to determine the validity of a package of legislation enacted by the Social Credit government of Alberta to bring the province out of the Depression. Part of the legislation granted a government agency, the Social Credit Board, the power to prohibit the publication of a newspaper, to force a newspaper to print corrections of articles that

the Board considered inaccurate, and to prohibit newspapers from publishing articles written by certain blacklisted persons. The rationale behind this portion of the legislation was that the monetary reforms of the legislation as a package would work only if the people believed in them. The Supreme Court unanimously determined the matter on a jurisdictional or division-of-powers basis, finding the legislation to be outside the powers of the provincial legislature because it invaded the federal government's jurisdiction over banking, interest and legal tender. What is significant about the Court's decision, however, is that three of the justices also perceived the legislation as being contrary to the constitutional guarantee of freedom of the press.

Chief Justice Duff based his civil liberties argument on the fact that the preamble to the *Constitution Act, 1867* implanted in Canada the civil liberties principles of the United Kingdom, including freedom of the press and freedom of speech. Moreover, because the Constitution establishes the House of Commons as an elected and representative body, intended to work under the influence of public opinion and discussion, freedom of the press is an essential component of the principle of democracy.

The problem with the so-called "Duff Doctrine" was it could not be squared with the doctrine of legislative supremacy. As a result, it was not endorsed by the majority of the Court. The acceptance of a legally enforceable implied bill of rights would have meant a major restructuring of the Canadian political system. It would have meant recognizing constitutional principles of the United Kingdom, as enforced by judges. Such a judicial enforcement of civil liberties could ultimately have limited the powers of the legislatures and called into question the whole notion of legislative supremacy. Moreover, because an implied bill of rights would consist of abstract principles and judicial decisions about the nature of these abstractions, it would be even less clear than a written bill of rights. The Canadian judiciary at this time was naturally reluctant to embark on such a bold and uncharted course. Instead, the Supreme Court of Canada, even as the final court of appeal in Canada after 1949, ruled in favour of civil liberties claims only on the basis of the division of legislative powers.

THE BILL OF RIGHTS ERA

In the aftermath of the Second World War, human rights became a central issue of concern both at the international and the domestic level. Not only had Canadians witnessed atrocities abroad, but the suspension of human rights for Canadians of Japanese origin, the

confiscation of their property and their forced internment during the war had had a profound consciousness-raising effect on the people of Canada with respect to the issue of human rights. It is worth looking at the more important international human rights documents that developed after the war, because their impact on domestic legislation and practice in this area cannot be overstated.

The reality of the crimes committed by the Nazi régime during the course of World War II was a catalyst for the United Nations adoption of the *Universal Declaration of Human Rights* in 1948. The principal aim of the document was to set out, in general language, the basic rights to which all human beings ought to be entitled. Among the rights proclaimed are the right to life, liberty and security of the person, the right to privacy, the right to own property, and the freedoms of expression, religion, movement, conscience, and peaceful assembly. Although, as its name indicates, the Universal Declaration was intended simply as a declaratory document not binding on members of the United Nations, it has achieved the status of customary international law and, as such, it has served to provide both the inspiration and starting point for the numerous international human rights documents that have followed.

In 1966, the United Nations General Assembly supplemented the Universal Declaration with three additional documents: the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and the *Optional Protocol to the International Covenant on Civil and Political Rights*. Together, these documents are collectively known as the International Bill of Human Rights. The primary effect of the 1966 instruments was to elaborate and extend the rights expressed in the Universal Declaration and to establish machinery for their enforcement through the United Nations. Canada was an active leader in these human rights developments at the international level, and it has since made serious efforts to ensure that such rights are protected domestically.

As a result of the emerging public awareness of the need for human rights safeguards in Canada, and the judiciary's obvious reluctance to take a stand on these issues, it fell to the legislatures of the federal and provincial governments to bring the country's domestic law into line with its recent international commitments. As noted earlier, the area of human rights was not specifically catalogued under the division of legislative powers set out in the *Constitution Act, 1867*. The closest the Act came to providing for this area seems to be the federal power with respect to "peace, order and good government" in section 91, and the provincial power over "property and civil rights" in section 92. In view of this overlapping

jurisdiction, both levels of government entered the field of human rights, although the initiative was principally taken at the provincial level.

The first human rights statute of the contemporary era was the Ontario *Racial Discrimination Act* of 1944, which prohibited the publication, display or broadcast of anything indicating an intention to discriminate on the basis of race or creed. The significance of this pioneering statute is that, for the first time, a legislature explicitly declared that racial and religious discrimination was against public policy, so that the judiciary could not simply subordinate human rights to the interests of commerce, contract or property. In 1947, the Province of Saskatchewan enacted the first bill of rights in Canada, which, in addition to anti-discrimination provisions, also proclaimed such political liberties as the right to vote, freedom of religion, speech and press, assembly and association, and freedom from arbitrary arrest or detention. The major drawback to this ambitious statute, however, was the lack of an effective enforcement procedure. The *Saskatchewan Bill of Rights* was followed by the enactment in various provinces of fair employment and fair practices legislation, which contained enforcement mechanisms, though not full-time staff to administer them. The combined effect of this legislation was to serve as the prototype for modern provincial human rights codes.

At the federal level, Prime Minister John Diefenbaker, a civil liberties advocate, was convinced that Canada needed a national bill of rights that would have a superior status to other laws. Unfortunately, he was unable to obtain the broad provincial consensus required to entrench such a bill in the Constitution. Instead, he was forced to settle for a bill that was an ordinary enactment of Parliament and which applied only to matters under the jurisdiction of the federal government. Diefenbaker believed, however, that because of its very nature the courts would use such a bill to nullify federal legislation that conflicted with its provisions.

The *Bill of Rights*, which was enacted in 1960, is a relatively straightforward document. Section 1 guarantees the right to life, liberty, security of the person and enjoyment of property, unless deprived thereof by due process of the law; the right to equality before the law and the protection of the law; and the freedoms of religion, speech, assembly, association and the press. Moreover, it provides that these rights and freedoms are to exist without discrimination by reason of race, national origin, colour, religion or sex.

Section 2 of the *Bill of Rights* guarantees a number of rights that had already been developed by judges through the common law to protect the civil liberties of an individual when confronted with the judicial system. For example, all Canadians have the right not to be

arbitrarily detained or imprisoned. No one can be arrested or detained without knowing the reason, and detainees have the right to retain a lawyer without delay. Section 2 also confirms the right to a fair hearing in accordance with the principles of fundamental justice. Finally, the section contains a "notwithstanding" clause, which provides that every law of Canada shall, unless expressly declared otherwise, be construed and applied so as not to abrogate any of the rights or freedoms recognized in the *Bill of Rights*.

The problem faced by the judiciary was how, in a system of legislative supremacy, an ordinary statute like the *Bill of Rights* could take precedence over other ordinary statutes, particularly those enacted after it. Indeed, the judiciary made it quite clear that it felt a great deal of uncertainty about applying the statute because it did not constitute a constitutional mandate to make judicial decisions with the effect of limiting the traditional sovereignty of Parliament. In fact, with only one notable exception, the courts consistently rendered the *Bill of Rights* ineffective in the promotion and protection of human rights in Canada. Often, it was determined that the *Bill of Rights* did not apply to a particular case on the basis that the rights it could protect were only those that had existed at the time of its enactment. In other words, the courts gave an extremely narrow interpretation, often referred to as the "frozen rights concept," to the rights set out in the *Bill of Rights*. In some cases, the courts simply refused to find any inconsistency between its provisions and discriminatory provisions in federal legislation, particularly as the legislation at issue was usually based on a valid federal objective with which the courts felt they had no right to interfere.

It is not surprising, then, that at the same time as the courts were giving short shrift to the federal *Bill of Rights*, there was a flourishing of provincial human rights legislation, the administration and application of which was largely taken out of the hands of the courts and confined to administrative agencies in the form of human rights commissions and tribunals. The first human rights code to consolidate various anti-discrimination provisions was adopted by Ontario in 1962. The Act prohibited discrimination on the grounds of race, creed, colour, nationality, ancestry or place of origin, and it established a commission and a full-time staff to administer and enforce the law. The other nine provinces and two territories soon enacted similar legislation. In 1977, the federal government enacted the *Canadian Human Rights Act*, which had strictly federal jurisdiction.

While there is today some diversity among jurisdictions, the principles and enforcement mechanisms of human rights legislation in Canada are essentially the same. Each

Act prohibits discrimination on specified grounds (such as race, sex, age and religion) in respect of employment, accommodation and publicly available services. The system is complaint-based in that a complaint must be lodged with a human rights commission or council either by a person who believes that he or she has been discriminated against, or by the commission itself on the basis of its own investigation. If a complaint is determined to be well founded, the commission generally attempts to conciliate the difference between the complainant and the respondent. Where conciliation fails, a tribunal may be formed to hear the case and make a binding decision.

Despite the tremendous success of human rights commissions in dealing with cases of discrimination, concern exists today about the system's ability to deal effectively with current human rights issues. For example, human rights institutions were developed on the premise that discrimination is the direct result of individual acts of bigotry. As a result, procedures set out in the legislation are complaint-driven and individually focused in terms of dispute resolution. Not only does this place a heavy burden on the individual to bring forward and pursue an allegation of discrimination, a process that can take years and exact a significant emotional toll, but it has also resulted in commissions that are overburdened by an ever-growing caseload. More important, however, is the claim that this individualized, complaint-redress mechanism does not address adequately what is now generally seen as the more pervasive, and possibly more detrimental, form of discrimination that results from the unintended effects of system-wide patterns and practices. From this standpoint, commissions should adopt a radically different and more proactive approach to eliminating discrimination.

The jurisdiction of human rights commissions is also severely limited in at least two respects. First, human rights legislation expressly deals only with inequality in the workplace and in the provision of public goods and services. Given that international human rights instruments to which Canada is a signatory do not limit guarantees of equality to any particular area of activity, some concern has been expressed about whether commissions can be an effective vehicle for the full realization of the rights and freedoms to which our society is committed. In particular, domestic human rights laws do not address the fact that human rights deprivations occur with respect to the ability to access such basic needs as food, shelter, social security and health care.

Secondly, human rights commissions are essentially self-contained in the sense that their findings are enforceable only by means of special procedures and remedies set out in the legislation itself, and not by ordinary recourse through the court system. As recently as 1981,

the Supreme Court of Canada, still conditioned to looking to the legislature for the ultimate answer, affirmed this restrictive nature of human rights codes and thereby continued to lay the burden of policy-making on the legislature. In the case of *Board of Governors of Seneca College of Applied Arts and Technology* v. *Bhadauria* (1981), 124 D.L.R. (3d) 193, the Court held that the *Ontario Human Rights Code* must be interpreted as having been intended to restrict the enforcement of its discrimination prohibitions to the measures established by the Code itself, and not to vest any supplementary enforcement responsibility in the courts. The decision effectively eliminated the argument that the very existence of anti-discrimination legislation meant that discrimination, in and of itself, could constitute a civil action for damages before the courts.

Therefore, despite the tremendous legislative initiative dealing with rights violations, the system of human rights law in Canada developed in a peculiarly de-centralized manner. Even with the establishment of a national *Bill of Rights*, the general refusal by the courts in any way to weaken the political principle of legislative supremacy, effectively denied Canadians the benefit of a universally applicable human rights statute.

THE ADVENT OF THE CHARTER

By virtue of the *Constitution Act, 1982*, the British Parliament ceased to have authority to legislate for Canada; however, perhaps the most significant element of this historic document is the *Canadian Charter of Rights and Freedoms*, which guarantees Canadians fundamental rights and freedoms. While the Charter represents a culmination of the Canadian trend away from the British approach of an unwritten constitution as the preferred method of protecting fundamental freedoms, a trend which began with the adoption of the statutory *Bill of Rights*, it is important to note that most of the Charter rights were already protected by statute or common law prior to 1982. What is significant, then, is the enhanced legal status which the Charter accords these rights simply by placing them in an entrenched constitution. Moreover, section 52 of the *Constitution Act, 1982* expressly states that "The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." As a result, the Charter expressly modified the tradition of parliamentary supremacy with the principle of constitutional supremacy and thereby ushered in a whole new era of judicial review.

Thus, in 1982, the Canadian courts finally received a clear mandate not only to determine whether the laws passed by federal and provincial legislative bodies violate the rights and freedoms granted by the Charter, but to strike down those which do not conform to the Charter's precepts. The question remains, however, to what extent the courts will use their new role to alter the doctrine of parliamentary supremacy and even the structure of federalism itself. In order to answer this question properly, it is useful to study the rulings of the Supreme Court of Canada, as it is this court that generally sets the tone for the entire judicial system.

During the first years of the Court's treatment of the Charter, a clear signal was sent out that the Charter was to be given a large and liberal interpretation. The Court emphasized that the task of interpreting a constitution was crucially different from that of construing a statute such as the *Bill of Rights*. In *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145, Chief Justice Dickson urged his fellow judges "not to read the provisions of the Constitution like a last will and testament lest it become one." Charter interpretation, according to the Chief Justice, must be generous rather than legalistic. These words were equally matched by a boldness of decision-making. For example, while section 32 of the Charter declared that its provisions applied to all matters within the authority of Parliament and the legislatures of the provinces, the Court in the 1985 *Operation Dismantle* case embraced a broad concept of judicial review in its scrutiny of the federal Cabinet's decision to allow the testing of the cruise missile over Canadian territory. While the Court held that the executive branch of the Canadian government has a duty to act in accordance with the dictates of the Charter, no violation of Charter rights was established in this case. As well, in the area of legal rights, the Court used the Charter to alter the Canadian criminal process away from a "crime control" model to a more "due process" approach that protected the rights of the accused.

Perhaps the height of the broad interpretive approach adopted by the Court in the first years of the Charter was reached in the case of *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486. In that case, the Court dealt with section 7 of the Charter, which guarantees 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. The Court held that the principles of fundamental justice embraced a substantive as well as a procedural due process requirement. Thus, an element of mental intent is constitutionally required for any offence for which the accused could be liable to the punishment of imprisonment. This meant that punishment of an offence automatically on the basis of the act alone, without evidence of

intent, was unconstitutional. This decision ultimately had broad implications for the crime of murder, which had traditionally included acts wherein the accused must either have foreseen, or ought to have foreseen, death as a probable, though unintentional, result.

Finally, it is worth noting that the Court's initial nullification of 19 pieces of legislation by way of the Charter is in sharp contrast with the Court's prior exercise of deferential judicial review under the *Bill of Rights*, pursuant to which the Court struck down only part of one statute, in fact an obscure section of the *Indian Act*. In addition, not only were the judges of the Supreme Court strongly activist in the first few years of the Charter, but in virtually all cases they were also unanimous.

After about 1985, the Court appeared to divide into two wings. The activist wing continued to give broad and generous interpretations to Charter rights, while the other wing adhered to the philosophy of deferring to the legislators and, therefore, tended to limit the overall reach of the Charter. With the considerable change in the composition of the Court after 1989, a growing sense of caution and judicial self-restraint has appeared to permeate the entire Court. A good illustration of this emerging trend is found in the Court's 1992 decision in the case of *Her Majesty the Queen and Canada Employment and Immigration Commission* v. *Schachter*. In that case, the issue was the extent to which the courts have the power to rewrite discriminatory laws so as to bring them into line with the requirements of the Charter. Prior to November 1990, the *Unemployment Insurance Act* provided parental benefits for men who were adoptive parents but not for natural fathers. Mr. Schachter, a natural father, challenged the law as being contrary to the section 15 equality guarantees of the Charter. In a unique decision, the Federal Court of Canada, Trial Division addressed the problem by reading the words "natural parent" into the relevant section of the Act. The Court felt that to declare the offending provision of the statute unconstitutional, and thus of no force or effect, would take a benefit away from others but would not guarantee the positive right to equality envisioned by section 15 of the Charter.

On appeal, the Supreme Court considered the appropriateness of judicial lawmaking. The Court made it clear that judges who rule that laws violate Charter guarantees must always be careful not to overstep their bounds and intrude into the legislative sphere. While it may be possible for the courts to remedy legislation that is otherwise under-inclusive, this should be done only where it will clearly not substantially alter the nature of the social program at issue. In most instances, however, it is preferable to allow Parliament or a provincial legislature to formulate the solution to these constitutional problems, particularly where, as in

this case, the appropriation of public funds is involved. Therefore, the Court decided that, without a mandate based on a clear legislative objective, it would be inappropriate to read in the excluded class of persons under the *Unemployment Insurance Act*. The better course would be to declare the provision invalid but suspend that declaration to allow the relevant legislative body to weigh all the factors in amending the statute so as to meet its constitutional obligations. Such a declaration was unnecessary in this case, however, given that Parliament had amended the legislation in 1990 to provide equal benefits to natural fathers, before the Supreme Court rendered its decision in the matter.

In assessing the recent changes in the Court, it is useful to keep in mind the nature of judicial policy-making that is involved under the Charter. Essentially the courts make human rights policies in two ways. The first is to define the specific content of the rights and freedoms enshrined in the Charter. For example, it must be determined whether the "right to life" covers a fetus and whether equality encompasses economic and social rights. Secondly, the courts must decide whether a government objective that violates a right, once it is defined, can be considered justified pursuant to section 1 of the Charter. Section 1 applies to all rights and freedoms under the Charter and subjects them to "such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society." Therefore, section 1 involves a highly discretionary balancing test between the policy interests of government and the interest in the Charter litigant in having his or her rights upheld. It is important to recognize that section 1 represents one of two concessions to parliamentary sovereignty under the Charter. The second is section 33 ("the notwithstanding clause"), which permits the federal and provincial legislatures to enact laws which violate some, but not all, of the rights and freedoms enumerated by the Charter, but only for a maximum period of five years.

It is with respect to the balancing test under section 1 of the Charter that the judicial ideology of the Court has changed the most. Initially, a rather strict approach was taken whereby the government had to prove that the law or government action at issue was sufficiently important to override a Charter right and that the means adopted to attain that objective were reasonable and demonstrably justified. Members of the Court have now moved towards a more flexible approach requiring a less stringent fulfilment of the section 1 requirement in certain cases. Some would even argue that in recent equality cases the Court has seemed to withdraw from its activist approach to interpreting the substantive content of rights proclaimed under the Charter. Indeed, it would appear that some justices are even applying section 1 analyses while

determining whether a Charter right has been infringed in the first instance. As a result, it has been contended that the scope of rights and freedoms under the Charter has been watered down and that the burden on government to defend its actions has lessened significantly.

A number of explanations have been advanced for the Court's shift away from its more aggressive approach to the application of the Charter. Some contend that the Court is simply being careful not to tread on what it sees as clear exercises of legislative power. According to this view, innovative and creative change, particularly in the social and economic fields, should come not from the judiciary but from elected legislators who are better equipped to assess the full gamut of policy alternatives. This may explain why the Court now appears to uphold Charter rights more often in areas where it feels most comfortable, such as cases involving the criminal trial process. Others, however, argue that members of the Court have simply come to the realization that the balancing of individual and societal interests in a rapidly changing world does not lend itself easily to the application of neutral judicial principles. Thus, individual justices are being forced to rely on their own reasoning processes rather than conventional judicial wisdom.(4)

Court activism in the Charter era has led to assertions that non-elected judges are making significant policy decisions and this has led to allegations of anti-democratic judicial behaviour and queries about the way Supreme Court judges are appointed. Reference is made in this regard to the recent Supreme Court's decisions in *Vriend* v. *Alberta (Attorney General)*, [1998] 1 S.C. R. 493; *M.* v. *H.,* [1998] 1 S.C.R. 493; *Degamuukw* v. *British Columbia*, [1997] 3 S.C. R. 1010; and *Eldridge* v. *British Columbia (Attorney General),* [1997] 3 S.C.R. 624. In the *Vriend* decision, for example, the Court ruled that the omission in Alberta's *Individual Rights Protection Act* of sexual orientation as a prohibited ground of discrimination denied gay and lesbian individuals their equality rights under section 15 of the Charter. In order to remedy this under-inclusiveness, the Court read the words "sexual orientation" into the relevant provisions of the legislation. In *Eldridge*, the Court held, also on the basis of the equality guarantees of section

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(4) For a more in-depth discussion of the current trend of Charter decision-making by the Supreme Court see Patrick J. Monahan "The Supreme Court of Canada in the 21st Century," *The Canadian Bar Review*, Vol. 80, June 2001, p. 374-98; Errol P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1," in The Honourable Gérald-A. Beaudoin and Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed., Carswell, Toronto, 1996; Tom Denholm, "Heart of Oakes: The Supreme Court of Canada and the Charter," *Gravitas*, Vol. 2, Spring 1995, p. 27-32; and Leon E. Trakman, "Section 15: Equality? Where?," *Constitutional Forum,* Vol. 6, 1995, p. 112-126.

15 of the Charter, that the government of British Columbia was required to provide sign language interpreters for deaf persons receiving medical services. Critics have gone so far as to call on governments to invoke the Charter's "notwithstanding clause" to legislatively override these controversial decisions.

Also of concern is the fact that governments themselves are fuelling judicial activism by deferring to the courts issues that they perceive as being too controversial to handle themselves. As well, an increasing number of Canadians, disillusioned by the perceived inability of government to address Charter issues, are asking the courts to effect social and economic change. According to F.L. Morton and Rainer Knopff, authors of *The Charter Revolution and the Court Party,*(5) interest-group litigants, such as the Canadian Civil Liberties Association and the Women's Legal Education and Action Fund, have been particularly active in constitutionalizing their policy preferences by intervening in Supreme Court Charter cases. Indeed, Morton and Knopff contend that the Court has effectively been "hijacked" by such interest groups.(6)

One response to these concerns is that, in rendering decisions under the Charter, the Court is still simply exercising its powers of judicial review. The judiciary has not engaged in second guessing or re-ordering of government priorities in Charter cases to date. Rather, it has applied a set of established principles under section 1 of the Charter to determine whether challenged policies and regulations interfere with the lives of individuals more than is absolutely necessary under the law. This sometimes requires looking at laws that were made in the past and putting them into context. Thus, an expansive interpretation of human rights constitutional law does not necessarily mean that the Court has become "politicized."(7)

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(5) Broadview Press, 2000.

(6) While the Supreme Court of Canada has denied any suggestion that it has been hijacked by special interest groups, steps have been taken of late to reduce access to the Court by intervenors. It is felt that the Court has acquired sufficient expertise on the systemic implications of the Charter. (see "Rein In Lobby Groups, Senior Judges Suggest," *National Post*, 6 April 2000).

(7) For more on this issue see Gail J. Cohen, "Cory urges respect, tolerance at gay lawyers' meeting," *Law Times*, Vol. 11, No. 5, 7 Febuary 2000, p. 4. David Beatty, "*The Canadian Charter of Rights*: Lessons and Laments," *The Modern Law Review*, Vol. 60, July 1997; Susan Lightstone, "Seismic Shocks or Healthy Tension: The *Charter of Rights and Freedoms* 15 Years Later," *National*, Vol. 6, No. 5, August-September 1997; F.L. Morton, "The Charter Revolution and the Court Party," *Osgoode Hall Law Journal*, Vol. 30, 1992, Chief Justice Brian Dickson (retired); "The Canadian Charter of Rights and Freedoms: Dawn of a New Era?," *Review of Constitutional Studies*, Vol. 2, No. 1, 1994; and Robert E. Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson," *McGill Law Journal*, Vol. 41, 1995.

Furthermore, it is argued that judicial review under the Charter is not a veto over the politics of this nation, but rather the commencement of a dialogue between the courts and the legislatures as to how best to reconcile individual values guaranteed by the Charter with the social and economic policies that are necessary for the benefit of Canadian society as a whole. Decisions that strike down legislation on Charter grounds have generally left the door open for an alternative or substitute law to be re-enacted that allows for the exercise of democratic will, but with some new safeguards to protect individual rights and liberties.(8) The Chief Justice of the Supreme Court of Canada recently agreed with this "dialogue" theory on the relationship between the courts and the legislature under the Charter. She stated that "we don't consider ourselves the final word on things. We rule on the legal question that is put before us, and then the matter goes back to Parliament and the legislatures take it up. Usually, they amend the law or re-enact it or whatever to remedy the constitutional defect."(9)

Finally, the role of government and the legislators has also changed with the arrival of the Charter. Pursuant to section 4.1 of the *Department of Justice Act*, the Minister of Justice must now examine all government bills introduced in the House of Commons to ensure they are consistent with the Charter. Furthermore, even before the bills reach the House, at the policy development stage of legislating, government lawyers are now routinely involved in identifying and assessing the Charter implications of any proposed law. Legislation which may seem to run counter to the rights and freedoms protected by the Charter must be carefully rationalized and backed by solid policy arguments and evidence. Thus, the struggle to weigh and balance policy interests is an evolving skill in the legislative, as well as the judicial, realm.

CONCLUSION

As a result of a federal structure with a division of legislative powers, plus a constitutional revision in 1982, human rights in Canada are both entrenched in the Constitution and safeguarded in legislation at the federal, provincial and territorial levels. The creation of the Charter did not eliminate existing human rights legislation or diminish its importance. To the contrary, not only does the Charter itself in section 26 guarantee the continuation of existing

(8) P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures," 1977, Vol. 35, *Osgoode Hall Law Journal*, p. 105.

(9) "Rein In Lobby Groups, Senior Judges Suggest," *National Post*, 6 April 2000.

rights and freedoms in Canada, but the advent of the Charter also had the profound effect of freeing the courts from the constraint of the doctrine of parliamentary supremacy in the interpretation and enforcement of human rights statutes. In the post-Charter era, both the *Bill of Rights* and federal and provincial human rights legislation were given "quasi- constitutional" status by the Supreme Court and this has served to place them above ordinary legislation.

Thus, the *Bill of Rights* continues in force in Canada and its importance lies in those provisions which the Charter does not duplicate – for example, the right to the enjoyment of property (section 1(a)). Federal and provincial human rights statutes also continue to play a significant role in the promotion and protection of human rights because they are concerned with private acts of discrimination, whereas the application of the Charter is limited to governmental action. However, because human rights legislation is law, the reach of the Charter may well extend to private acts of discrimination through judicial interpretations of the prohibited grounds of discrimination and any statutory exceptions to such prohibitions found in these statutes. Moreover, just as decisions rendered under the Charter will be used in human rights hearings, so too will human rights decisions be used in interpreting the Charter. While it may seem odd to speak of the effect of a federal or provincial statute on a constitutional instrument such as the Charter, human rights legislation in Canada has a history of significant decisions that have been useful tools in Charter interpretation.

The Charter, the *Bill of Rights* and federal and provincial human rights laws, in conjunction with the legislators' duty to comply with the Charter and the courts' role in ensuring such compliance, all combine to provide Canadians with a comprehensive scheme of human rights promotion and protection. Yet, as was mentioned at the beginning of this paper, human rights systems are shaped largely in response to variables that are specific to time and culture. Canada is certainly a very different nation from what it was at the time of Confederation. In an age of rapid technological advancement and globalization, public cynicism and individual and community feelings of insecurity, this country's human rights scheme will undoubtedly be the subject of re-examination and re-assessment over the coming years. At the same time, judicial activism will continue to be a subject of much debate as the courts seek to define the parameters of their role relative to that of the executive and legislative branches of government.

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