

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Memorandum by
THE GOVERNMENT OF CANADA

Introduction

This paper is intended to provide a brief description of Canada's new Charter of Rights and Freedoms which came into force on 17 April 1982 and some of Canada's early experience in its application.

The Entrenchment of Rights in a Parliamentary System

2. Canada is a Federal State with a Federal Parliament and ten Provincial legislatures. Within their own spheres of legislative jurisdiction these legislative bodies have been recognised as sovereign in the same sense as the United Kingdom Parliament. In accordance with traditional British constitutional theory and practice, prior to the entrenchment of the Charter civil liberties were primarily protected by the principles of parliamentary government. For their part, the courts recognised that provided the legislation was validly enacted and clearly expressed, they could not protect civil liberties from legislative infringement.

3. The Canadian Charter of Rights and Freedoms is designed to provide constitutional protection for the rights and freedoms set out therein by providing that any legislation that is inconsistent with the Charter is, to the extent of the inconsistency, invalid and of no force or effect. To the extent that this gives the courts the constitutional authority to pass judgment on the substance of legislation in light of constitutionally entrenched rights and freedoms, this is a fundamental change in Canada's Constitution.

Rights and Freedoms Protected by the Charter

4. These include:

"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 peace assembly; and
- (d) freedom of association."

"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 therefore;
- (b) to retain and instruct counsel without delay and to be informed of that right;
- (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 recognised 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."

5. Section 15 does not come into effect until 17 April 1985 in order to provide time for governments to review and amend any possibly inconsistent legislation or practices.

6. Other rights included in the Charter are "Democratic Rights" (e.g. every citizen has the right to vote), "Mobility Rights" (e.g. every citizen has the right to enter, remain in and leave Canada and move about within Canada), "Official Languages" (e.g. the right to use English and French in courts established by Parliament) and "Minority Language Education Rights" (e.g. the right to an education in English or French). The Charter also recognises aboriginal rights, cultural rights and other rights and freedoms.

The Charter and Parliamentary Supremacy

7. The constitutional entrenchment of the rights and freedoms set out in the Charter is reconciled with the concept of parliamentary supremacy in two ways. First, all of these rights and freedoms must be considered in light of section 1 which provides:

"(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."

8. In addition, section 33 of the Charter provides that Parliament or a Provisional legislature may expressly declare in an Act that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 (set out above). Unless re-enacted any such declaration ceases to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. Given our parliamentary system of government, including elections at least once every five years as provided by section 4 of the Charter, it is unlikely that any legislature will lightly resort to invoking this provision. However, it preserves the power of the legislature to make the

final determination on fundamental controversial issues involving rights and freedoms in the Charter while ensuring public awareness, debate and accountability.

9. The Charter applies to the Parliament and Government of Canada and to the legislature and government of each Province in respect of all matters within their authority. It is intended to deal with the relationship between the State and the citizen. It is not intended to apply to disputes between private individuals. For example, if a person is unduly subjected to discrimination by a person acting in a private capacity, such as a landlord or employer, his remedy will not be based on the Charter but on the Federal or Provincial human rights legislation which prohibits individuals from engaging in this kind of conduct and provides mechanisms of redress. If a government body were to engage in such conduct then of course the Charter will be applicable.

Remedies

10. The Charter also includes a provision relating to its 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."

11. Subsection 24(2) is intended to be a compromise between the traditional Canadian common law approach and the American constitutional law approach concerning the admissibility of illegally obtained evidence. The Canadian courts have allowed such evidence to be admitted in virtually all cases whereas the American courts have excluded it. Under subsection 24(2) the new test for admissibility of illegally obtained evidence is whether, under all the circumstances, its admission "would bring the administration of justice into disrepute."

Experience With Charter Application

12. Canada's experience has centered on three types of activities resulting from the Charter. One is the Federal and Provincial Governments' own efforts at ensuring implementation of the Charter. This has involved thorough reviews of Federal and Provincial legislation and practices to ensure they are consistent with the Charter. A second and related activity has been educational efforts aimed at the general public and also at lawyers and the judiciary. The third type of activity centres on the litigation to result from the Charter.

Litigation Resulting From The Charter

13. In the first few weeks following proclamation the Charter was not frequently invoked in litigation, no doubt as a result of the widely held view that its provisions could not be applied retrospectively to events which took place prior to 17 April 1982. As well there was perhaps an understandable hesitancy on the part of counsel to make use of a constitutional instrument whose full implications were not generally known, and consequently it may have been thought preferable to engage in a study of the Charter's provisions rather than to receive an education in its meaning at the hands of a court. Since those early days, however, a decided momentum has been building and it can now be said that there are literally hundreds of cases in which a Charter argument has been made, including three cases now before the Supreme Court of Canada. For the most part, these arguments have arisen in criminal proceedings at the trial level, but there has been a gradual expansion in the range of cases and there are now many civil actions in progress, covering diverse subject matters, which involve at least some consideration of the Charter's impact upon the rights of the individual. Perhaps the most noteworthy of these are the challenges to Provincial language legislation (Bill 101) in Quebec, based upon the guarantee of minority language education rights, and the attacks on the citizenship requirements for admission to Provincial bars, premised on violations of mobility rights.

Types of Cases Where The Charter Has Been Invoked

14. Although invocation of the Charter is gradually becoming broadly based, an examination of the early experience reveals a concentration of activity in certain areas. As might be

expected, the actions of the police and the validity of statutes governing the criminal law have received the greatest scrutiny, and while the Crown has generally been successful in defending the challenges there have been some notable achievements by the defence. The major areas of interest to date have been:

- (i) The breathalyzer provisions of the Criminal Code. Numerous attacks have been launched based on the view that the obligation to provide a breath sample compels the accused to be a witness against himself and runs contrary to the concept of fundamental justice. A Provincial Court Judge in Ontario had given effect to these contentions while another Provincial Court Judge in British Columbia had reached the opposite conclusion. The Ontario Court of Appeal has upheld the validity of these provisions.
- (ii) Statutes which impose an onus of explanations on an accused have been called into question on many occasions, principally with regard to section 8 of the Narcotic Control Act (which requires an accused who has been proved to have been found in possession of a narcotic to establish that he did not intend to traffic) and the judicial interim release provisions of the Criminal Code (which places the onus on certain accused persons to show cause why they should not be detained in custody). Central to these cases is a consideration of the application of the presumption of innocence, and while the weight of authority so far tends to support the validity of such legislation there have, again, been exceptions which the Crown will be taking to the appellate courts.
- (iii) Arrest situations have given rise to numerous applications for Charter remedies based upon alleged denials of the right of an accused to be informed of his right to counsel and of the reason for his arrest, and to be secure against unreasonable search or seizure. The results in these cases, of course, turn in large measure on the particular facts but it does appear that the admission in evidence of statements made by an accused who has not been informed of his right to counsel will, from the Crown's standpoint, be in some jeopardy.
- (iv) Exclusion of evidence pursuant to section 24(2) of the Charter has been established as one of the most sought after remedies, in a wide variety of circumstances. Alleged violations of several of the guaranteed legal rights, either alone or in combination, in the course of gathering evidence have been put forward as a ground for the submission that the administration of justice would be brought into disrepute by the admission of the evidence obtained, and the courts have been called upon to examine both the conduct of the police and the validity of the statutes under which their powers have been exercised. In at least three cases at the Provincial Court level, evidence has been excluded and, as a result, acquittals have been secured.

Emerging Principles

15. At this early stage it is not possible to say that any point has been definitely settled, but from a review of the decisions of the lower courts there appear to be some discernible trends, although exceptions do exist:

- (i) The Charter will not be applied retroactively to govern events which transpired prior to its proclamation. However, while the factual basis for a proceeding may have crystallised before 17 April, this does not mean that a consideration of the validity of any applicable legislation will necessarily be precluded and thus, for example, cases have arisen where a defence has been predicted not on the facts of the case but rather on the constitutionality of the charging provision.
- (ii) Generally speaking, reverse onus provisions have been upheld by reference to the principles laid down by the Supreme Court of Canada in pre-Charter decisions, the theory being that such provisions do not affect the ultimate burden on the Crown of proving its case beyond a reasonable doubt but instead are directed towards the secondary burden, that of adducing evidence. So long as it is rationally open to an accused to establish certain facts on a balance of probabilities, a legislative provision requiring him to do so will apparently be sustainable under the Charter, although it must again be emphasised that not all courts have readily embraced this view.
- (iii) The test which the courts seem to be leaning towards for the purpose of determining whether the administration of justice would be brought into disrepute by the admission of evidence obtained in violation of Charter rights is whether

the conscience of the community would be shocked by the admission of the evidence. This is substantially the test proposed by Mr. Justice Lamer in concurring reasons in the pre-Charter case of Rothman, and seems to recognise that the purpose underlying the enactment of section 24(2) of the Charter was to strike a reasonable balance between the traditional Canadian rule of almost unlimited admissibility and the American approach of virtual automatic exclusion.

- (iv) Allied with the "conscience of the community" test has been the recognition that the interests of justice do not require the granting of a remedy in every case in which a violation of guaranteed rights, however trivial, has occurred. For the most part, it seems to have been accepted that a substantial infringement of rights must be made out in order to gain access to the remedial provisions, and from that standpoint it might be said that there has been shown to be no basis for the fear expressed in some quarters that the Charter would become a powerful technical weapon in the hands of the guilty. On the other hand, the serious consideration and occasional acceptance accorded to Charter arguments by the courts provides an indication that substantial transgressions will have consequences, and that the rights of the individual against the State will not be lightly ignored.

The Future

16. Since it is a constitutional document, the Charter was deliberately drafted in general terms and, given the rather open-ended nature of some of the guarantees, it may be that the kinds of arguments that will be brought forward will be limited only by the imagination of counsel. Certainly from the volume and content of the Notices of Constitutional Questions that have been served on the Department of Justice to date it can be seen that the horizons are expanding, and in the coming months the courts will be considering challenges in the following areas:

- (i) Legislation dealing with public morality, such as statutes permitting film censorship or prohibiting the importation of immoral or indecent literature.
- (ii) Legislation empowering administrative agencies such as securities commissions and tax investigators to conduct searches and seizures.
- (iii) The provisions of the Criminal Code prescribing confidentiality for documents used to obtain wire-tap authorisations.
- (iv) Minority language education rights in Provinces other than Quebec.
- (v) Restrictions on the political activities of public servants.
- (vi) Statutory minimum terms of imprisonment.
- (vii) Statutes creating absolute liability offences.

17. As well, the entry into effect of the section 15 equality rights in 1985 will open up whole new vistas in a field which has already established itself as a primary source of litigation.
