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THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS TWENTY YEARS LATER

The Honourable R. Roy McMurtry*

When I became the Attorney General for Ontario in 1975, Robert Bourassa was premier of Quebec but René Lévesque's Parti Québécois had become a major political force. The Government of Ontario agreed with Prime Minister Pierre Trudeau that a renewal of constitutional discussions would strengthen the federalist forces in Quebec.

An entrenched charter of rights had a particular appeal as it was expected to receive strong public support and could also act as a counter to Quebec's increasing demands for additional legislative authority.

Constitutional discussions with the provinces were therefore initiated and continued after the election of the Parti Québécois in 1976. However, no real progress had been made by the time of the 1980 Quebec referendum.

During the 1980 Quebec referendum Prime Minister Trudeau had promised the people of Quebec constitutional reform and "renewed federalism," as he expressed it, without being very specific. When the separatist side was defeated in the 1980 referendum the Constitution did become a priority for the Prime Minister and the day after the referendum Jean Chrétien met with Premier William Davis and myself in Toronto. What followed was a long hot summer of constitutional discussions involving federal and provincial attorneys general, ministers of intergovernmental affairs and their officials. A proposed charter of rights was but one of 12 topics, which included communications, equalization, family law, the Supreme Court, fisheries, a statement of principles, offshore resources, resource ownership powers over the economy, the Senate and patriation — quite a plateful to say the least.

I believe that the Trudeau approach to a charter of rights was significantly influenced by the Duplessis years. Premier Maurice Duplessis had presided over an authoritarian, corrupt and nationalist regime that had held Quebec back from general postwar development. His government sacrificed the rule of law to political ends, denied freedom of speech to critics and non-

* Chief Justice of Ontario. This paper is reproduced with the permission of the CBA from conference materials published in *The Canadian Charter of Rights and Freedoms: Twenty Years Later* in 2001.

conformists, denied freedom of association to those battling for economic rights against big business and denied religious freedom to Jehovah's Witnesses.

I also recall Mr. Trudeau telling me about his own brief stint in the federal civil service some years before his entry into politics. He had been incredulous at the fact that he, a French Canadian, could not write a memorandum in French to his superior and he marvelled at the absence of a French sign designating the Prime Minister's office.

In particular, the Government of Ontario was very supportive of what we believed to be the core of the Trudeau approach to constitutional reform, namely, his belief in the provision of constitutional protection for language and education rights. We agreed that this would undercut growing French-Canadian nationalism in Quebec by releasing French-Canadians from what Mr. Trudeau perceived as their national ghetto.

We therefore supported Pierre Trudeau's opposition to the features of the Canadian federal system which considered Quebec as the only real home of French-Canadians and encouraged an erosion of the French-Canadian presence in other parts of the country. I was personally committed to the strengthening of the French language in Ontario and within a few weeks of becoming Attorney General in 1975 committed the government to the creation of a bilingual court system.

The government of Ontario supported the entrenchment of language rights in the Charter so that all Canadians could engage at both the provincial and national level throughout the country and have confidence that their children could be educated anywhere in Canada in their own language.

In our ministerial discussions, Quebec passionately argued that constitutional entrenchment of minority-language education guarantees would be a direct assault on exclusive provincial legislative jurisdiction over education. Quebec also argued that the proposed section 23 would eventually dilute the French language and culture in Quebec. Clearly, these opposing visions offered little room for compromise.

When one reflects on the passionate debate over minority-language education rights, together with all of the other issues on the table, it is not surprising that many of the details of the Charter of Rights were not debated by the federal government and the provincial governments to the extent that they deserved.

In any event, the version of the Charter of Rights that was tabled in October of 1980 was somewhat different than what was proposed in early 1981. For example, in relation to legal rights, in October the wording of section 8, with respect to search and seizure, and section 9, with respect to detention or imprisonment, was as follows:

8. Everyone has the right not to be subjected to search and seizure except on grounds and in accordance with procedures established by law.

9. Everyone has the right not to be detained or imprisoned except in accordance with procedures established by law.

The sections were, of course, amended to employ the words “unreasonable search or seizure” and “the right not to be arbitrarily detained or imprisoned.”¹ These amendments obviously would delegate a great deal more interpretative responsibility to judges. The amendments in early 1981 might also be said to reflect the more effective advocacy of the Canadian Civil Liberties Association than that of the Canadian chiefs of police. It also should be emphasized that the amendments had the enthusiastic support of M.P.’s of all parties.

Backing up for a moment, it should be recalled that the constitutional debate became extremely polarized after the failed First Ministers’ Conference in September of 1980.

Premier Davis and I were particularly disturbed by what we regarded as an overly belligerent and uncompromising attitude towards Mr. Trudeau that was displayed by some of the premiers. In fact, the 1980 first ministers’ meeting blew up before its official commencement at a dinner hosted by Governor General Edward Schreyer. Some of the premiers insisted that they wanted one of the premiers to co-chair the meeting. To say the least, the Prime Minister was not pleased and I recall his saying to the Governor General, “Ed, will you please get the dessert served so that I can get the hell out of here.”

In October of 1980, Prime Minister Trudeau announced the intention of the federal government to proceed unilaterally with a request to the British government to introduce a new *Constitution Act* in the United Kingdom Parliament. This infuriated the majority of the premiers and the media-described “gang of eight” premiers was formed, with only Ontario and New Brunswick supporting the federal government. The opposing premiers believed that the actions of the federal government signified the abandonment of Canadian traditions of compromise and accommodation. So began a bitter and protracted confrontation which ceased only after an accord was reached at the First Ministers’ Conference in November of 1981.

The support of Ontario for the federal proposals was based on our belief that it would not serve the public interest for the country to isolate the federal government on this important issue, particularly as we strongly believed that

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 8-9.

after more than 50 years of protracted debate, the Canadian Constitution should cease to be an Act of the British Parliament.

In the debates that followed it was often unfairly suggested that those opposing the Charter were less committed to the protection of individual rights. In fact, the debate was fundamentally about how best to protect individual rights. The provinces that were opposed to an entrenched charter of rights strongly believed that legislatures could more effectively provide such protection than the courts.

The unhappy American experience in the nineteenth and early twentieth centuries was frequently cited. Rigid judicial interpretation of the United States Bill of Rights had blocked important reform legislation, particularly in the area of worker protection and child labour reform and, of course, racial desegregation.

In Ontario's view, the entrenchment of a charter of rights was a valid response to a widely perceived need. We regarded it as a legitimate step in our nation's development. The charter represented a balance between the dominant English and French legal traditions as well as reflecting the plurality of our country as a whole. Above all, it represented what Canada stood for as a nation: a basic respect for individual rights subject only to the wise restraints that could be "demonstrably justified in a free and democratic society." While each province had passed human rights legislation, it was important to Ontario that there be a charter of rights that applied equally throughout Canada.

I spent some time in London in January of 1981 speaking to parliamentarians and journalists in support of the federal constitutional package. At the same time, I was personally very concerned about the political legitimacy of the federal proposals, given the opposition of the eight provincial governments and the three court challenges in Manitoba, Newfoundland and Quebec.

The Attorney General for England and Wales, Sir Michael Havers, was a personal friend and we discussed at length the viability of Westminster passing the patriation package while three provincial appellate courts in Canada were considering the constitutionality of the proposals.

The result was that I became somewhat of a double agent when I enlisted Sir Michael Havers' agreement to recommend to the British Cabinet that they strongly encourage the Canadian government to make a direct reference to the Supreme Court of Canada.

In a follow-up letter to Sir Michael Havers, I stated, in part, as follows:

My fear is that these worthy goals may be put in jeopardy by an approach which, in its haste, does appear insensitive to legitimate questions that others have posed as to its legality, and perhaps inattentive to the need to gain the support of a broad consensus in Canada for the changes.

I became somewhat unpopular with my federal colleagues when they learned of my intervention with Attorney General Havers. However, a few weeks later the reference to the Supreme Court of Canada was launched.

When I reflect on the British role in our constitutional debate, I share the embarrassment of many that the Canadian political debate had to be exported to Britain. One result was that British parliamentarians ate very well for many months as they were being aggressively lobbied by the Canadian federal and provincial governments. A second, more important consequence of the lobbying was that during 1981 many British parliamentarians became increasingly paternalistic about Canada's political future.

Indeed, I remember Jean Chrétien telling me about a dinner that he had with United Kingdom parliamentarians in London. Although most of these parliamentarians had never been to Canada, they were apparently very generous in their advice as to how Canadians should resolve the Quebec issue. By the end of the evening Jean had become somewhat irritated. He announced that he would be having lunch in Belfast the next day and that he hoped that they could rejoin him for dinner the next night so that he could advise them as to how to settle the problems in Northern Ireland.

British parliamentarians were, for the most part, sceptical of the Canadian proposal for the constitutional entrenchment of the Charter of Rights as they believed strongly in the supremacy of Parliament. This also encouraged some very paternalistic views as to the wisdom of Canada proceeding down that road.

When the Supreme Court delivered its decision in September of 1981, it stated that, although constitutionally legal, the patriation package would breach a long-standing constitutional convention of substantial provincial support whenever Britain had been requested to amend our constitution.

As we approached November 1981, two of the most controversial issues were the Charter of Rights and the amending formula. In relation to the Charter of Rights, the principle of the supremacy of Parliament was still a fundamental issue for the majority of the provinces. Clearly, a principled compromise had to be found.

Early in the week of the November First Ministers' Conference, events conspired to give me some time alone with the Prime Minister. I had become convinced that the inclusion of a notwithstanding clause in the Charter would be the only way to gain the support of the majority of the premiers as well as being an honourable compromise. Mr. Trudeau was not at all enthusiastic but he was listening.

In any event, it was Premier Lévesque's support of Trudeau's proposal for a national referendum on the Constitution that shattered the alliance between the Quebec premier and his seven other heretofore provincial allies. Most

provincial premiers regarded the federal referendum process as a federal tactic to bypass the provincial governments and deal directly with their citizens.

The inclusion of a notwithstanding clause in the Charter proved to be the compromise that achieved the necessary support in relation to an entrenched charter. The inclusion attracted a great deal of controversy but, in my view, it represented an honourable compromise representing a balancing mechanism between the institutions of Parliament and the judiciary.

As I reflect on the historical perspective that I have been invited to address this morning, I am reminded of Machiavelli's warning of the risks related to the making of constitutions. As regards the roles played by Chrétien, Roy Romanow and myself, it may be recalled that we all lost our next political battles. Romanow was defeated in a provincial election two weeks after the patriation of the Constitution and Jean Chrétien lost his first leadership contest. In fact, I remember being on a conference call with Jean Chrétien and Roy Romanow the day after the federal election in September of 1984. As we concluded our conversation, Jean stated, "I don't think that the Canadian people like the new constitution. First they get you Romanow, yesterday they got us," and to me he said, "big Roy keep your head up." Several months later I lost my own bid to become the leader of a certain political party in Ontario.

So much for the making of a constitution.