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LIVING TREE?

Allan C. Hutchinson

One of the most popular metaphors in constitutional law is "the living tree". Originally coined by Lord Sankey to justify a large and liberal interpretation of the British North America Act, it has become commonplace to read that, with the Charter, Canada "planted a living tree capable of growth and expansion within its natural limits".¹ On the tenth anniversary of its ceremonial planting, it is instructive and revealing to take stock of how the Charter tree has grown and what fruit it has borne.

To begin with, it bears repeating what many are prone to forget — that the Charter was planted. Contrary to developing folklore, the Charter was not a naturally germinating shoot in indigenous soil. It was the product of ideological haggling and institutional seed-trading. A deeply undemocratic process, the constitutional circus of 1980 to 1982 was an exercise in high politics and another occasion for the continuing power play between Ottawa and the provinces. Indeed, while planting the Charter tree, the founding fathers of Canada's new constitutionalism also sowed the seeds of contemporary discontent that sprouted at Meech Lake and its aftermath.

Transplanted and spliced together from other cultures by a brood of contending politicians, its origins are as distinctly political as its continuing cultivation is politically distinctive. Yet the Charter's planting is mistakenly thought of in lyrical and mystical terms as a romantic moment of national self-definition. The Charter sapling has already become a national treasure, emblem and monument — the constitutional equivalent of the fabled maple.

In the exclusive care of its judicial custodians, the Charter has blossomed and bloomed ever stronger each season. After some initial hesitation, this privileged group of enthusiasts has warmed to its national undertaking and actively nurtured the Charter's expansive growth. The Supreme Court of Canada has become a markedly public law forum and constitutional matters now dominate its docket. In the first few years of the Charter, the courts upheld Charter claims and struck down laws with relative abandon. Settling in to a more measured pace, the Supreme Court began to worry about its own competence to take such an active posture once it grasped the importance of its invigorated role in Canadian politics. Coincidentally, this stutter of confidence and concern about its lack of expert knowledge only occurred when the Court had to deal

with requests by unions and workers to enter the Charter arboretum. But more about this later.²

The major force of the "living tree" metaphor is, of course, directed at the process of constitutional interpretation. And it is in that context that Charter judges have invoked its arboreal assistance and authority. Despite bold statements by the present Chief Justice that "adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy,"³ the judges remain deeply (and rightly) troubled by the exact scope and terms of their mandate to affect the constitutional review of legislation. Mindful that the line between law and politics is increasingly more imagined than real, they have taken refuge under the convenient and capacious shelter of the Charter's living tree. Although at times reluctant, the judges have become, with the urging of a sophisticated and ambitious legal corps, the new aristocrats of Canadian culture.

At an early stage, the courts decided it was time to thaw the "frozen rights" approach that was popular under the discredited Bill of Rights. The Charter was not to represent and hold in place those rights recognized and declared to exist at its enactment in 1982.⁴ Instead, the courts used this interpretive run-off to water the Charter shrub and to feed its future growth. What might have been a legal performance of ice-sculpting turned into a judicial exercise in constitutional gardening. Under the green-fingered encouragement of Bud Estey and Tony Lamer, it was emphasized how care must be taken not to "stunt the growth of the law and hence the community it serves".⁵ As Brian Dickson put it, the Charter "must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."⁶

In carrying through on this horticultural undertaking, the Supreme Court emphasized at an early stage that, if they are to produce a truly organic stand of jurisprudence, they must not be hampered by the original intentions of the Charter's foresters. To allow for growth and adjustment, the Charter must not be held hostage to the design and ambitions of those who supervised its planting.⁷ However, in typical fashion, the Supreme Court has been less than consistent in its commitment to this approach. When the Charter tree threatens to become unruly and grows in unanticipated or undesired directions, judges have been quick to invoke the superior authority of the original political foresters to warrant the odd bough being lopped off or the occasional branch

trimmed. Again, this technique curiously has been relied upon when the Charter challenge has come from one of the under-privileged groups in society, mainly working people and women.⁸

In cultivating the Charter tree, judges have disagreed strongly over the tools to be used and the horticultural philosophy to be embraced. Among those gardeners who have been elevated to the highest garden shed on Canadian grounds, LaForest and Wilson represent the most marked and opposing styles. The former takes a more hands-off approach. Apart from an occasional act of tree surgery, LaForest's philosophy is to rest content with letting democratic nature take its course: "in the absence of unreasonableness or discrimination, courts are simply not in a position to substitute their judgment for that of the Legislature."⁹ The latter has a more interventionist, hands-on style of constitutional gardening. For Wilson, the challenge is to keep a strict check on the Charter tree's growth so that its cut and appearance comport with a very definite view of what a Charter tree should look like: "the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the court is to map out, piece by piece, the parameters of the fence."¹⁰

Although the Court began with a fairly shared vision of its horticultural responsibilities and the pruning techniques to be used, it soon became apparent that there was considerable disagreement among the eclectic ensemble. Whereas thirteen of the first fifteen decisions were unanimous, there were dissents in sixteen of the next thirty-two. Moreover, it now seems that no Supreme Court decision can be handed down without at least one and sometimes as many as four dissents. This lack of unanimity, while not conclusive, does little to resist the broadening chorus of criticism that the work of the court is ideological in nature and operation.

Accordingly, instructed and informed by only their amateur gardening skills, the judges have become political topiarists and have shaped the Charter much to their own preferences.¹¹ As such, the Charter's growth and expansion has come to look naturally conservative, favouring established interests and traditional values over more progressive positions. With a bunch of judicial gardeners that are drawn exclusively from the ranks of the middle-class and middle-aged, this should come as little surprise. This is perhaps best illustrated by the double-limbed, means/ends interpretation of s. 1 which gives heavily presumptive weight to a retention of the status quo.¹²

The Charter tree was planted with the proclaimed intention of providing constitutional shelter and civic

nourishment to ordinary Canadians. In this it has surely failed. While the courts have opened themselves up for constitutional challenges through a liberalization of the rules of standing and non-party intervention, the price of admission remains outrageously high. Estimates range between \$100,000 and \$300,000 to take a case all the way to the Supreme Court of Canada. With its dazzlingly colourful and seductively scented foliage, it has proved to be more an ornamental shrub for the bulk of Canadian citizens. It tickles the aesthetic fancy, but does little to satisfy more substantive cravings.

Whether one agrees or disagrees with his mission, Joe Borowski's ten-year odyssey through the courts is a travesty of any kind of democratic process. Having first filed his case in September 1978, it took three years, \$150,000 and a visit to the Supreme Court to establish that he had standing to bring his constitutional challenge. In October 1988, after two more trials, seven years and another \$200,000, Borowski was back in the Supreme Court only to be told that his case was moot because of the recent decision in *Morgentaler*. At the very least, Borowski was entitled to a more conclusive and more expeditious decision on the validity of his constitutional challenge. In such circumstances, constitutional gardening becomes an indulgence that no sane society should endure or encourage. There are more nourishing and constructive pursuits to be fostered.

Confined to a rather elite arboretum, it is the corporate sector that has gained the most access to the Charter tree. Able to influence and reinforce the judges' horticultural instincts, corporations and their members have procured a constitutional crop that is to their liking. They have persuaded the courts to recognize their rights to free speech, religion, equality, to be tried within a reasonable time and to be free from unreasonable search and seizure. It is a bumper crop and must have surpassed even the most optimistic expectations of the corporate establishment.

In contrast, workers and other ordinary Canadians have been hard pressed to catch sight of, let alone benefit from, the Charter's reputed bounty. Efforts by the unions to secure a reasonable share of the Charter's fruit in the form of a right to strike or bargain collectively have been bluntly and unsympathetically rebuffed. So bleak is the situation that, as a face-saving manoeuvre, some union lawyers are minded to pass off as victories those decisions that simply leave in place benefits that took long years of political struggle to obtain.¹³ Furthermore, by way of adding insult to injury, the Supreme Court has refused to grant rights to unions because they are not fundamental and are not expressed dimensions in the Charter. Remembering the economic *raison d'être* of corporations and that corporations are

nowhere mentioned in the Charter, Le Dain's conclusions are perverse:

Since trade unions are not one of the groups specifically mentioned by the Charter, and they are overwhelmingly, though not exclusively, concerned with the economic interests, it would run counter to the overall structure and approach of the Charter to accord by implication special constitutional rights to trade unions.¹⁴

Indeed, the Charter's fruit has a delicate blush, is easily bruised and appeals to an acquired taste. While there has been the occasional produce for more general consumption of benefit, its choice berries only satisfy the palates of the privileged few. Costly to reap, it has not been the substantial and sustaining harvest that was promised or hoped for. For instance, equality rights have been effectively ambushed and held hostage by the more privileged sectors of society. The provision has been used to deal with charges such as drunk driving and the manufacture of pop cans. In the first three years after its planting, there were approximately 600 court decisions under the equality provisions and 44 or 7% of these involved sexual equality. Most alarmingly, only 7 of the 44 cases were initiated by or on behalf of women; the other 37 decisions were based on claims by men.¹⁵

Perhaps the most serious problem with this constitutional conifer is that the maintenance of its luxuriant growth seems to have become almost an end in itself. Casting a large shadow over the body politic, the Charter has insatiable organic needs. It requires constant and expensive attention, stymies the cultivation of other promising popular saplings and, most worryingly, sucks the political soil dry of its vital democratic spirit. This is particularly true of the failure by embattled and pusillanimous politicians to exercise their power to override the Charter under s. 33.

A topical illustration of the Charter tree's deleterious effect on other Canadian political fauna is the government's unwillingness to place spending limits on any referendum campaign. Taking the government at its word (a dangerous course), it defended its decision on the basis that such limits would be vulnerable to successful challenge under the Charter. As the purpose of spending limits is to ensure that democratic decision-making does not become hostage to the interests and views of the wealthy, the effect of the Charter has been to handcuff efforts to retain the semblance of democratic legitimacy that exists in Canadian politics. Wealthy individuals and corporations can use the broad reach of the Charter to shelter them from the refreshing rains of participatory democracy. Rather than be a democratic haven from a world of unequal wealth and power for the least advantaged, the Charter tree has become an elitist

hideaway for the privileged sectors of society who seek to evade the egalitarian instincts of a democratic polity.

While it is too late to nip this constitutional scion in the bud, it is not too soon to prune the Charter tree to more modest proportions. The judicial gardeners can best fulfil their democratic mandate by engaging in such a worthy project. Reduced to a less prominent position on the Canadian political landscape, the Charter tree might have a useful and limited role to play. Small is not only ecologically beautiful, but is also constitutionally sound.

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1. *Edwards v. Attorney General for Canada*, [1930] A.C. 124 at 136.
2. See *Dolphin Delivery*, [1986] 2 S.C.R. 573 and *Alberta Labour Reference*, [1987] 1 S.C.R. 313.
3. *Re Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 497 per Lamer J.
4. See *Big M Drug Mart*, [1986] 1 S.C.R. 103.
5. See *Re Motor Vehicle Act*, *supra*, note 3 and *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.
6. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.
7. See *Re Motor Vehicle Act*, *supra*, note 3.
8. See *Alberta Labour Reference*, *supra*, note 2 at 313 per MacIntyre and *Morgentaler v. R.*, [1988] 1 S.C.R. 30 per MacIntyre.
9. See *Edward Books Limited v. R.*, [1986] 2 S.C.R. 713.
10. See *Morgentaler*, *supra*, note 8.
11. See Petter and Hutchinson, *Private Rights and Public Wrongs: The Liberal Lie of the Charter* (1988) 38 U.T.L.J. 278; Hutchinson and Petter, *Rights in Conflict: The Dilemma of Charter Legitimacy* (1989), 23 U.B.C.L.J. 531; and Hutchinson and Petter, *Daydream Believing: Vision Reformalism and the Constitution* (1990), 22 Ottawa L. Rev. 365.
12. See Hutchinson, *Waiting for Coraf (Or the Beatification of the Charter)* (1991) 41 U.T.L.J. 332.
13. See *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211.
14. See *Alberta Labour Reference*, *supra*, note 2.
15. See G. Brodsky and S. Day, *Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

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