

# **Courts, Cabinet and Parliament: Community Law-Making on Great Political and Social Conflicts**

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## I. INTRODUCTION

A special challenge faces the Constitutional lawyer operating in a situation of constitutional *tabula rasa*: a newly-independent state, unencumbered by too much in the way of "received", inherited or imposed foreign law, Imperial or other. The opportunity, *qua* jurist, of playing the philosopher-king is even greater than it was for the Emperor Napoleon personally engaging in the study and then speedy adoption of his celebrated *Code Civil*; for Napoleon was, after all, the heir to an already highly developed legal system and the beneficiary of many years of prior research by other people.

The constitutional game within any political-legal system involves particular constitutional players (judges and others) operating through particular constitutional rules on particular constitutional bases of power to realize particular community goal-values. It may be helpful now for the lessons it offers as to what to do and even more importantly what not to do to re-visit the great Canadian constitution-making exercise that absorbed so much of our time and intellectual energies throughout the 1970s and into the early 1980s — a constitutional novation, as it was first, optimistically described and constitutional "patriation" as it ended up, anti-climactically. If it appears in retrospect to have been a substantially flawed exercise, the trial-and-error experience of the actual drafting and even more of subsequent incremental step-by-step building on concededly unsatisfactory intellectual and institutional foundations has many lessons for Constitutional lawyers in Canada and in other countries, including new states.

### A. The Conception and Drafting of the Canadian Charter Text

A decade after its conception in first draft form in October, 1980 the technical and substantive-legal imperfections of the *Canadian Charter of Rights and Freedoms* and of the larger constitutional novation exercise of which it was part, are painfully apparent. The principal designer of that larger constitution-making project, then Prime Minister Pierre-Elliot Trudeau, was fully aware of the faults and the awkward gaps by the time of the *Charter's* formal adoption as part of the Canadian Constitution in April 1982; though his unnecessarily harsh condemnation of it as a "failure" seemed addressed primarily to the political horse-trading and back-room deals that produced the final Heads-of-Government political consensus (minus Quebec) deemed necessary at the time to secure legal enactment of the *Charter*.

For the key concepts and internal design and organisation of the *Charter* and the correlative institutional infrastructure necessary for its concrete implementation (not changed in the essentials between the first draft of October 1980 and the final version inserted into the Constitution in April 1982), Prime Minister Trudeau and his constitutional advisers deserve full credit and full responsibility.

In terms of Comparative Law and Legal Science acquired through the often painful, trial-and-error, historical experience of other mature societies, as well as our own, the Constitutional patriation project of 1982 and its key component, the *Charter*, do not come off very well. The highly intelligent and politically sophisticated advisers who surrounded Prime Minister Trudeau — who devised the strategy and also carried through the tactical campaign for elaboration and then adoption of the *Charter* — were, for the most part, not schooled in Comparative Law and Government and the main lessons from past history. Even more intriguing, they did not seem at the time to be familiar with the two great alternative, Common Law and Civil Law, constitutional ideal-types or models for a Charter of Rights: the American Bill of Rights and the French Declaration of the Rights of Man and the Citizen. I do not suggest, now, that our constitution-making exercise of 1980-1982 should have attempted any mere verbal replication of those two late 18th century (what might be called "bourgeois-liberal") documents. That would be bad sociological jurisprudence without prior study and demonstration of the congruence or non-congruence of the background societal conditions against which their respective positive law provisions had emerged with those of contemporary Canada.

The main lessons of the U.S. and French systems of Constitutional Charters of Rights relate to the "gamesmanship" of constitutional drafting: what to put in and what to omit from a constitutional charter; what sort of language and literary style to attempt; and what sort of institutional or processual support such charters need in order to be effective as constitutional law-in-action — to be normative-legal, as well as purely nominal or hortatory as is the case with many Constitutional Charters of Rights around the World and as was the case, it may be suggested, with the 13th, 14th, and 15th amendments to the U.S. Constitution for almost two thirds of a century after their adoption.

Prime Minister Trudeau, unlike the Founding Fathers of the U.S. and French documents, did not draft the Canadian *Charter* himself but left it to his advisers. That is a pity because he was intellectually at least as well-equipped as his earlier U.S. and French counterparts. He could certainly himself have produced in as little time as the Americans and French took at the end of the 18th century an equally elegant and succinct document capable of enduring through the ages as the U.S. and French models have. However, in marked contrast to the U.S. and the French experience, the Canadian *Charter* is a "Government's" and not a "People's" Charter: long, rambling, discursive, and rendered in highly technical language which requires a skilled lawyer at one's elbow to comprehend its implications or to resolve its frequent, inbuilt ambiguities or antinomies. It reminds one, in this sense, of the ill-fated Weimar Constitution of 1919 — the product, also, of an oligarchic, politically elitist group rather than any popular democratic process and of whose drafters it was said that when faced with irreconcilable political contradictions their solution was to put them all into their Charter and to leave it to history to resolve the dilemmas. Every main principle seemed accompanied by its own direct antithesis.

This overly arch, politically clever or cynical approach to constitutional drafting and to the fundamental political choices inherent in it is well demonstrated in the unnecessarily complicated and wordy affirmation of "Equality Rights" in Section 15 of the Canadian *Charter* and the seemingly timid or half-hearted acknowledgment of the constitutional antinomy or antithesis presented by "affirmative action", contained in Section 15(2). The alternative U.S. and French approach, elaborated a century and a half before the notion of direct community intervention to promote a substantial and not merely a procedural equality was accepted as a norm of societal conduct, is to recognize that the constitutional Charter's

prime obligation is to establish long-range community goals or legal "standards" whose meaning and content is subject to continual expansion and development through time in direct response to the evolution of community needs and expectations. In international legal arenas this is aptly called, "the expanding juridical conscience of mankind". It is not some sort of arcane game reserved for the judges and their highly-salaried supporting technical lawyers, but an exercise of what Jeremy Bentham called "Judge and Company". Through educated public opinion, the community's own role in the creative evolution of constitutional standards and in shaping the Court's own comprehension of that necessary and inevitable "progressive development of law" (again to borrow from international-legal discourse) is crucial, as it has been over the years in the imaginative adaptation of the late 18th century U.S. and French liberal charters to the special conditions of the highly complex, post-industrial U.S. and French societies at the close of the present century. In this view, the historical evolution of the U.S. constitutional "Equal Protection" guarantee of the post-Civil War 14th Amendment from a formal to a substantive equality, then on to the still not completely resolved "reverse discrimination" notion of the *Bakke* Court majority [438 U.S. 265 (1978)], stems from a legal-dialectical process that rests upon a constitutional charter reserved for the postulation of long-range community goal-values (constitutional-legal "standards") rather than the petti-point needlework of particular low-level, often purely transitory, problem-situations. This process of historical evolution also rests upon the existence of a Special Constitutional Court (*de facto* in the U.S. case, *de jure* in its latter-day Continental European analogues) whose members will be "representative" in a political and social, as well as a legal-systemic sense, and whose mandate by virtue of their broad public, political experience, in addition to their legal training and professional background, will be construed, broadly and openly, as one of legislating affirmatively to adapt the high-level and general goal-values of the constitutional charter to contemporary societal interests and needs.

## **B. The Policy-Making role of the Courts in light of the *Charter***

This leads me on to examine the other main gap in the Canadian Constitutional Patriation project, in addition to the flaws already noted in the conception and drafting of the *Charter* text. That is the failure to acknowledge publicly that adoption of a constitutionally-entrenched *Charter of Rights* would inevitably produce immediate and substantial consequences for the other main coordinate constitutional-governmental institutions and above all the courts to which the great political-legal controversies inherent in the Charter's many, sometimes deliberately vague, sometimes recognisedly conflicting, substantive provisions could reasonably be expected to be transferred. For example, we are observing our courts, at the end of the 1980s, in default of executive-legislative leadership, assuming the responsibility for resolving, in a necessarily imperfect, incomplete, and intermittent case-by-case species of policy-making, the community policy dilemmas and alternative choices inherent in the "right to life/right to choice" abortion conflict.

What should have been foreseen and prepared for during the Constitutional Patriation exercise, namely, the role of the Supreme Court of Canada and Provincial Supreme Courts in the post-Charter era must be faced now on an *ad hoc* basis in the middle of the political and social tensions resulting from an evidently conscious and deliberate executive-legislative inaction and a seeming patchwork quilt of disparate Provincial judicial policy-

making interventions that, to the general public, seem too often to have been rendered on a hit-or-miss basis and as acts of individual faith and not of law.

The problem was evident enough and should have been studied by the new generation of constitutional "Founding Fathers" during the Patriation "great debate" of 1980-1982. Recognizing that the matter is no longer *tabula rasa* and that today we must proceed on a basis of a number of years of post-*Charter* judicial testing or stumbling from one case to another, we may usefully pose the basic dilemmas of judicial policy-making (political legislation) in a contemporary Canadian constitutional context:

1. Are the Courts the best arena for resolving fundamental political-social conflicts such as the sanctioning of voluntary interruption of pregnancy; or the permitting of cruise missile tests by a foreign power in one's own national air space and over national territory; or the creation of positive legal advantages or preferences for one societal group over other societal groups by reason of past social or economic disabilities (reverse discrimination)?
2. If the answer is affirmative, does it imply correlative changes in the nature and character of judicial appointing processes and the quest for other and different ("policy") qualifications in candidates for the highest judicial offices; and does it also warrant a sharply-accentuated right of public criticism of the political performance of judges in terms of their actual record on the courts? I mention these possibilities because they are already amply recognized in the Constitutional Law or in the developed Constitutional practice of other cognate legal systems to our own — the U.S., France, West Germany, and other Western-influenced, post-industrial societies.
3. If, as seems likely, our answer in Canada must, because of past oversight but also the on-going experience of the 1980s be a mixed one, what are the implications of a new, *de facto* Constitutional policy-making role for the judiciary for conventional Constitutional conceptions (separation of powers, inter-institutional comity) that until now have conditioned and controlled the courts in their relations with Executive-Legislative authority and also with the public at large. Finally, what new relationships should sensibly be worked out within the Court's own case-by-case jurisprudence?