Charter Remedies and Democracy

John C. TAIT*

I would like to talk about how certain Charter remedies affect the political process and "over time" may affect the quality of democracy in Canada.[1] I will focus on how courts deal with legislation that offends the Charter, for example, by striking it down, severing portions or reading words or concepts into a provision.

I should first explain how I came to choose this subject. During my six years as Deputy Minister of Justice and in the two years since I left, I have been reflecting on governance in Canada, how the political system may be evolving and what the influence of the Charter on that evolution may be. I have approached these questions as a practising public servant and as a participant in the justice system. It is important to me that these roles be complementary, and I have always found that they are.

One of the great challenges has been to find an appropriate balance between the day-to-day requirements of running a government department and the attempt to understand and help governments to influence the impact of ongoing events on Canada's overall system of democratic government under the rule of law.

Over time, I have been increasingly concerned that as a result of accelerating change and stress, Canadians may be losing some of their understanding of our principles and institutions, those that provide our sense of history, continuity and community, our sense of what we are. They may be slipping away, and I am concerned that 10 or 20 years from now we will regret not only that they are gone but that we cannot get them back.

One of these defining institutions is parliamentary democracy, which is under often inadvertent attack by commentators who do not understand the difference between responsible government in Canada and presidential government in the United States, by citizens who think compromise is a dirty word and by litigators who want the courts to become legislatures. We cannot afford to treat lightly these institutions and the values they embody.

We hear a great deal these days about the stresses on our major institutions in the face of rapid and constant change. Canadians, we hear, are losing confidence in our key public institutions — and even we who work within them are having doubts.

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* Senior Advisor to the Privy Council Office, Ottawa, Ontario.

1. The views expressed here are personal and do not reflect the views of the Privy Council Office or the Government of Canada. I would like to thank Jim Hendry and Doug Williams of the Department of Justice, and Alex Himelfarb of the Privy Council Office, for their help in preparing this presentation.

While of course there are reasons for these concerns and there is the danger of which I have spoken, I would like to share with you a somewhat more optimistic view: the strength of Canada, or at least one source of it, is the adaptability of our institutions, their flexibility to evolve as the needs and aspirations of Canadians evolve. Two institutions of central importance to Canada's unique brand of democracy — the legislatures and the courts — have evolved remarkably, especially over the past decades.

In times of change, however, we have to pause deliberately and reflectively to take stock of the evolution, especially in times such as ours when the change may come too fast, so fast that we threaten the principles that are the foundation of our system of government. Equally, we have to make sure that our institutions are evolving in compatible ways. Institutions must have a certain reciprocity — what in human terms we would think of as mutual understanding and respect — and it is important that such complementary institutions as legislatures and the courts not evolve in divergent ways.

Let me be more concrete. Our legislatures have always changed to meet new demands, sometimes in informal and subtle ways, sometimes in quite dramatic and formal ways. One of the most profound changes was the adoption of a *Canadian Charter of Rights and Freedoms* through which parliamentarians chose to modify their legislative powers in a way that strengthens protection of individual and minority rights.

As Deputy Minister of Justice, my first duty was to encourage the government to play its role in respecting the letter and principles of the Charter, and I collected my thoughts on leaving Justice in a talk called "Policy Development and the Charter".[2]

The message that I had for governments is that they must act purposively and proactively to respect and reflect the purposes and principles of the Charter. Government has a unique role and is founded on specific values — the rule of law, accountability to citizens, reasonableness and fairness. If legislatures do not fully play their role, it will leave a void to be filled by others, including the courts, which face unrelenting pressures to fill the policy vacuum.

I have, for today's talk, turned to focus specifically on the reciprocal role of the courts.

The courts have changed perhaps even more dramatically, particularly with the *Canadian Charter of Rights and Freedoms*. The Supreme Court especially has provided a principled framework for incorporating the Charter in our system of government and the courts have worked hard to ensure profound respect for the Charter and its values while protecting the prerogatives of legislatures to the extent compatible with Charter purposes. My talk today accepts the principles laid down by the Supreme Court and attempts to make a small contribution in the application of these principles.

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2. See my article, "Policy Development and the Charter", in Tait and Cappe, *Perspectives on Public Policy*, CCMD, 1995 at 1.

When Tom Cromwell asked me to speak on remedies and the political process, I was reminded that when I taught a course at Queen's University last year on "The Charter and Public Policy", I had been impressed with the realization that one of the greatest impacts that the Charter could have on democracy was caused by court decisions as to what remedy to grant when legislation offended the Charter. In considering Charter remedies, courts are often faced with the question of the extent to which they wish to make legislative policy themselves; for example, whether they want to strike down parts of legislation, redraft it or perhaps even strike it down and make new rules.

Over the years, forces at play in interpreting and applying the Charter have done much to turn the courts into a new form of policy-making body. Relaxed rules of standing and intervention allow litigants to attack legislation without themselves experiencing any particular problem with it. The Supreme Court of Canada has supported a broad and purposive interpretation of Charter language that is already very general and inclusive, an approach that invites subjective policy interpretation, and the *Oakes*[3] criteria under section 1 include many policy considerations. As a result, just about anyone with the will and commitment can invite subjective interventions by courts in respect of a vast array of government activities and legislation. I do not criticize this situation; I merely take note of it. Most of it flows naturally from the Charter and its place in the Canadian legal system. And in applying it, the courts generally make serious efforts not to unduly affect the prerogatives of legislatures.

Much of the policy and even political impact of the Charter is unavoidable. But in my view, the overall legitimate impact is so pervasive that it makes it all the more undesirable that courts go beyond what is unavoidable by making legislative policy unnecessarily.

It is important to have a clear idea of what it is we are trying to protect, because this will help the courts to focus on the factors that accomplish this goal. First, there are the constitutional prerogatives of legislatures, including the authority to approve taxes and spending, which stand together with other constitutional guarantees. Equally important are the democratic principles which underlie the authority of the legislature and are reflected in the Charter, and the conventions which embody much of Canadian parliamentary democracy, such as responsible government and the accountability of elected officials to the people of Canada. We are sometimes sceptical about the merits of our democratic system, but all we have to do is look at countries that do not have free and open elections under the rule of law to know what a treasure our system truly is.

In my view, a focus on respect for the authority and role of legislatures also protects the independence of the judiciary, another crucial constitutional principle. It does so by allowing the courts to focus on their core roles and ensuring that they do not move unnecessarily into areas of political controversy where public opinion and debate are important, and where working out an agreed compromise is often a part of the answer. Institutions can function best by doing what they are mandated to do and doing it well.

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3. *Oakes* v. *The Queen*, [1986] S.C.R. 103.

I believe that the classic approach to the respective roles of the courts, governments and legislatures works best: the courts should define and apply the law of the Charter and legislatures should enact legislation that respects the law. There is an obvious constitutional reason for this approach but I believe that it is also in the public interest. Now, our entire constitutional history shows that the matter may not be so simple: the two roles overlap at the edges. For example, courts have had to be involved in clarifying or filling gaps in legislation, and of course governments have had their own views of what is legal. For courts, merely striking down or holding inoperative unconstitutional legislation often leads to ridiculous or unfair results. Therefore, techniques such as reading in or down, severance and constitutional exemptions have been used, generally wisely and respectfully of legislative roles and responsibilities.

In my view, these techniques, while sometimes necessary, always entail some risk, some encroachment on the role of legislatures and some stretching of the role of courts. Furthermore, since the advent of the Charter, the situation has changed, a clearer division of roles in respect of invalid legislation has become more realistic, and these techniques need not be used so widely.

Basically, my view is that it is often unnecessary for courts to make choices that change the reach of a statute under the Charter, because the authority exists to suspend the judgment in a way that would allow the legislature to make the policy decisions involved in adapting their legislation to respect the Charter.

The reason is that the Supreme Court has found that the courts have the authority to suspend their judgments invalidating legislation, to give legislatures time to react and replace it. This is a strong instrument now available to the courts — I will call it the "suspension technique" — and its importance may not be fully recognized. I wish to make a contribution to the analysis, because in my view allowing legislatures to make the adjustments necessary to their statutes can be important to the long-term health of our democratic system. The main point is, suspension is often less intrusive than reading in or severance.

The remarks that follow focus on the use of the suspension technique" and how it can help courts in their efforts to respect the democratic system. I am aware that a focus on one aspect of judicial decision-making, and an abstract one at that, can fail to give weight to other factors involved in cases, especially human and real-life factors such as personal urgency, the harm being done to specific people and the actions being taken — or not being taken — outside the courtroom to provide solutions. The point I wish to underline is the importance of considering carefully and clearly the longer-term impacts of some decisions on the democratic system as "one" important factor.

Let me pause and say a word about the suspension technique. To my knowledge, it was first used in the *Reference Re Manitoba Language Rights*,[4] but it has been used fairly often since then in Charter cases, probably because Charter cases present an array of situations not seen in cases interpreting federal and provincial powers.

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4. [1985] 1 S.C.R. 721.

The leading decision on this matter is *Schachter* v. *Canada*.[5] When I was Deputy Minister of Justice, I thought that *Schachter* was an excellent decision, and I still do. You will recall that the issue was what to do with unemployment insurance legislation in the face of a government concession that discriminated against natural parents. The question was whether the legislation should be struck down or extended to natural parents, as was done in the trial court. The decision of the Supreme Court of Canada was very respectful of the roles of legislatures and was especially cogent in recognizing their role in making decisions about significant spending programs.

I have always found that the respective merits of techniques for dealing with invalid legislation under section 52 of the *Constitution Act*[6] are very complicated, but they are much clearer after the majority judgment of Lamer (C.J.C.) who did an excellent and comprehensive overview of the techniques available when legislation offends the Charter — striking down, severance, reading down and reading in — and a clear analysis of the use of the suspension technique. The Chief Justice upheld its availability and indeed would have used this device in *Schachter* itself if Parliament had not already acted to change the legislation.

Lamer C.J.C. found that severance and reading in are much the same thing: if they were not, the style of drafting would determine the remedy. Both are used to avoid striking down parts of a legislative scheme that themselves do not offend the Charter. And for both, what is most important is to balance the requirements of the Constitution and respect for the original scheme enacted by the legislature. Lamer C.J.C. undertakes a very careful analysis of how to balance the two requirements, showing real concern for the purposes of the legislature in enacting the legislation.

I would like to comment on ways of respecting the role of the legislature, from my point of view as a practitioner of government. First, it is always difficult to talk about legislative intent outside the words of a statute; it is even more difficult when the legislature enacted a statute later found to be unconstitutional. In most cases, it is not possible or useful to imagine what the legislature would have done had it known of the problem. It is not always even the most relevant focus.

The focus may not be the most relevant because, second, the issue is often not what the legislature would have done in the past; it is what the legislature would do now, because it is only now that the legislation has been found to be invalid and it is now that it must be fixed. And what a legislature may wish to do now is usually unknown and unknowable to a court. Governments can completely redraft statutes and restructure programs or distribute benefits at a lower level, as was done when *Schachter* was being litigated. Legislatures and the executive are subject to different time-lines and face different constraints. Legislatures work through a different process of consultation and decision-making. Canadian federalism is also relevant here. Governments and legislatures at different levels are in a position to work together to ensure that their legislation is complementary.

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5. [1992] 2 S.C.R. 679 [hereinafter *Schachter*].

6. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

In *Schachter*, the Chief Justice indicated that suspension should only be used in cases where there was danger to the public, the rule of law would be undermined or, as in *Schachter* itself, striking down legislation would do harm to those benefitting from legislation that is under inclusive (e.g. do harm to the adoptive parents in *Schachter*). In *Schachter*, the Court would not have extended the benefits to natural parents, since this would have broadened the legislation in a huge measure and had major and disproportionate financial impacts, but the court equally would not have simply struck down the legislation, because innocent beneficiaries would suffer. (The Chief Justice noted the expression "equality with a vengeance" argued before him by intervenors as a description for court decisions cutting off benefits because they are under inclusive.) Therefore, the judgment would have been suspended.

Lamer C.J.C. specifically said that the decision whether to suspend judgment is not related to whether there should be reading in or severance. Indeed, he implied that suspension of a court's judgment should rarely be used because of respect for the role of legislatures. The suspension technique impacts on the legislature by affecting its agenda. It is therefore an intrusion and should only be used if members of the public would otherwise suffer. On this argument, suspension is not to be used to protect the role of the legislature, and, by implication, suspension is more intrusive of the role of the legislature than reading in or severance.

I'd like to comment on these two points. First, providing a suspension or delay to allow legislatures to act does *in part* respect their role, by allowing legislatures to make the choices, and it is impossible to ignore this fact in weighing the pros and cons of using it.

In my view, it is in principle very important to allow the legislature to redesign the legislation within the law of the Charter. This should be a positive, though not necessarily conclusive, reason to suspend judgments that would sever or read in.

But what of the effects on the legislative timetable? These effects are real and relevant but in my view, the courts should be interested in the health of the long term democratic process and not only the short term impacts of their judgment on political events. This is another balance to be struck.

Second, it should be noted that Chief Justice Lamer indicates that reading in or severance should be done only if it is compatible with reasonable respect for the legislature. If it is not, what are the options? I believe that suspension should be one clear option, either instead of, or in addition to, reading in or severance. Suspension helps to ensure respect for the legislature and is therefore directly related to the balancing test for reading in.

Because I am a public servant, I am unable to share with you specific examples of cases where my Ministers and I discussed the impact, or possible impact, of court decisions to change the contents of legislation. But I can give you the flavour of these discussions and some sense of what I learned.

For example, we had cases where the government was committed to amend legislation to respect the Charter but was slow to act because of the give and take of politics.

For governments, the challenge is often to balance different legitimate points of view and, from the perspective of a specific court case, the process can often look agonizingly slow. For politicians, there is often a desire to exercise leadership in a way that does not get so far ahead of public opinion that it looks like imposition. Governments often know what they want to do and try to build constituencies to support their proposals. It therefore can take a long time to decide on *how* to respect Charter guarantees.

This process can lead to maintaining laws that may offend the Charter for a long time. Time passes. Litigation commences. In the face of legislation they find to offend the Charter, courts have to decide what to do besides striking down the offending provisions. A review of the record shows that the issue was first raised in the political arena many years before and little or no action was taken. In such situations, a court might be tempted not only to declare the law invalid, but to make policy changes to the legislation. The political process appears to have failed.

But of course, one thing that the political process lacked was an objective and authoritative declaration of what the Charter required. Even if Justice lawyers point out the need for change, often their legal opinions become the subject of challenge and debate. In Canada in the 20th century, when the law is declared by a court, governments follow it.

If the courts decide to change the policy in the law, they influence the real options open to governments as to how they will respect the Charter. Interest groups will react adversely to legislation that appears to give them less than a court decision, whatever the cost or implications for other litigants may be. The court's decision may be the minimum that is politically acceptable.

More importantly, in my experience, there is systemic harm when the courts make policy unnecessarily. As Deputy, when faced with controversial issues, I heard again and again, "let the courts handle it". When matters appear complex or controversial, for governments this is the comfortable thing to do. But I also heard, again and again, severe criticism of the courts for interfering with government prerogatives. Clients believed they could have it both ways, encouraged by the willingness of courts to step in and make policy decisions on controversial subjects. Approaches that encourage public officials to want to have it both ways do not enhance good government. They diminish accountability. Court decisions that make legislative choices as well as applying the law may also lead to unnecessary criticism of the courts, while encouraging abdication by those truly responsible.

Of course, litigants do try to use the courts as legislative bodies, and are vocal in their criticism when courts refuse to act. It must be accepted that litigation is now seen by many as an integral part of the political process, but it is unwise to raise the expectations of litigants that courts will provide all the answers. It should be clear that it is out of bounds for litigants to want courts to provide policy decisions that they cannot get from legislatures, where such decisions go beyond the court's core roles and

responsibilities. I know that the courts are criticized from all sides of the issue, and feel caught in the middle, but it is just possible that some of the criticism is caused by raising unrealistic expectations.

Sometimes the courts appear to act out of impatience with government inactivity. But impatience is not always warranted if there are honest viewpoints being expressed politically on different sides of an issue. Impatience is another sign that we may be overly preoccupied with the short term at the expense of the longer term. And even warranted impatience does not require the imposition of policy by a court that could instead be decided under a deadline by a legislature. Suspension of a judgment of invalidity does not let governments and legislatures off the hook in terms of respecting rights. A short suspension helps to concentrate the mind wonderfully on a solution that respects the Charter.

Suspension, of course, is not the answer to all the complex questions we have been posing. It cannot be used indiscriminately or be relied on exclusively.

So far I have been emphasizing the importance of respecting the role of the legislature, because this is the focus of my particular concern. It is of course also crucial, in considering whether to suspend a judgment, to consider the purposes of the Charter. If invalid legislation stays on the books even for a short time, this is in direct contradiction of Charter purposes and it must be avoided when this is reasonably possible. A balance must be struck between respecting the role of the legislature and the democratic process, on the one hand, and the role of the courts in enforcing the Charter and providing justice to litigants, on the other. The test is similar to that mentioned by Chief Justice Lamer in *Schachter*, in respect of reading in and severance. My point is to include consideration of the suspension technique for the very purpose of protecting the democratic process.

In striking the balance, the public harm test as described in *Schachter* is one important factor. But if a court is considering severing or reading in and finds itself weighing policy choices, then the court must strike a balance of constitutional principles, between the role of the legislature and respect for the Charter. And here considerations as to the seriousness of the harm, for example, whether the legislation breaches the Charter in what it does — or what it does not do — are relevant, as the Chief Justice pointed out in a different context in *Schachter*. Legislation that offends the Charter in what it "does" may be more difficult to sustain, even briefly. In any case, the purposes of the Charter require that the suspension be for the shortest possible time and be accompanied by any consistent incidental remedies useful and proper for the litigants.

As pointed out in *Schachter*, short-term considerations may also affect the question of the weight given to the role of legislatures in the balance. At times, forcing an item onto the parliamentary agenda with a short time frame will indeed be truly undesirable in the public interest because of some relevant factor in the political conjuncture.

It is important to realize that the approach I suggest supports the purposes of the Charter by encouraging the courts to play a strong role in interpreting the Charter: the Charter rights of minorities would be supported, not weakened, because the courts would

focus more on their own role and be less distracted by the complexities of providing the best legislative result. The independence of the courts would be less threatened by undue politicization. And the approach does not allow governments to duck Charter issues: even if a government uses the suspension period to invoke a notwithstanding clause, it is accountable for this very decision.

The crucial value that I believe has to be kept in view is the short and long term interest in an effective democratic system and an independent judiciary under the rule of law. It is likely that this value has implications for other aspects of Charter application by the courts, such as laying out detailed prescriptions as a Charter requirement in the area of legal rights relating to the criminal law.

I have not considered all aspects of the policy-making role of the courts. If courts are likely to consider rewriting legislation, this possibility also of course has implications for the litigation process. The litigation process has weaknesses as a forum for policy analysis and decision. If rewriting legislation is open to courts, the nature of the rewrite has to be argued at trial and beyond. This distracts and detracts from the kind of arguments on the law and evidence that courts and lawyers can handle well. Moreover, policy development involves looking at many options; in justice we were inhibited from putting many options to courts for fear of undermining the argument we most believed in: this is a tactical issue quite inappropriate for a policy process. These implications support the view that the courts should make legislative policy as little as possible.

CONCLUSION

Canada has experienced and is experiencing rapid change, and the system of justice is no exception. Indeed, with the advent of the Charter, the justice system is a source of enormous change.

My experience has been that much of this change is beneficial for society, such as greater protection of human rights. The courts have generally done well the difficult job of enforcing the Charter without unnecessary intrusion into legislative responsibilities. *Schachter* is an example of a profound effort to respect the role of legislatures and to provide a coherent summary of the factors and complexities involved. But it may have underestimated the difficulty of applying its tests in the complicated situations often found in litigation. I believe that some clarification of the use of the suspension technique can serve the purpose so evident in *Schachter* of full respect for the Charter and protecting our democratic system.

Will increased use of the suspension technique mean that government will not leave difficult policy issues to the courts? No. My subject today covers only a small part of this problem, which relates to the inherently broad policy coverage of the Charter, but use of the technique is a start, a useful clarification of accountability.

This is important. The role of government will be as significant in the 21st century as it was in the 19th or has been in the 20th. And democracy is crucial. It is also

quite fragile. Majorities can hurt minorities and the weak and they must be protected. But democracy must be made to work, over time. It is a *sine qua non* for protecting rights, including those of the disadvantaged.

The political system is far from perfect. The public distrusts government. They are looking for principled decisions, clear debates. They want answers. But if they seek inappropriate answers from courts and are successful, the courts will be drawn increasingly into the hurly burly of politics where they cannot defend themselves. Democracy will be even less trusted. The system will be more dysfunctional.

I know that the courts share these concerns and work effectively to get the balance right. My hope is that as our experience with the Charter continues to evolve, the suspension technique will help us all to ensure reciprocal roles in the application of the Charter, and will make a modest contribution to the balance of respect for Charter rights and freedoms and for parliamentary democracy.