PRESENTATION BY
THE CANADIAN HUMAN RIGHTS COMMISSION
TO
THE SPECIAL JOINT COMMITTEE
ON THE CONSTITUTION OF CANADA

NOVEMBER, 1980

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Purpose of this document:

1.0 to set out the general principles supported by the Canadian Human Rights Commission on the issue of the constitutional protection of non-discrimination rights.

2.0 to make specific recommendations as to the formulation of the offered protection in the Charter of Rights and Freedoms.

1.0 GENERAL PRINCIPLES

1.1 The Canadian Human Rights Commission supports the entrenchment of a Charter of Rights in the Canadian constitution, and the inclusion of non-discrimination rights in the Charter.

1.2 The Charter of Rights should offer protection at least as comprehensive as, and close to the language and spirit of, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. These instruments were ratified by Canada in 1976 with the concurrence of the provincial governments.

1.2.1 In this connection it should be noted that Canada, with agreement of the provinces, has also ratified the Optional Protocol to the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. Canada has also made a declaration under Article 41 of the International Convenant on Civil and Political Rights, which allows other countries to call attention to any failure on Canada's part in fulfilling her obligations under that Convenant. Canada has thus increased her accountability to the world community in this regard.

1.2.2 We note in particular that under the Covenant on Civil and Political Rights, non-discrimination rights are non-derogable and cannot be made subject to limitations, even in war-time.

1.2.3 We note further that under both Covenants, the equal rights of men and women to the enjoyment of the enumerated rights is guaranteed.

1.3 Parliament should make its intentions clear as to the scope of the offered protection. That is, does the offered protection apply to the substantive contents of legislation (only), or does it apply to the administration of legislation (only), or does it apply to both the substantive contents of the law and the administration of the law? It is the position of the Canadian Human Rights Commission that the offered protection should apply to the substance and the administration of the law.

1.0 GENERAL PRINCIPLES (cont'd)

1.4 Non-discrimination rights should offer protection against legislative distinctions based on a full range of possible grounds of discrimination.

1.4.1 The Commission's first preference would be for a general proscription of discrimination, with no grounds enumerated, thus offering the broadest possible protection.

1.4.2 Alternatively, the Charter of Rights should offer general protection with a list of examples, that is, it should allow for no discrimination on grounds such as race, sex, national or ethnic origin, colour, religion, age, marital status/situation de famille, physical or mental handicap, political belief, or sexual orientation.

1.4.3 Less desirable, but acceptable as a minimum description of the offered protection, would be a guarantee of no discrimination on the grounds of race, sex, national or ethnic origin, colour, religion, age, marital status/situation de famille, physical or mental handicap, political belief or sexual orientation.

1.4.4 A list of enumerated grounds which does not include marital status/situation de famille, physical or mental handicap, political belief and sexual orientation does not offer adequate protection.

1.5 It must be recognized that for the offered protection to be meaningful, it should be capable of being applied to specific forms of discrimination in the law while at the same time allowing for certain legislative distinctions to be made on the basis of the proscribed grounds in the interests of the public good. Paradoxically, therefore, in order to have strong non-discrimination rights, it is necessary to limit them.

1.5.1 Limitations on non-discrimination rights must, however, be formulated carefully and specifically. The very sweeping limitations contained in Section 1 of the present form of the Charter of Rights, for example, are unacceptable.

1.5.2 The section of the Charter of Rights which guarantees non-discrimination rights should therefore be taken out from under the application of Section 1 of the present form of the Charter, or any other general limitations clause in any revised form of the Charter. As we have noted, Article 4 of the International Covenant on Civil and Political Rights provides for certain limitations on rights to be made in time of emergency but specifies that such measures may not involve discrimination.

1.0 GENERAL PRINCIPLES (cont'd)

1.5.3 Section 15 of the present form of the Charter of Rights, or any other similar provision of a revised Charter, must allow for no legislative distinctions as between various groups of persons on the basis of a proscribed ground of discrimination except those legislative distinctions reasonably and justifiably related to some bona fide social or economic amelioration of the condition of certain specified groups of persons. For example "age"- guaranteed income supplement; "marital status/situation de famille"- family allowance; "physical or mental handicap"- disability pensions.

1.5.4 No negative legislative distinction against a specified group of persons on the basis of a proscribed ground of discrimination would be allowed, (e.g. "race"- the incarceration of Japanese-Canadians; "sex"- section 12(1)(b) of the Indian Act) subject only to such reasonably justifiable limitations as can be demonstrated to be necessary for reasons of compelling state interest. Parliament should make it clear that this limitation is to be interpreted extremely narrowly and rigorously; that it is Parliament's intention that this limitation will almost never be "reasonably justifiable" or "demonstrably necessary" on the grounds of race, sex, or colour; and that its use would be restricted to legislative distinctions such as age of eligibility to vote and other such purely practical distinctions.

1.6 Section 1 of the Charter of Rights and Freedoms as it is presently formulated offers unacceptably broad excuses for the limitation of rights and freedoms. Not only non-discrimination rights, but the entire range of guarantees in the present Charter, are rendered extremely fragile by Section 1 in its present form.

1.6.1 The present wording: "subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government" is not a formulation which is found in the growing world of jurisprudence pertaining to rights and freedoms.

1.6.2 It is the view of the Canadian Human Rights Commission that any general limitation clause in the Charter should accord with the accepted clauses in the International Bill of Rights (i.e. the Universal Declaration of Human Rights, the International Convenant on Economic, Social and Cultural Rights, the International Convenant on Civil and Political Rights, and the Optional Protocol to that Convenant.)

1.0 GENERAL PRINCIPLES (cont'd)

1.6.3 The words "generally accepted" are of particular concern. It is the position of the Canadian Human Rights Commission that limitations should be "justifiable", thus placing the burden of proof on those who wish to limit rights and/or freedoms, and that any limitation should be provided for by law.

1.6.4 The Canadian Human Rights Commission is also concerned that the words "with a parliamentary system of government" may have the effect of constraining the courts, whose role it is to uphold the Charter, by invoking the doctrine of parliamentary supremacy.

2.0 SPECIFIC RECOMMENDATIONS

2.1 With respect to the Guarantee of Rights and Freedoms, the Canadian Human Rights Commission recommends that Section 1 of the Charter of Rights and Freedoms be revised to read:

1.(1) The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

(2) No limitations on the legal rights or the non-discrimination rights set out in this Charter may be made under this provision.

(3) This Charter guarantees the equal right of men and women to the enjoyment of the rights and freedoms set out in it.

2.2 If Parliament should consider that sub-sections (2) and (3) of this formulation do not reflect its intentions, the Canadian Human Rights Commission would recommend that the present wording of Section 1 of the Charter be revised to read:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

2.3 With respect to non-discrimination rights, the Canadian Human Rights Commission recommends that Section 15 of the Charter of Rights and Freedoms be revised to read:

15.(1) Everyone has the right to equality under the law and to the equal protection of the law without discrimination.

(2) This section does not preclude any legislative distinction which is justifiably related to some bona fide amelioration of the condition of certain specified classes of persons.

.0 SPECIFIC RECOMMENDATIONS (cont'd)

(3) This section does not preclude any legislative distinction which is justifiably necessary for reasons of compelling state interest.

2.4 If Parliament should consider that it is necessary to enumerate proscribed grounds of discrimination in Section 15 of the Charter of Rights and Freedoms, the Canadian Human Rights Commission would recommend that Section 15 be revised to read:

15.(1) Everyone has the right to equality under the law and to the equal protection of the law without discrimination on grounds such as race, national or ethnic origin, colour, religion, age, sex, marital status/situation de famille, physical or mental handicap, political belief or sexual orientation.

(2) This section does not preclude any legislative distinction based on a proscribed ground of discrimination which is justifiably related to some bona fide amelioration of the condition of certain specified classes of persons.

(3) This section does not preclude any legislative distinction based on a proscribed ground of discrimination which is justifiably necessary for reasons of compelling state interest.

November 12, 1980

A PROPOSAL FOR A CHANGE IN THE WORDING OF SECTION 1 OF THE PROPOSED CHARTER OF RIGHTS AND FREEDOMS

Introduction:

Section 1 of the proposed Charter now reads:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."

The underlined words will likely render all that follows in the Charter useless. They invite judges applying the Charter to undertake an empirical inquiry into what fact is accepted, rather than to make an independent judgment of what limitations on basic rights should be tolerated. It is seriously possible that what Parliament does will be taken by the courts to be an excellent indicator of what is "generally" acceptable. The Charter would then be virtually meaningless as a limitation on the power of the federal government.

I propose a slight change in wording with potentially critical consequences. Section 1 should read:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are acceptable in a free and democratic society with a parliamentary system of government."

By saying "acceptable" instead of "generally acceptable", the Charter would encourage judges to make an independent assessment of whether a limitation on basic rights should be sustained. The judge would consider on the one hand the liberal principles suggest by the word "free" and elaborated in the substantive provision of the Charter. But at the same time the words "democratic" and "parliamentary" would remind him of the importance of giving due respect to the political judgment of the majority as expressed through elected legislatures.

Under its present wording, Section 1 is highly ambiguous. Two main branches of interpretation are possible. These will now be considered in turn.

-I-

Section 1 can be interpreted as requiring a judge to consider whether a limit on rights recognized in the Charter is of a sort accepted as a reasonable limit on basic rights in a free and democratic society with a parliamentary system of government. The enquiry is in theory strictly factual.

The explanatory note the Government provides in its publication of its constitutional proposals says that Section 1 speaks of "reasonable limits generally recognized in a democratic society with a Parliamentary system of government". The text itself and the French explanatory note make no express reference to judicial

history. But let us pursue this approach for a moment. If we look at Canadian jurisprudence prior to the passage of the Canadian Bill of Rights, we find the courts repeatedly stating that they were not prepared to review legislation on human rights standards at all. The question of what counts as a "reasonable limitation" on basic rights was simply not reached. The Canadian Bill of Rights contains no "reasonable limitations" escape from the standards it establishes. It provides instead that Parliament may override it by expressly stamping legislation to be passed "notwithstanding the Canadian Bill of Rights". This has been done only once, in the case of the War Measures Act in 1970. The Courts have nonetheless managed to avoid striking down legislation in a number of cases, and one might extract from these judgments some "generally accepted" limits on basic rights in Canada. But the number of cases is too small and their facts too parochial to provide much guidance for the future. Even if it were otherwise, we would probably not want the future of the Charter of Rights and Freedoms to depend forever on the judicial opinion of the 1960's and 1970's.

"Generally accepted" might refer to the judicial precedents of other states beside Canada. But the case law of the two countries we would most naturally turn to is of little or no assistance. Courts in Great Britain have never reviewed legislation

against either "reasonableness" or "human rights" standards. The United States does not have a "parliamentary system of government". But even if we stretched that term to include the American system of government, with its independent executive, we would find its case law of severely limited use. Judicial opinion on what counts as a reasonable limitation on basic rights varies greatly over the years and among different members of the federal judiciary. Very little is generally accepted for very long.

There is no logical necessity to confine an empirical search to what has been generally accepted to judicial history. Judges applying the "generally accepted" test could look at Canadian or world legislative precedents, books of normative political philosophy, collections of letters to the editor. But the wider the search, the less any consensus can be found on the difficult and sensitive issues that would be litigated under the proposed Charter.

We have already seen that it is unclear where and to whom you look to determine whether a limitation is "generally accepted". It is also unclear at what period of time the consensus must exist. At the moment the Charter is applied to a particular issue? For an extended period preceding that moment? At the moment the Charter is passed by the British Parliament?

A judge applying the Charter will have a wide range of choice in the institutional, geographical and temporal components of the defintiion of "generally accepted". The test of Section 1 provides little guidance. Depending on his choice of definition, a judge could "demonstrate" that practically any legislative limitation on basic rights either has or has not been "generally accepted". Under Section 1 as presently worded, judges are directed to undertake empirical inquiries for which they have no special qualifications, to be conducted on the basis of a standard which is liable to arbitrary interpretation.

Alarmingly likely is one particular construction of Section 1. Judges may reason as follows:

> The best geographical parameter of what is "Generally accepted" is the boundary of Canada. National opinion about the limits of basic rights is the most relevant belief, and also the most easily ascertainable. The best temporal meaning of "generally accepted" is "now". Contemporary beliefs should govern, not the outdated norms of the past. The optimal institution to look at is Parliament. What better guage could there be of what is "generally accepted" than a body composed of politically well informed individuals elected by the national general population?

The result of this reasoning will be that federal legislation will always be upheld. The very fact that Parliament has passed legislation will be taken as proof that a limitation on human rights contained in the legislation is generally accepted. If this possibility is realized, the Charter of Rights and Freedoms

2772-403
6
230

will be a Canadian Bill of Goods. It will be an entrenched embarrassment, an enshrinement of legally unenforceable platitudes. It may be admitted that under the interpretation of Section 1 under discussion might permit some provincial legislation to be struck down. A contravention of the Charter may have legislative and popular support in one province or region but not across the country. Taking "generally accepted" to mean "generally accepted in Canada", the Courts might nullify the offensive statute. But a Charter which is effective only against provincial governments is not acceptable, nor will it be "generally accepted". Especially if you consider that it is the federal government which has the greatest power under the section 91-section 92 division of authority to abuse basic rights.

To conclude we should recall that according to a government pamphlet explaining the Constitution Act (p. 12);

> "An entrenched Charter, by proclaiming specified rights to be beyond the normal power of legislative majorities, provides a sense of security, and moreover, a practical means of redress, through the courts, to individuals and minorities who feel aggrieved"

If this is indeed the purpose of the Government in proposing the Charter, it is very likely defeating itself by including Section 1 in its present wording. A legal guarantee against unjust majority action becomes visibly empty when it nullifies

itself whenever majority action is "generally accepted". The 7 210
wording I propose avoids altogether the problems of empirical
enquiry into what is "generally accepted". It calls instead for
judges to make their own judgment of whether a legislative measure
is acceptable as a reasonable limitation on the basic rights
protected by the Charter. In making such decisions, courts will
be guided by the liberal philosophy suggested by the word "free"
and "Parliamentary system of government" to give appropriate respect
to the judgment of the majority. Judges will also consider the
precedents established by their colleagues, and a distinctive body
of Canadian jurisprudence on basic rights will evolve. We will
indeed by relying on the soundness of the judgement of unelected
officials. But they will be officials who are by long legal
tradition immune to political pressure. They are therefore specially
suited to protect individual rights against oppressive majority
action. If we could rely solely on the judgement of elected officials,
we would not need a Charter of Rights to begin with.

-II-

Section 1 might also be interpreted to call for a two-step process
mentioned earlier. The court applying the Charter would ask of a
limitation on human rights

(1) Is this limit reasonable?

and

(2) Is it generally accepted in a free and democratic society with a parliamentary system of government?

Unless the answer to both (1) and (2) is yes, the legislation cannot stand.

Under this interpretation, a judge will at least be required to independently assess the reasonableness of legislation. But he will have no guidance on what criteria to apply. Unless he derives some guidance from the words "in a free and democratic society with a parliamentary system of government", in which case his first step is identical with all that would be required under the wording I propose.

The second step, if followed, would lead the judge into the jurisprudential quagmire discussed under Part 1. But no judge is going to find legislation reasonable, but strike it down because it is not generally accepted, etc. A judge who finds legislation reasonable will have no inclination whatsoever to undertake the difficult demonstration that what Parliament or a legislature has passed is not generally accepted. So the second possible interpretation of Section 1 of the proposed Charter might in practice produce similar results to the wording I propose. But the latter is more clearly worded, and does not risk the disastrous but likely first interpretation.