SOUTHEY MEMORIAL LECTURE: THE CANADIAN CHARTER AND THE DEMOCRATIC PROCESS*

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I. *INTRODUCTION*

Just over nine years ago, in April, 1982, Queen Elizabeth II visited Canada's capital city to participate in one of the most important ceremonies in our country's history. Her Majesty was in Ottawa for the formal signing and declaration of a new constitution. It was a remarkable day — the Queen was accompanied by all measure of pomp and circumstance. Politicians turned out in their finest formal wear. Most impressive that day, however, was the wind. It blew fiercely down the Ottawa River and across Parliament Hill, unsettling what would otherwise be a pleasant spring day. And fittingly so. Because the new constitution contained in it a document which itself carried the winds of change, and would in many ways herald a shifting in the constitutional order. In less than a decade, Canada's Charter of Rights and Freedoms, our first constitutional rights document, was to alter the constitutional balance of our country and change the respective roles of our legislators, administrators and judges.

Tonight, I find myself in a country in which, like Canada, constitutional reform is being discussed. As we contemplated the possibility of enacting a Charter guaranteeing individual rights, we found ourselves asking two questions — questions which are no doubt being asked in the Australian context. First, will a Charter really change things? Second, will those changes be for the good? It is those two questions which I propose to address. I do not promise pat or even very clear answers. Rather, I propose to offer certain reflections on these questions on the basis of ten years' experience with the Canadian Charter of Rights and Freedoms, in the hope that you may find them relevant to the concerns you share as Australians.

II. *WILL A CHARTER OF RIGHTS REALLY CHANGE THINGS?*

If the Canadian experience is any indicator, the answer to this question is a resounding 'yes'. But before getting into the details of how, let me explain how our Charter works.

At the heart of every democracy lies an inherent tension between individual and minority rights on the one hand, and the will of the majority on the other. This reflects itself in a tension between the judiciary and the legislative branches of government. As Justice Megarry has remarked, the traditional role of the

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judge is the protector of minority interests against the tyranny of the majority, which tends to be represented by the elected parliamentarians.[1] As Justice Megarry's comments attest, this is so even in states lacking formal guarantees of rights. But in such states, protection of individual and minority interests may be haphazard and somewhat uncertain. The effect of a constitutional bill of rights is to provide an incontestable foundation for the assertion of individual and minority rights, thus strengthening their position in relation to the majority. Parliament's right to legislate is limited; it cannot override guaranteed rights except as permitted by the constitution, which in turn is interpreted by the judges.

Thus a charter of rights strikes a balance between the will of the majority as expressed through the legislatures and the rights of the individual as defined by law and the courts, between the concepts of legislative supremacy and guaranteed fundamental rights. The Canadian Charter, which has been referred to as the 'quintessential Canadian compromise'[2] effects this balance in a unique, inelegant and — some would venture — rather successful way.

The compromise which is the Canadian Charter consists, on the one hand, of strong assertions of the fundamental human rights which are guaranteed to every Canadian. Many of these are the sort of classic guarantees that are familiar to western political thought and tradition. Guarantees of freedom of expression, religion, peaceful assembly and association are among the fundamental provisions of the Charter. Canadians are also guaranteed democratic rights and mobility rights and rights of due process directed to the fair exercise of the state's criminal law power: rights against unreasonable search and seizure; rights to a fair trial within a reasonable time; and the right not to be subject to cruel and unusual punishment, for example.

The other side of the compromise resides in three provisions which allow for the potentially uneasy fit of the individual Charter guarantees with traditional notions of parliamentary supremacy — section 33, section 1 and section 24(2).

Perhaps the most controversial of these provisions is section 33, known as the legislative override or the 'notwithstanding clause'. Section 33 permits a legislature, provincial or federal, to expressly declare that particular legislation will operate notwithstanding the guarantees of certain fundamental freedoms. Thus, by a simple legislative declaration — which must be renewed every five years — a law may be enacted which legislators know is in violation of, for example, the guarantee of freedom of expression or equality. The effect of section 33 is to suspend the operation of the Charter in respect of that provision for 5 years.

The section 33 override has not been used often. Governments do not lightly invoke section 33, signalling as it does conscious legislative intention to act in contravention of the fundamental guarantees of the people. Its recent invocation by the province of Quebec to shield a language law from the dictates of the Charter provoked considerable anger from Canadians both inside and outside the

[1] Megarry, R., 'The Judge' (1983) 13 *Manitoba Law Journal* 189, 190.

[2] Russell, P. H., 'The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts' (1982) 25 *Canadian Public Administration* 1, 32.

province and has led some to call for an amendment to the Charter which would repeal the override. Others, however, continue to see the clause as the ultimate safeguard for Parliamentary supremacy against rule by appointed judges.

The second provision of importance to the Canadian Charter's constitutional compromise is uniformly referred to among Canadian legal circles simply as 'section 1'. Section 1 states that the Charter 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. It constitutes an express recognition that sometimes it is right and just that individual freedoms give way to the greater good as expressed by Parliament or the legislators (section 1 operates only where there is a 'law' and hence cannot 'save' administrative acts which violate individual rights). As such, it provides a mechanism for balancing individual rights and freedoms against the considered majoritarian view as expressed by the legislators.

Unlike the section 33 notwithstanding clause, section 1 figures prominently in the Canadian constitutional picture. Courts frequently find legislative provisions to violate particular guarantees of the Charter, only to be 'saved' or justified by the courts under section 1, on the ground that they are demonstrably justified in a free and democratic society.

For example, the Supreme Court of Canada recently found that a law making it a criminal offence to wilfully promote hatred violated the Charter guarantee of freedom of thought, belief, opinion and expression.[3] The law was 'saved', however, under section 1. The majority of the Court held that the hate law, while offending the guarantee of free expression, was justified as a reasonable limit on the freedom of expression. The 4 to 3 split on the Court bespeaks the difficulty of applying section 1 of the Charter.

The Charter contains yet a third mechanism whereby the impact of breaches of fundamental rights may be attenuated. Section 24(2) permits a court to receive evidence obtained in violation of the Charter. The test is whether its reception would bring the administration of justice into disrepute. This permits the courts to weigh the seriousness of the infringement of the right against the majoritarian concern with obtaining a proper verdict.

The inclusion in the Canadian Charter of Rights and Freedoms of these three mechanisms for effecting case by case compromises between individual rights and majoritarian concerns constitutes a fundamental and most important distinction between the Canadian Charter and the American Bill of Rights. In the United States such compromises, if they are made at all, must be made in the guise of 'reading down' the citizen's constitutional rights. Viewed thus, the Charter is much less extreme and much more flexible than its American counterpart.

Against this background, I turn to the first question posed — how has the Charter changed the Canadian political and legal scene?

[3] *R. v. Keegstra* [1990] 3 S.C.R. 697.

A. *The Political Scene*

I use 'political' in the widest sense, to encompass the participation of various individuals and groups in society in the governance and organization of that society.

One way people participate in the governance of a democratic society is through the election of representatives to legislative bodies. Those bodies then enact laws. This, in essence, is parliamentary supremacy. Because the representatives can be voted out of office at the next election, the system is also called responsible government.

Parliamentary supremacy in a federal state is never absolute. At the very least, it is subject to court rulings on whether a particular law is within the competence of Parliament or the legislature in question. A constitutional charter of rights further intrudes on the supremacy of Parliament by permitting judicial review on the basis that the law in question violates the guaranteed rights and freedoms. The Charter thus effects an additional transfer of power from elected representatives to judges who are not elected but appointed, usually for life or until retirement. In this sense the Canadian Charter has altered the political landscape.

Does this mean that the Charter has weakened Canadian democracy? Such a conclusion is far from self-evident. Indeed, the Charter has arguably strengthened Canadian democracy by enhancing the participation of individuals and minority groups in the governance of their country.

A strong case can be made that the adoption of the Charter in Canada, far from being a move away from democratic ideals, represents a fundamental step forward in the continuing development of a full and flourishing system of democratic government in Canada. As Commonwealth experience has demonstrated, democracy is not a static concept, nor can its essence be found in a notion of crass majoritarianism. If that were the case, then even a representative system, as opposed to direct democracy, would be considered retrograde. In a recent case before our Supreme Court, my colleagues and I had the opportunity to consider the meaning of democratic rights in the Canadian context, and found that they entailed much more than the simplistic one person one vote notion. Rather, the Canadian tradition is one of 'evolutionary democracy', whose guiding principle is 'effective representation', not mere numerical equality of voting power.[4]

This is similar to the view of democracy taken in your country. Stephen J. of the Australian High Court has stated that to focus on precise numerical equality:

> is to deny proper meaning to language and to ignore long chapters in the evolution of democratic institutions both in this country and overseas, in which, representative democracy having been attained, its details have undergone frequent changes in response to community pressures but have failed to possess this feature of equality of numbers on which the plaintiffs now insist.[5]

If the essence of democratic government is the participation and effective representation of all citizens, the Charter may be seen as strenghtening democracy. It does this in a number of ways.

[4] *Attorney General of Saskatchewan v. Carter*, unreported, Supreme Court of Canada, 6 June 1991, 14.

[5] *Attorney-General of Australia; ex rel. McKinlay v. Commonwealth* (1975) 135 C.L.R. 1, 57.

The first way in which the Charter may be argued to strengthen democracy is by sustaining and enhancing values which are essential to the proper working of democracy. The right to free expression and a free press are essential underpinnings of a strong and effective democracy. The same may be said for the guarantee of the right to vote and the entrenched requirement that national elections be held at least once every five years. The guarantee of equality before and under the law is another example of Charter commitment to the essential components of democratic government. If democratic government includes 'political participation, equality, autonomy and personal liberty', then the Charter enhances it.[6]

From this perspective the Charter and judicial review emerge as supportive of democracy, not opposed to it.[7] This is a view that has found its way into our Court's jurisprudence on the Charter. The Court has held that the scope of freedom of expression must be based on a recognition of its fundamental value to a free and democratic society. Former Chief Justice Dickson stated that freedom of expression was constitutionally entrenched 'to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream'. 'A free and democratic society', he continued, prizes 'a diversity of ideas and opinions for their inherent value both to the community and to the individual'.[8] The underlying value of the guarantee, deserving vigilant protection, includes the seeking of truth and the participation in social and political decision making.[9]

Thus the Charter, by enhancing the values and freedoms on which democracy rests, ensures a climate of freedom within which democracy can thrive. But the Charter functions as more than a backdrop. A second way in which it supports democracy is by enhancing the participation of individuals and groups within the democracy, effectively enfranchising people who in the past may have been excluded from the process of governance and societal change.

Traditionally, the political process in Canada at the national and provincial levels was (and is) driven by the large, mainstream political parties. Participation in this process, apart from voting, was largely confined to lobbying — an activity which requires a great deal of organization, money and grass roots work in the large political parties. In this structure, the political agenda tends to be set by the party in power, supplemented, depending on their clout, by the opposition parties. The usual result is that individuals and small interest groups often have little influence in initiating a particular political issue; it is the majoritarian concerns which capture the attention of the governments.

6 Whyte, J. D., 'On Not Standing For Notwithstanding' (1990) 28 *Alberta Law Review* 347, 352. Whyte acknowledges that not all interests in the Charter can be justified on the basis that they enhance the democratic process. He also looks to legalism and federalism as two other concepts which justify the role of the Charter and judicial review.

7 Other similar views may be found in Ely, J. H., *Democracy and Distrust* (1980), and Monahan, P., *The Charter, Federalism and the Supreme Court of Canada* (1987), 97-138. The opposing view is presented, among other places, in Petter, A. and Hutchinson, A. C., 'Rights in Conflict: The Dilemma of Charter Legitimacy' (1989) 23 *University of British Columbia Law Review* 531.

8 *Irwin Toy Ltd v. Attorney General of Quebec* [1989] 1 S.C.R. 927, 968.

9 *Ibid.* 976.

The Charter arguably alters the political power equation. Through its inclusive language it creates new 'insiders' in the Canadian political and constitutional order. Two groups in particular, women and aboriginal people, are explicitly recognized and have their place in society affirmed in the Charter. Similarly, the multicultural nature of the country is constitutionally recognized, as are equality rights regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The provisions of the Charter, 'by giving rights to citizens and by handing out particular constitutional niches to particular categories of Canadians, such as women, aboriginals, etc., implicitly suggest some citizen role in constitutional change', and indeed, the entire sphere of political activity.[10]

Not only does the Charter give new status to particular groups, it gives formal and visible expressions to interests — liberty, security of person and equality, for example. The recognition that such interests are of *constitutional* importance is of great symbolic and practical significance. It encourages individuals to identify themselves more strongly with certain groups and to focus on particular goals — for example, gender equality. The result is increased and broader based participation in debates on public issues.

By conferring a new legal status on particular groups and interests the Charter creates a new tool for enhancement of participation in public affairs — judicial review. Before the advent of the Charter, the courts in Canada did not function significantly as a means of initiating and participating in political change and action. The Charter has changed this, broadening the base of public challenge to government measures. This draws judicial and, eventually, legislative attention to areas of the law which may be out of step with the values and aspirations of the country as expressed by the Constitution, thus opening up the law reform process.[11] Individuals and groups can influence the agenda of law reform by challenging laws in the courts. Government action may similarly be challenged and such review may even extend to Cabinet deliberations on security.[12]

The Charter has altered not only the role of Parliament and the legislators, but that of the courts. The advent of the Charter in Canada has elevated judges from a position where they once toiled in relative obscurity, to the level of media figures. Now, more than ever before, the contributions made by the courts are seen to impact so directly and profoundly on the everyday life of the country that judgments of the Supreme Court on the Charter receive regular and extensive attention from the news media.

That focus is not restricted to a concern with the substance of the courts'

[10] Cairns, A., 'Ritual, Taboo and Bias in Constitutional Controversies in Canada, or Constitutional Talk Canadian Style' (1990) 54 *Saskatchewan Law Review* 121, 127. Professor Cairns, a University of British Columbia political scientist, has developed this theme in several lectures and papers, some of which are noted in this article.

[11] Russell, P. H., 'Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Review* 30, 48-50.

[12] The susceptibility of executive action to review was discussed in *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 443.

output. There is accompanying increase in public interest in the judges themselves, not only as judicial figures, but also as people.[13] The Canadian public in the post-Charter era takes the view that it is entitled to know who its judges are. As one columnist recently put it:

> In Ottawa, the nine judges on the Supreme Court of Canada are more consequential than all but a handful of politicians at the top of the political process. Yet outside the legal fraternity they remain largely unknown.[14]

Judges at the Supreme Court level find themselves under increased scrutiny of their personal views on certain issues. The Charter has engendered a concern that the courts be representative of the public which they are required to serve; the appointment of women and racial minorities is seen as important. And it has brought calls for a re-examination of the manner in which judges are appointed in Canada.

Judges in Canadian superior courts are presently appointed by the federal government after private consultation with various groups, including the Canadian Bar Association. Traditionally the process of selecting Canada's judges, particularly to the Supreme Court, has been one which eschews partisanship and ideology. This stands in stark contrast to the prevailing view of the American process, where the selection of Supreme Court justices has turned into a highly politicized and complex ideological contest between the President, elected representatives and various national interest groups, which sometimes seems to have little to do with getting the best judge for the job.[15]

As the American experience demonstrates, there are no easy solutions to the problem of developing a workable, yet public, judicial appointment process. Yet given the prominent role which judges play under the Charter, calls for a more open judicial appointment process in Canada will doubtless continue. They tend to suface in Canada in the wake of cases which force the courts to balance clear statements of legislative policy against the fundamental freedoms enshrined by the Charter. As a national columnist wrote after a recent decision from a judge in the Province of Quebec declared federal legislation banning tobacco advertising an unjustified infringement of freedom on expression:

> The more we push parliamentary supremacy into the shadow of the judiciary, and encourage the courts to resolve essentially political (in a non partisan sense) issues, the more necessary it becomes that political debates about the suitability of judges occur before their nominations.[16]

Not only has the Charter changed the role of legislators and courts, it may be changing the way they work together to improve the law. Canada's former abortion law provides an example. The Supreme Court struck it down in 1988,[17] leading the way for new draft legislation and a political debate which has yet to

[13] See, for example, *Toronto Star* (Toronto), 7 July 1991.

[14] Simpson, J., 'When Supreme Court Judges Hear Charter Arguments, How Do They React?' *Globe and Mail* (Toronto), 14 August 1991.

[15] At least one respected observer suggests that this exists as a possibility in Canada, particularly if the ideologies of the major political parties in Canada become more polarized on issues which may arise in Charter litigation: Russell, P. H., *The Judiciary in Canada: The Third Branch of Government* (1987) 117.

[16] Simpson, J., 'The Charter Intrudes On Yet Another Essentially Political Question' *Globe and Mail* (Toronto), 7 August 1991.

[17] *R. v. Morgentaler* [1988] 1 S.C.R. 30.

[18] The draft legislation was defeated in Senate.

be resolved, given the difficulty of the issue.[18] In other areas, however, the judicial-legislative partnership has proved more productive. When the courts have struck down legislation, the legislators have moved to rectify the deficiency, even where the rectification was arguably against the government's immediate political interests.

An example is the *Dixon* case, on which I sat as a trial judge.[19] I found that the electoral boundaries in the province of British Columbia violated the Charter guarantee of the right to vote. Rather than declare the electoral law immediately invalid — which would have left the province without the means to hold an election should one become necessary — I stipulated a time period during which the government could introduce the necessary reforms. The government did so without undue delay.

I like to think that we are developing in Canada a new constitutional tradition predicated on recognition that the courts and legislators each have a role to play in governance. The courts, for their part, must respect the proper legislative role and be careful not to encroach too much on it. The legislators, for their part, must discharge that role by responding appropriately when legislation is declared unconstitutional. As former British Columbia Chief Justice Nemetz said in *Hoogbruin*:

> If any law is inconsistent with the provisions of the Charter, it is the court's duty, to the extent of such inconsistency, to declare it to be of no force or effect (s. 52(1)).
>
> Before the Charter, the courts could and did declare legislation invalid on division of power grounds. When they did so, we know of no recent occasion when the legislative branch of government did not faithfully attempt to correct the impugned legislation. Likewise, when this Court declares a statute or portion thereof to be 'of no force and effect' where it is inconsistent with the Charter, it is for the legislature to decide what remedial steps should be taken in view of the declaration. Section 24(1) of the charter empowers the courts to grant citizens remedies where their guaranteed rights are infringed or denied . . . It would be anomalous, indeed, if such powers were reserved only for cases where limitations are expressly enacted and not for cases where an unconstitutional limitation results because of omission in a statute.[20]

Where then does the political governance of Canada stand after a decade under the Charter? It undeniably has been altered. Parliament's supremacy is more qualified than before. The voice of individuals and minorities is stronger. Political discussions and debate thrives. The courts, forced to assume a more important role, find themselves not only increasingly powerful, but under increased scrutiny. And a new politic of co-operation between the legislative and judicial branches may be emerging. Is all this good or bad? That is my second question, and I defer comment for the moment.

B. *The Legal Scene*

The new constitutional status which the Charter gives to individual rights has impacted on the legal scene with considerable vigour. This flows from the broad scope which the courts have accorded to the Charter generally, as well as from the generous definition given to particular rights and freedoms.

A word about scope. The Charter applies to government legislation and

[19] *Dixon v. Attorney-General of British Columbia* (1989) 35 B.C.L.R. (2d) 273.
[20] *Hoogbruin v. Attorney General of British Columbia* [1986] 2 W.W.R. 700, 704-5.

government action. Section 32 provides that the Charter applies to the Parliament and government of Canada, and to the legislature and government of each province. This would seem straightforward enough at first glance, given the traditional function of a rights document to protect citizens from an excess of power by the state. But that initial impression of clarity has proven to be somewhat illusory and one of the great unknown qualities of the Charter continues to be its uncertain scope of application. As in many countries, it is becoming increasingly difficult to draw clear divisions between public and private domains. There are many enterprises in Canada where the government and private sector work together. The state is an actor in many areas which are traditionally the domain of private concerns. Similarly the question of whether the legal system, and the common law itself, must conform with the Charter is one which has significant implications for definite conclusions about the Charter's ultimate impact.

The Supreme Court has explored the range and potential scope of the Charter's application in a number of decisions. In *Operation Dismantle Inc. v. R.*,[21] where a peace group challenged a Cabinet decision to allow the United States to conduct cruise missile testing on Canadian territory, the Court held that the executive branch of government was duty bound to act in accordance with Charter terms. In *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd*,[22] where a striking union sought to challenge a court order restraining picketing as a violation of the guarantee of free expression, the Court held that the Charter applies to the 'legislative, executive and administrative branches of government', but not to court orders made in the resolution of a private dispute. Speaking for the Court, Justice McIntyre concluded that the common law was subject to the Charter, but 'only in so far as the common law is the basis of some government action which, it is alleged, infringes a guaranteed right or freedom'.[23] The Court thus indicated that the common law governing private litigation was not to be subject to the Charter.[24] Nevertheless the judgment observed that '[t]he element of governmental intervention necessary to make the Charter applicable in an otherwise private action is difficulty to determine'.[25]

The matter was further explored in the mandatory retirement cases.[26] The issue was whether mandatory retirement policies violated Charter equality guarantees and constituted unjustified discrimination on the basis of age. Before this question could be addressed, however, it was necessary to determine whether the employers in question, universities and hospitals, constituted 'government' for the purpose of the application of the Charter.

21 [1985] 1 S.C.R. 441.
22 [1986] 2 S.C.R. 573.
23 *Ibid.* 598-9.
24 *Ibid.* 600.
25 *Ibid.* 598.
26 *McKinney v. University of Guelph* [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia* [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital* [1990] 3 S.C.R. 483; *Douglas/Kwantlen Faculty Assn v. Douglas College* [1990] 3 S.C.R. 570.

In Canada, both universities and hospitals rely heavily on funding from government sources. They are also often limited in their operations by government regulation and policies. Finally, these bodies exist to serve the public interest. Notwithstanding these characteristics, a majority of the Court found that these bodies did not fit the notion of 'government' for the purpose of applying the Charter. Justice La Forest stated that while the universities are largely dependent on the state for funding, they are essentially self-governing and free to determine allocation of funds and policies in most areas. Each institution has its own independent governing body. Justice La Forest concluded that decisions related in particular to the policy in question, regarding the hiring and dismissal of staff, are not government decisions. The universities function as 'autonomous bodies'.[27] In assessing whether the Charter applies in a particular context a number of factors will therefore be relevant. Foremost among these is whether it can be said that government has a power of 'routine or regular control' over the body and the impugned activity or policy.[28]

While it appears that its direct application will remain confined to governmental bodies, there is some expectation that state conduct in line with Charter values will 'create a society-wide respect for the principles of fairness and tolerance on which the Charter is based'.[29] It was with this in mind that the Court rejected the argument that the Charter does not apply to governmental entities when they are engaged in what may be characterized as a private or commercial activity, such as collective bargaining. It is outdated to think of true governmental action only as the traditional law-making role. To limit the Charter to that enterprise would defeat an important element of its role. As Justice La Forest stated:

> Through the process of applying the *Charter* to government decision-making, the government becomes a kind of model of how Canadians in general should treat each other. The extent to which government adherence to the *Charter* can serve as an example to society as a whole can only be enhanced if the government remains bound by the *Charter* even when it enters the marketplace.[30]

The scope of the Charter is concerned not only with who is bound by the Charter, but with who can claim its protection. Who is entitled to invoke the charter in a challenge to a particular law or action? Are the Charter's protections aimed at Canadian citizens, or can anyone subject to Canadian law assert its provision? Can a corporation rely on the rights and freedoms the Charter guarantees?

While not all the questions have been settled, it is clear that the scope of the Charter's application is broad. The language used in many of the provisions ensures this. For example, the fundamental freedoms of expression and religion are guaranteed to '[e]veryone', as is the right to life, liberty and security of the person. Criminal procedure guarantees are provided to '[a]ny person charged with an offence'. The right to equality before and under the law is granted to '[e]very individual'. In light of this broad language the Supreme Court has held that the section 7 guarantee applies to every person within the country, not just

[27] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, 272-4.
[28] *Lavigne v. Ontario Public Service Employees' Union*, unreported, Supreme Court of Canada, 27 June 1991, 11 *per* La Forest J.
[29] *Ibid.* 15.
[30] *Ibid.* 15.

citizens, with the result that non-citizens applying for refugee status in Canada have the right to invoke its guarantees of procedural fairness in their initial hearings.[31]

The extent to which corporations may benefit from the Charter remains a contentious issue. What is clear is that if a law is inconsistent with the Charter, then it is of no force and effect: s. 52(1). Accordingly, a retail corporation was able to successfully challenge a Sunday closing law on the basis that it infringed the guarantee of freedom of religion.[32] Some rights have been held to extend to corporations; thus commercial expression has been held protected by the Charter.[33] At the same time, the absence of explicit guarantees of property rights in the Charter suggests that its impact on corporations will be confined.

Not only is the scope of the Charter relatively broad; the Supreme Court has generally taken a similarly broad and purposive approach to defining the rights and freedoms themselves, giving them real substance and meaning. The way was foreshadowed by the early *Re B.C. Motor Vehicle Act*,[34] in which the Supreme Court signalled that section 7, the section guaranteeing the right to life, liberty and security of person, extended beyond procedural matters to substantive law. In due course the other rights guranteed by the Charter have been generous interpretations — from the procedural guarantees protecting the criminal process found in sections 8 to 14 of the Charter to freedom of expression in section 2.

This is not to say that the Supreme Court has not read limits into the rights. Freedom of expression does not extend to violent acts.[35] The right to vote is not to be equated with absolute voter parity.[36] Most significantly, the Court has eschewed a broad definition of equality in Aristotelian terms of treating like cases alike, in favour of a definition of equality which focuses on the remedial goal of improving the situation of traditionally disadvantaged groups.[37] Some scholars suggest that the effect of thus confining the concept of constitutional equality is to in fact strengthen the impact of the guarantee.[38]

Nor should the Supreme Court's generous approach to the interpretation of particular rights be seen as a radical break with tradition. The Court has repeatedly affirmed that the rights guaranteed by the Charter must be considered in the context of the pre-existing law. Parliament and the legislatures, in adopting the Charter, cannot be taken as having intended a social and political revolution. As Chief Justice Dickson made clear, in securing for individuals the full benefit of the Charter's protections, 'it is important not to overshoot the actual purpose of the right or freedom in question'. A judge must 'recall that the Charter was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts'.[39]

31 *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177.
32 *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295.
33 *Ford v. Attorney-General of Quebec* [1988] 2 S.C.R. 712; *Irwin Toy Ltd v. Attorney-General of Quebec* [1989] 1 S.C.R. 927.
34 [1985] 2 S.C.R. 486.
35 *Irwin Toy Ltd v. Attorney-General of Quebec* [1989] 1 S.C.R. 927.
36 *Attorney-General of Saskatchewan v. Carter*, unreported, Supreme Court of Canada, 6 June 1991.
37 *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.
38 Black, W. and Smith, L., 'The Equality Rights' in Beaudoin, G.-A. and Ratushny, E. (eds), *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989) 557, especially 582-8.
39 *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295, 344.

Finally, although adopting a generous approach to the definition of rights and freedoms guaranteed by the Charter, the courts have not hesitated to use section 1 to save offending legislation. Laws regulating advertising of children's products,[40] laws prohibiting Sunday shopping,[41] laws permitting prosecution for hate-mongering,[42] laws permitting conviction and imprisonment without requisite *mens rea* (the reverse onus on the insanity defence)[43] — all these and more have been upheld under section 1 as reasonable and demonstrably justified in a free and democratic society. Indeed, it can be argued that it is the presence of section 1, whose equivalent is not found in the United States Constitution, that permits Canadian courts to adopt a relatively broad approach to the definition of particular rights and freedoms. In addition, section 24 of the Charter has frequently been used to permit the use of evidence obtained in violation of the Charter on the basis that the use of the evidence would not bring the administration of justice into disrepute.

Against this background, let me give you a few examples of how the Charter has changed the law in Canada. I shall confine my focus to three areas — criminal procedure, substantive criminal law, and finally, human rights and equality.

In the area of substantive criminal law, the Charter has produced several key judicial affirmations of fundamental criminal law principles. One of these fundamental principles, which receives express recognition in section 11(d), is the right to be presumed innocent. This guarantee is viewed as an essential precondition to the state's authority to impose penal sanctions and is a recognition of the serious implications of any experience with the criminal justice system. In view of the grave potential consequences, the Supreme Court has said that the presumption of innocence is 'crucial', that it 'confirms our faith in human kind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise'.[44]

As a result of this guarantee, court decisions under the Charter have told Parliament that in most cases it will violate the presumption of innocence to create an offence which lessens the burden on the Crown to prove all elements of an offence beyond a reasonable doubt. In *R. v. Oakes*, the Supreme Court struck down an offence which provided that if the Crown proved the accused was in possession of a narcotic, the burden fell onto the accused to establish on the balance of probabilities that he or she did not possess the drugs for the purpose of trafficking.[45] Put another way, the creation of an offence which allows for the possibility of a conviction where there exists a reasonable doubt on any essential element violates the presumption of innocence. Nevertheless there remains the possibility that such a measure can be saved under section 1.[46]

[40] *Irwin Toy v. Attorney-General of Quebec* [1989] 1 S.C.R. 927.
[41] *R. v. Edwards Books and Art Ltd* [1986] 2 S.C.R. 713.
[42] *R. v. Keegstra* [1990] 3 S.C.R. 697.
[43] *R. v. Chaulk* [1990] 3 S.C.R. 1303.
[44] *R. v. Oakes* [1986] 1 S.C.R. 103, 120.
[45] *Ibid.*
[46] *R. v. Whyte* [1988] 2 S.C.R. 3. In *R. v. Chaulk*, [1990] 3 S.C.R. 1303, a majority of the Court held that a Criminal Code provision (s. 16(4)) imposing on an accused the burden of establishing that he was insane at the time of the offence violated s. 11(d). Nevertheless the provision was saved under s. 1 as a reasonable limit in view of the impossible burden on the Crown of proving sanity in each case.
[47] [1985] 2 S.C.R. 486.

Section 7 is another Charter provision which has had a profound impact on the criminal law of Canada. Courts have found in the principles of fundamental justice, to which this principle refers, a renewed commitment to the notion that the imposition of criminal law restrictions on liberty may only be justified where the accused has the requisite mental element to commit the crime. In short, there should be no punishment where there is no fault. The prosecution must establish a state of mental blameworthiness.

The expression of this principle through the Charter, both in section 7 and in the presumption of innocence, means that a legislature may not pass a law which combines a provision for imprisonment with absolute liability. In the *B.C. Motor Vehicle Reference*, the impugned law was struck because an accused could face imprisonment for driving without a valid licence or with a suspended one, even though he or she was unaware of the suspension.[47]

The principle that a guilty mind is necessary to the legitimate exercise of the criminal law, and its expression in the Charter, has clearly limited the power of the legislatures in enacting offences. In the case of very serious crimes, the Court has held that the minimum mental state for conviction must be at least objective forseeability — that is, that the accused ought to have foreseen the potential consequence of his or her actions. As a result, so called 'felony-murder' offences have been placed in jeopardy. In *Vaillancourt*, for example, the Court held that the Charter was offended by creating an offence of murder where there was not at least the requirement that the accused ought to have foreseen that his or her actions in the commission of certain underlying offences could have caused death.[48] The reason for requiring a minimum mental element for such offences lies in the severe consequences of a conviction for serious crimes like murder. As Justice Lamer explained:

> there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. . . . Murder is . . . such an offence. The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. . . . It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.[49]

The Charter has thus placed concrete restrictions on the ability of Parliament and the legislatures to create certain types of offences. It has also had a substantial impact on the investigation and prosecution of offences. Legal rights entrenched in the Constitution have altered the obligations and powers of the police and have imposed requirements on those at the heart of the administration of justice. Time does not permit a complete account of all the changes in criminal procedure wrought by the Charter, so I will briefly mention three areas.

As an example of the Charter's impact, the section 8 right to be secure against unreasonable search and seizure has recently been held to be violated by an

48 *R. v. Vaillancourt* [1987] 2 S.C.R. 636.

49 *Ibid.* 653-4. In a subsequent decision, *R. v. Martineau* [1990] 2 S.C.R. 633, the majority, though it could have done so on the basis of objective foreseeability, struck another felony murder provision down (s. 213(a) of the Criminal Code), and stated that murder required a subjective mental element.

established Criminal Code provision which permitted police to electronically intercept a conversation with the consent of one of the parties to that conversation. The Court held in *R. v. Duarte* that this common police practice offended the privacy interests which the Charter provision was designed to protect.[50] Such a practice is now permitted only where police obtain prior judicial approval of the interception. This is a decision which has been heavily criticized by police, who claim that it hampers investigation of drug offences and may put undercover officers and police informants at risk.[51]

Another procedural guarantee which has had an important effect on police work is the right to retain and instruct counsel without delay and to be informed of that right: s. 10(b). As the courts have defined this right, a person must be adequately informed of the right to counsel when detained by police and, if the person asserts this right, a reasonable opportunity for its exercise must be provided. Moreover, once an accused has indicated a desire to contact counsel, all questioning of the accused must cease until there has been a reasonable opportunity to consult with a lawyer.[52] In addition, a majority of the Court determined in *R. v. Brydges* that police must inform an accused of the availability of legal aid, whether requested or not.[53] The violation of the right to counsel is considered an infringement of the highest order and may result in the exclusion of evidence obtained in light of the breach.[54]

Another procedural guarantee which has dramatically affected the legal scene is the right to be tried within a reasonable time: s. 11(b). In a series of decisions, including the *Askov* case, the Court indicated that undue delay in proceedings against an accused, whether as a result of the fault of the Crown, or matters related to inadequate resources in the judicial system, will not be tolerated.[55] Both an accused and the public have an interest in the efficient delivery of justice, according to the Court.[56] Where an accused is subject to unreasonable delay, a stay of proceedings is the most prominent remedy. The potential dismissal of hundreds of charges on the basis of delay has forced several provincial governments to allocate new resources to the judicial system, and to consider innovations which will enhance the efficiency of the court system.

The impact of the Charter on criminal law and procedure is perhaps the most visible example of how the entrenchment of fundamental rights has altered the Canadian legal landscape. But the Charter may also have an important impact on a third area — human rights and equality. Section 15 guarantees every individual equality before and under the law, as well as equal benefit and protection of the law without discrimination based on certain enumerated grounds including race, sex, religion, age or disability. While the jurisprudence on this provision has

50 *R. v. Duarte* [1990] 1. S.C.R. 30.
51 Moon, P., 'Ruling Removes "Life Line", Police Say' *Globe and Mail* (Toronto), 26 July 1991.
52 *R. v. Manninen* [1987] 1 S.C.R. 1233.
53 [1990] 1. S.C.R. 190.
54 Factors relevant in assessing whether evidence should be excluded under s. 24(2) are canvassed in *R. v. Collins* [1987] 1 S.C.R. 265.
55 *R. v. Askov* [1990] 2 S.C.R. 1199. See also *Mills v. R.* [1986] 1 S.C.R. 863; *R. v. Rahey* [1987] 1 S.C.R. 588.
56 *R. v. Askov* [1990] 2 S.C.R. 1199, 1219-23 *per* Cory J.

been slower to develop than in areas such as criminal procedure, the Supreme Court has indicated that the proper approach to the section is one which affirms that its purpose is that of 'remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society'.[57] This should ensure the provision's potential as a tool for redress for those individuals and groups who have been disadvantaged by 'stereotyping, historical disadvantage or vulnerability to political and social prejudice'.[58]

The full potential of the equality guarantee is only beginning to be realized. In addition to the guarantee's direct effect, it can be argued that it may have a collateral effect impact even where the Charter does not apply directly. Thus the Supreme Court recently reversed an earlier pre-Charter ruling[59] which had adopted a restrictive interpretation of sexual discrimination.[60] Moreover, constitutional gurantees of fundamental rights and freedoms will affect not only the content of laws enacted by the legislatures, but also their administration and enforcement. Finally, one cannot ignore the impact in the private sphere of the heightened awareness of fairness and tolerance occasioned by the Charter.

C. *Summary*

The foregoing review permits only one conclusion. The Charter has had a significant and permanent impact on Canadian government and the Canadian legal system. It has profoundly affected the way power is shared and exercised in Canadian governmental structures. And it has significantly altered the legal system. It is too soon to say how great the final impact of the Charter will be, if one could ever measure such a thing. As the American experience shows, a constitutional bill of rights is only as good as the judiciary make it, and one must expect times of retrenchment as well as times of more liberal expansion. But one thing is clear from the Canadian experience. A charter of rights really does change things.

III. *ARE THE CHANGES EFFECTED BY THE CHARTER GOOD?*

The question demands a value judgment. As Socrates taught us long ago, there can be no definitive answers to such questions. I will offer you no answer, but two points of view — the general public point of view, as I perceive it, and my own.

My perception is that generally speaking the Charter is highly popular with the Canadian public. I base this perception on a number of observations. The first is that it is frequently lauded and virtually never criticized by a wide variety of constituencies, ranging from elected politicians through the gamut of public interest groups. The Canadian public is increasingly critical of government and public institutions and, the pundits tell us, increasingly sceptical about laws and

[57] *R. v. Turpin* [1989] 1 S.C.R. 1296, 1333.
[58] *Ibid.*
[59] *Bliss v. Attorney-General of Canada* [1979] 1 S.C.R. 183.
[60] *Brooks v. Canada Safeway Ltd* [1989] 1 S.C.R. 1219.

measures aimed at improving the public weal. That the Charter emerges from its first decade largely unscathed and uncriticized is remarkable, given the general Canadian mood. While a few scholars express mistrust of the whole idea of an entrenched charter of rights, they are in the minority.[61] From time to time suggestions for change are made, but they are usually for expanding rather than limiting the impact of the Charter: examples are Prime Minister Mulroney's suggestion that the notwithstanding clause permitting legislative overrule of the Charter should be deleted, the recurrent suggestion that the aboriginal protections should be strengthened and the recent call of a provincial premier for the inclusion of property rights in the Charter.[62]

The regard in which the public holds the Charter is attested to by the following comments of a prominent Canadian journalist:

> In English-speaking Canada, the Charter has sunk such deep roots into the political culture that many citizens trust judges more than politicians to articulate rights. Judges are also seen as fairer, more in touch with contemporary realities and more trustworthy than politicians.[63]

The second basis for my perception of the Charter's public popularity is the enthusiasm with which individuals and the public have taken it up as a tool in litigation and debate on social issues. A wide variety of interest groups not only litigate, but avail themselves of the opportunity to appear in court as intervenors to put forward their views of how it should be interpreted. The Charter could have been ignored and left to languish, but the Canadian public has not let that happen. They debate it, and debate it vigorously. They argue over its interpretation, but not its existence. In short, the Charter has become a constant in Canadian life.

Ten years ago, Canadians greeted the Charter with enthusiasm. Many saw it as an instrument which would enhance the development of a decent and just society and as an instrument which held the potential to preserve and, with luck, enhance the rights and aspirations of individuals and disadvantaged groups — women, ethnic and cultural minorities and the native people. As Thomas Berger put it, the constitution reveals the values a nation holds most deeply; he spoke for many when he described the Charter as a vital step toward achieving a true regime of tolerance.[64] Today, many Canadians would echo the same sentiments.

The Charter in one short decade has become a central feature of Canadianism, symbolizing the values of tolerance, fairness and equality that bind Canadians together.

While few would suggest that we return to pre-Charter days, some of the consequences of its application and the enhanced role of the judiciary have attracted concerned comment. The apotheosis for me was a recent press article, authored by a law professor, describing my colleagues and me as 'nine dangerous people' and, worse yet, 'seven old men and two old women' bent on

[61] These critics include Mandel, M., *The Charter of Rights and the Legalization of Politics in Canada* (1989), and Hutchinson, A. and Petter, A., 'Private Rights/Public Wrongs: The Liberal Lie of the Charter' (1988) 38 *University of Toronto Law Journal* 278.

[62] Matas, R., 'Victorious Johnston Setting Stage Early for Next Election' *Globe and Mail* (Toronto), 22 July 1991.

[63] Simpson, J., 'When Supreme Court Judges Hear Charter Arguments, How Do They React?' *Globe and Mail* (Toronto), 14 August 1991.

[64] Berger, T., *Fragile Freedoms: Human Rights and Dissent in Canada* (1981) xiv, 255-62.

'subverting' democracy and turning Canadians into Americans. We were informed, quite simply, that we were 'out of control'.[65]

More substantively, a recent Supreme Court of Canada decision upholding the right to trial within a reasonable time has provoked significant public criticism because it resulted in the quashing of many indictments throughout the Province of Ontario, where accused persons had sometimes been waiting years for trial dates.[66] The recent decision of a Quebec Court striking down a federal ban on cigarette advertising on the ground that it violates free expression has provoked comments expressing concern that the Charter permits the courts to decide issues most appropriately left to Parliament and the legislators.[67] And academics continue to call for more public input into the judicial appointment process.[68]

There are also the mailbags. For my part, I was pleased to note that a recent decision of our Court quashing the conviction of a young man for two particularly heinous murders on grounds that the police had violated the Charter in their interrogation of him was greeted not only with the expected condemnations that a 'killer' was being freed on a technicality, but also by public and private comments that the Court's decision represented the proper operation of the justice system, given the grave doubts that existed about the validity of the conviction.

While expressions of concern about the effect of the Charter in particular areas and the danger of according too much power to the judiciary must be taken seriously, I see them not so much as criticism of the Charter itself as a reflection of the fundamental tension between parliamentary supremacy and individual rights which underlies the document. The public is right to raise such concerns and to demand that judges remain sensitive to the limitations inherent in their role and the need to accord appropriate deference to legislative choices. The concern is not that the Charter is bad, but that the courts maintain the proper balance between majoritarian rule and individual rights.

From the public perception, I turn to my own. I must confess to having greeted the advent of the Charter with some scepticism. As a student, I had studied the record of the United States Supreme Court on the Bill of Rights and concluded that high-sounding guarantees didn't amount to much, in the absence of a sensitive and courageous judiciary. And the way Canadian courts had interpreted the quasi-constitutional Bill of Rights which preceded the Charter gave little hope for optimism. I wondered if the best hope for a fair and just society must not in the end be Parliament and the legislatures.

My views have changed — a fact which I like to see as not entirely coincident with becoming a judge. The Charter, by strengthening the rights and remedies of individuals and minority groups, has strengthened what is best about our country

65 Martin, R., 'Nine Dangerous People' *Citizen* (Ottawa), 17 June 1991.

66 *R. v. Askov* [1990] 2 S.C.R. 1199.

67 Simpson, J., 'The Charter Intrudes On Yet Another Essentially Political Question' *Globe and Mail* (Toronto), 7 August 1991.

68 For example, Ziegel J. S., 'Federal Judicial Appointments in Canada: The Time is Ripe for Change' (1987) 37 *University of Toronto Law Journal* 1; Russell, P. H. and Ziegel, J. S., 'Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees' (1991) 41 *University of Toronto Law Journal* 4.

— its sense of fairness and tolerance. The limitations which it imposes on Parliament and the legislatures are more than made up for, in my view, by the greater access it affords people of all walks of life for participation in the public processes of our country. And the guarantees of procedural fairness which it imposes I now see as virtually essential to a society built on a respect for law and justice. The real question is increasingly not whether we should have such guarantees, but whether they should be formally enshrined or left implicit. Even in countries such as England, where unwritten guarantees have long sufficed, recent events such as the fallout from the reversal of the convictions of the Birmingham Six are leading thinking people to ask whether a firmer foundation for justice is required.

Let me conclude by evoking once again the theme which has run throughout the entirety of my remarks. If the Canadian Charter works — and I think it does — it is because it strikes the right balance between the supremacy of Parliament and the legislatures on the one hand, and rights of individuals on the other. In our country, as in most of the western world, both elements are important. Democracy requires that the public weal be served, but it also requires that the rule of law be supreme and that individuals be treated with equality and dignity. A society which sacrifices one to the other is simply unacceptable. The genius of the Canadian Charter, as I see it, is that it preserves both these goods. Individual rights are maintained, but where necessary the public good is allowed to prevail. The initial credit for this lies with its framers, who in the end put in their pens to an assortment of provisions which recognize both the public and the private interest. But the continuing responsibility rests with the courts, who must be vigilant to ensure that the blance remains where it should remain.