

THE CHARTER OF RIGHTS AND FREEDOMS

FEDERAL-PROVINCIAL CONSIDERATIONS: IMPACT ON QUEBEC LAWS

The following sets forth some general comments on the "Pratte Report" as reported in the Montreal Gazette on March 4, 1981. The Pratte Report identifies Quebec laws that could be adversely affected by entrenchment of the Charter of Rights.

First, the report cautions that a firm opinion cannot be given on what laws may be rendered inoperative by the Charter since section 1 (the limitation clause) is broadly cast and it is difficult in advance to predict how the courts will apply the "reasonable" and "demonstrably justified" limits test in given cases. This is a fair enough observation, but it should equally be noted that these are not tests peculiar to the Charter. Many of our ordinary laws, both civil and criminal, now call upon the courts to determine what is reasonable conduct in a given case (the Criminal Code requires establishment of "reasonable and probable cause" for an arrest and tort law/delict employs the "reasonable person" test) in determining if negligence was involved. Equally, our Criminal Code imposes upon anyone who is authorized to use force to demonstrate that the degree of force used in a particular case was not excessive; in other words that the force used was demonstrably justified by the circumstances. Consequently, to suggest that there is novelty in the generality of the language of section 1 is without foundation. Much of our law -- common and civil -- is based upon general principles to which the courts must give concrete content in specific cases. Obviously, in performing this task, the courts must weigh competing social, moral and political values in reaching their decisions, and the same process will pertain in interpreting the Charter.

Second, the report alleges that the Charter imposes on the courts a completely new role which is more legislative than judicial, where they will be handing down political decisions rather than judicial decisions. This is challengeable in at least two respects. In the first place, the courts will not be "legislating" in the parliamentary sense. Rather, they will be -- as they now do -- examining a law, regulation or administrative action to ascertain if it is legally consistent with the provisions of another law -- the Charter. Where they find a conflict to exist, they will pronounce the law or action to be invalid, but they will not be "writing" a new law. That will remain with the legislatures. In this sense, the Charter is no different to the present distribution of legislative powers under sections 91 and 92 of the BNA Act: the courts must in both instances determine whether the federal or provincial law is constitutionally valid in light of the authority given by the constitution to make laws. In the second place, the decisions by the courts will not be more political and less judicial than they are now. The role of the courts will remain that of interpreting laws, and to the extent that the weighing of different values enters into the judgments it will not be different from that which now exists. Surely this is the very role that the courts play now in determining the constitutionality of laws (eg. in the Alberta Press Bill case of 1938 where the Supreme Court held that the Alberta laws were an undue limitation on freedom of speech and of the press). Equally, they do this in interpreting Human Rights Codes where the issues in question are very subjective (eg. what constitutes a bona fide occupational qualification for refusing a person employment on the basis of religion or handicap?). It seems particularly odd that Quebec would argue this position when they have enacted the most comprehensive Charter of Rights in Canada which contains many general principles (right to life, right to personal security, freedom of conscience, religion, expression, assembly and association, right to safeguard one's dignity, honour and reputation, right to equality in the exercise of one's rights without discrimination on many grounds, etc.). They are prepared to have the courts adjudicate their laws and actions in light of these very subjective and general provisions of the Charter of Human Rights and Freedoms. If this be the case, why do they question a similar role for the courts under the proposed Canadian Charter? Surely their Charter creates no less "judicial uncertainty" than the Canadian Charter.

Third, the report suggests that under the Charter the courts will be able to set aside a law because the judges disagree with its policy. This is not the role of the courts in interpreting the Charter any more than it is their role in interpreting the distribution of powers. When they set aside a law it will be because they have concluded, as a matter of judicial interpretation, that the law is legally inconsistent with the Charter. This fear of the courts usurping the powers of the legislators appears to stem from what some perceive to be the role played by the U.S. courts in interpreting the American Bill of Rights. While there may be some basis for allegations that the U.S. Supreme Court on occasion has strayed beyond its judicial role, I think it fair to say that the prevailing view of that Court is well-stated by the following passage from the Court's judgment in Railway Employees' Dept. v. Hanson in 1956, dealing with labour laws and freedom of association:

"Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis, who had wide experience in labor-management relations prior to his appointment to the Court, wrote forcefully against the closed shop. He feared that the closed shop would swing the pendulum in the opposite extreme and substitute 'tyranny of the employee' for 'tyranny of the employer'. But the question is one of policy with which the judiciary has no concern, as Mr. Justice Brandeis would have been the first to concede. Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary."

Turning to some of the specific Quebec laws that the report has identified as being in possible jeopardy once the Charter is adopted.

1. Bill 101. It is true that section 23 of the Charter would preclude Québec from denying the right of citizens educated anywhere in Canada in English to enrol their children in English-language schools. However, section 23 would also grant an equal right to Francophone citizens in other provinces to enrol their children in French-language schools. Section 23 simply affirms the principle agreed to by the Premiers in Montreal in 1978 and reflects the reciprocity arrangement that Premier Levesque was offering to the other provinces when Bill 101 was adopted.
2. Defamation Laws and Freedom of Expression. The Courts have long recognized that a justifiable limitation on freedom of expression are laws that protect a person's honour and reputation. Indeed Quebec's Charter of Human Rights makes specific provision for the right of every person to safeguard his dignity, honour and reputation. Consequently, the defamation laws will be no more at peril under the Canadian Charter than they are under Quebec's Charter.
3. Unsigned Pamphlets and Freedom of Expression. Here, it would depend upon the reason why it was necessary to have the pamphlets signed. If it were to enable identification of the author for purposes of enabling suits for defamation or to attribute expenses incurred in elections or referenda, this would appear to be a proper justification for requiring pamphlets to be signed. Again, the Quebec Charter guarantees freedom of expression, so presumably the Quebec laws would be equally susceptible to challenge now if they are in doubt.
4. Freedom of Association and Police Unions/Labor Federations. Presumably the basis of the Quebec law forbidding police unions from belonging to labor federations is to prevent an association which could give rise to conflicts when police must enforce laws against labor leaders. If this be the case, it may well be that this is a reasonable and justified limit on freedom of association. Again, the Quebec Charter provides for freedom of association, so any question of the validity of this law should arise equally under the Quebec Charter as under the Canadian Charter.

5. Right to be Candidates: Bar Against Policemen, Crown Prosecutors and Legal Aid Lawyers. It is difficult to ascertain the reason why Quebec law should preclude these categories of persons from being candidates in provincial and federal elections, provided they obtain a leave of absence. If it is to avoid their identification with political parties and hence bring their impartiality into question, there may be justification for the limit. However, it would have to be demonstrated that this is the case.
6. Mobility Rights and Acquisition of Farm Lands by Non-Residents. The right of non-residents to acquire property in another province was expressly dropped from the mobility rights. The only rights now are to move to and take up residence in another province and to seek the gaining of a livelihood in another province. Thus the right of non-residents to acquire property is not included. (Arguably it could arise as an incident of gaining a livelihood in another province, but this is not likely to be a frequent occurrence.)
7. Mobility Rights and Construction Regulations. The primary thrust of the Quebec construction regulations is to control mobility of construction workers among areas within the province, and this will not be affected since the mobility rights deal only with tran-provincial mobility of workers. Hence, the only part of the Quebec regulations that may be affected is that which imposes greater restrictions on workers from outside the province than on those who are residents of Quebec.
8. Equality Before the Law and Advertising Aimed at Children. The Quebec Consumer Protection Law, in prohibiting advertising aimed at children, is designed to protect persons of an impressionable age from being unduly influenced by soft-sell advertising techniques. There have long been laws designed to protect young children from predatory activities by adults, and this law would appear to fall within that category as one which is justified for the protection of the young. The prohibition in section 15 against discrimination based on "age" does not mean that every law which distinguishes on the basis of age will be invalid. Where the distinction, as here, appears to have a reasonable objective, it is unlikely to be struck down.

9. Religious Equality and Roman Catholic Rights.  
Unlike the U.S. Bill of Rights, the Canadian Charter does not contain any prohibition against laws which permit the establishment of religion or laws which provide funds for religious institutions. Consequently, laws which provide for religious education or tax exemption for religious institutions will not be prohibited. The equality clause in section 15 of the Charter, in prohibiting discrimination based on religion, does not mean that reasonable distinctions cannot be drawn on this ground. Thus, separate burial grounds for Catholics and non-Catholics would likely be justified on the basis of religious beliefs. Again, the Quebec Charter prohibits discrimination or preference based on religion. Consequently, the religious laws of Quebec could be equally challenged now under that Charter as they could be under the Canadian Charter.

F.J.E. Jordan  
Department of Justice  
992-2320