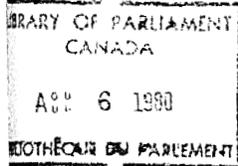


July 5, 1980



BACKGROUND NOTES

ENTRENCHING A CHARTER OF RIGHTS

TABLED BY THE DELEGATION
OF THE GOVERNMENT OF CANADA

Introduction

There have been strong differences of view in Canada about the need and desirability of having rights spelled out (or entrenched) in the Constitution. In addition, among those who support or would be prepared to consider entrenchment, there have been various opinions about what categories of rights should be included. During the last round of constitutional discussions, in 1978-79, the federal government proposed a wide-ranging Charter, entrenching linguistic, non-discrimination, legal, property, and mobility rights, as well as fundamental freedoms and democratic rights. In contrast, most provinces argued, until the February 1979 First Ministers Conference, that rights in general were better safeguarded by constitutional traditions and ordinary law, with elected legislators rather than courts acting as the ultimate arbiters and protectors of rights. As of February 1979 only one province was unwilling to accept entrenchment of at least fundamental freedoms and democratic rights.

Advantages of Entrenchment

- a) Entrenching a Charter of Rights would have the following advantages:
- constitutionally-guaranteed rights have an educative value for citizens and also remind governmental authorities at all levels that their powers are limited and must be exercised with care and prudence;
 - in a federal state there should be a common standard of rights throughout the country; entrenchment is the only effective way of ensuring this;
 - by proclaiming specified rights to be beyond the normal power of legislative majorities, an entrenched Charter provides a sense of security and, moreover, practical means of redress to many individuals and minorities who are aggrieved;
 - entrenchment would give clear effect to the rights set forth in the International Covenant on Civil and Political Rights to which Canada adhered in 1976;
 - the judiciary has traditionally decided disputes between the citizen and the state and thus would be performing a normal role in interpreting entrenched rights;
 - many states with a common law parliamentary supremacy tradition have now adopted entrenched charters of basic rights (examples of such states follow in point 1 below);

- entrenched rights provide an effective standard by which to test legislation;
 - an entrenched Charter would place restrictions on provincial legislatures' power to legislate contrary to protected rights, but it would equally limit the powers of Parliament;
 - entrenchment would not prevent a legislature or Parliament from adding to the protection of rights, as they have done under their human rights legislation. What it would prevent is legislation depriving persons of entrenched rights;
 - entrenchment is therefore not a redistribution of powers between governments, rather it is a redistribution from governments to the people. The Joint Parliamentary Committee on the Constitution in 1972 noted "the fact is that the losers in the "power game" under an (entrenched) Bill of Rights are the totality of governments and the winners are the people".
- b) The following are comments on some of the arguments made against entrenched rights:
1. Entrenchment of rights and freedoms is foreign to the concept of a responsible parliamentary system of government.
 - A number of states which adhere to the responsible parliamentary system have seen fit to incorporate in their constitutions entrenched rights extensive in scope: Kenya, Tanzania, Denmark, Norway, Federal Republic of Germany, Singapore, Trinidad and Tobago, Barbados, Malta, to name a few;
 - Virtually all federal states in the world have constitutionally-enshrined rights and freedoms; the United States of America and the Federal Republic of Germany are particularly noteworthy in this regard;
 - In Britain, such eminent jurists as Lord Hailsham (Lord Chancellor in Mrs. Thatcher's government) and Lord Scarman have argued in favour of entrenched rights; noting that it would not contradict the principle of parliamentary supremacy.
 2. Entrenchment of rights and freedoms would remove from the elected legislators and place in the hands of an appointed judiciary the ultimate power to determine the nature and scope of these rights, contrary to the principle of parliamentary supremacy.
 - The doctrine of parliamentary supremacy is already a limited concept in Canada, as in any federal state where there is a distribution of powers. It rests with the courts to adjudicate finally the allocation of legislative powers, subject to modifications made through subsequent constitutional amendment. In this context, the courts also deal with the issue of jurisdiction over rights and freedoms and their protection, and a constitutional Charter would provide the courts with clearer legislative guidance than they now have on the scope and nature of protected rights;

- Once an amending formula is also entrenched in the Constitution, ultimate sovereignty will still rest with the legislators, but modification of rights as interpreted by the courts will not be left to the decision of any single legislative body with a transient and perhaps capricious majority;
 - Courts do not exist in a vacuum. Judges and the lawyers who appear before them reflect many of the same ideals and attitudes found among elected legislators and other citizens.
3. Rights and freedoms in Canada are already sufficiently recognized and protected by inherent laws and traditions and legislation which has now been enacted. Also, there is no evidence that basic rights and freedoms have been unduly infringed in Canada under our present laws.
- While our present legislative and legal systems have provided Canadians with a good degree of protection of basic rights and freedoms, we are all aware of instances in Canada where laws or administrative actions have resulted in a deprivation or derogation of rights. The entrenchment of rights by itself will not prevent aspects of such actions from occurring in the future, but it would allow practical means of redress;
 - At present, rights and freedoms vary from place to place in Canada. If there is one overriding element of unity in a federal state it should be the greatest possible measure of commonality in the recognition and protection of basic rights so that a person moving from one place to another will be assured equal treatment and protection wherever he may be.
4. There is a risk of limiting or "freezing" rights at the point in time which they were entrenched.
- It is essentially a drafting problem to ensure that entrenched rights will not be "frozen". If the Charter casts the rights in broad terms and contains a clause stating that the rights listed in the Charter are not exclusive, courts will have sufficient latitude to interpret the rights flexibly but subject to reasonable limitations;
 - The United States experience, for example, demonstrates how courts can adapt entrenched rights to new realities;
 - The "freezing" of rights in our system may occur even if they are not entrenched.
5. The history of countries like the Soviet Union shows that the entrenchment of rights is not effective in protecting civil liberties.
- It is spurious to raise such examples and apply them to a country like Canada which justly prides itself on being governed according to its Constitution. Of course, entrenched rights are no more sacrosanct than the Constitution of which they form a part.