

## Notes of Cases

### Jurisprudence

CANADIAN CHARTER OF RIGHTS AND FREEDOMS—RIGHT TO PROPERTY AS AN EXTENSION OF PERSONAL SECURITY—STATUS OF UNDECLARED RIGHTS.—During the public debate which preceded the enactment of the Constitution Act 1982<sup>1</sup> there was considerable concern expressed over the expanded responsibilities to be given to judges in connection with the interpretation and enforcement of the Charter of Rights and Freedoms. Except for those relatively infrequent cases in which a minority on the Supreme Court of Canada had recognized the existence of an implied Bill of Rights<sup>2</sup> the Canadian legal tradition has been to vest responsibility for the protection of fundamental rights and freedoms in sovereign parliaments and legislatures. While that tradition has manifested itself in the enactment of statutory bills of rights both at the federal<sup>3</sup> and provincial level<sup>4</sup> the judicial treatment of those bills of rights has not led to any significant diminution of legislative authority. However, with the enactment of the Charter of Rights and Freedoms, the constitutional framework for the protection of rights and freedoms was drastically altered. Certain rights became constitutionally entrenched and the courts were given responsibility to declare void federal and provincial statutes which did not conform to the prescriptions set down in the Charter. Thus, primary responsibility for the ultimate protection of rights and freedoms was shifted from the sovereign legislative authorities to an appointed and independent judiciary.

Criticism of this change did not challenge the desirability of protecting minority interests from encroachment by a popularly elected majority.

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<sup>1</sup> The Constitution Act 1982, is part of the Canada Act 1982, 1982, c. 11 (U.K.).

<sup>2</sup> This expression is used to describe some of the reasoning employed in cases in which the courts have reviewed the authority of the Provinces to prohibit or regulate political and religious dissent. Dicta in these cases suggests a limitation on such power which goes beyond an encroachment on a federal subject area and extends to a recognition of certain fundamental interests protected from any legislative interference. See Duff C.J. in the *Alberta Press* case, [1938] S.C.R. 100, at pp. 133-134; *Saumur v. A.-G. Quebec*, [1953] 2 S.C.R. 299, per Rand, Kellock and Locke JJ.; *Switzman v. Elbling*, [1957] S.C.R. 285, per Abbott J. at p. 328.

<sup>3</sup> The Canadian Bill of Rights, S.C. 1960, c. 44.

<sup>4</sup> Saskatchewan Bill of Rights Act, R.S.S. 1978, c. S-9; Alberta Bill of Rights Act, R.S.A. 1980, c. A-16; Quebec Charter of Rights and Freedoms, R.S.Q. 1977, c. C-12.

What was questioned was the ability of the judiciary as an institution to balance the values and interests competing for recognition and protection under the Charter. An illustration will suffice. The inclusion of section 7 guaranteeing the right to life raises at least an arguable case that the provisions of the Criminal Code which sanction therapeutic abortions<sup>5</sup> are void. However, a claim advanced on behalf of a foetus scheduled for abortion that his or her right to life be protected may conflict with a claim by the mother that she, as a matter of constitutional right, is entitled to determine the outcome of her pregnancy. The source of that right could conceivably be found in either the right to liberty or the right to security of the person. The question which arises is how, if at all, those two interests can be reconciled and whether courts of law are capable of doing so in a way which does justice to both.

A second criticism of an entrenched Charter interpreted and enforced by judges addressed the question of judicial "bias". Those critics who saw in the Charter an attempt to provide added protection to certain rights feared that a conservative judicial response could undermine that objective.<sup>6</sup> Those who viewed the entrenchment of rights and freedoms as undesirable in principle feared that an activist judicial response would further limit the capacity of elected legislatures to respond to changing needs. Moreover, since in either case the narrowing or widening of protected interests had constitutional status its impact was more significant in that, short of invoking the procedure for a constitutional amendment or persuading the courts to overrule prior decisions, a judicial interpretation which was viewed as either too narrow or too broad could not be easily changed. Thus the consequences of judicial "error" were much more significant.

In one of the first cases interpreting the Charter of Rights and Freedoms a judge has approached the Charter in a way which would alarm both conservatives and activists. In *The Queen v. Fishermen's Wharf Limited*,<sup>7</sup> Dickson J. of the New Brunswick Court of Queen's Bench had to rule on the validity of certain provisions of the Social Services and Education Tax Act<sup>8</sup> which, with respect to unpaid sales tax collected by a vendor, created a lien in favour of the Crown upon property used in the business of the vendor. Fishermen's Wharf Limited operated a fast food takeout restaurant business and was licensed as a vendor under the Sales Tax Act. That Act constitutes vendors as agents of the Minister for the purpose of collecting tax<sup>9</sup> and provides that any tax collected is deemed to be held in trust for Her

<sup>5</sup> S. 251.

<sup>6</sup> In this respect the interpretation of certain provisions of the Canadian Bill of Rights in the Supreme Court of Canada disappointed many who saw the Bill of Rights as enacting a broad guarantee of human rights. Of particular concern was the treatment of the equality provisions of s. 1(b).

<sup>7</sup> (1982), 135 D.L.R. (3d) 307.

<sup>8</sup> R.S.N.B. 1973, c. S-10.

<sup>9</sup> S. 16.

Majesty in right of the province and to be paid over as provided under the Act. It further provides that any amount collected, until paid, forms a special lien on "all the property used in or in connection with or produced in or by the business of the vendor".<sup>10</sup> Finally, where the Provincial Tax Commissioner determines that a lien exists under section 19 he may issue a certificate stating the amount due and payable and declaring that the goods or property referred to in section 19 are subject to a lien.<sup>11</sup> A certificate issued to the Commission is authority for the sheriff to seize any goods or property subject to the lien.<sup>12</sup>

The company fell into arrears in remitting to the provincial authorities tax exigible under the Act and the Commissioner caused a certificate to be issued. Acting on the strength of the certificate the sheriff seized, among other things, a soft-drink dispensing machine and a cigarette vending machine which, though found on the business premises of Fishermen's Wharf, were owned by persons or companies other than Fishermen's Wharf. A dispute arose as to the application of the Act to property owned by persons other than the vendor, and the sheriff brought an interpleader application. Dickson J. held that section 19(1) did not apply to such property, that no lien attached to the chattels and directed that they be released to their respective owners. It was held that the words of section 19(1), as construed, do not, in the absence of some more specific language, establish a lien upon the property of other owners used in the vendor's business. Had such a result been intended clearer language would have been used. However, in reaching that conclusion the learned judge referred to the Charter of Rights for support.

His use of the Charter is, to say the least, aggressive. A measure of that may be seen in his treatment of the parties before him. Since the application had been heard before the proclamation of the Constitution Act 1982, counsel quite properly did not argue its applicability. Nevertheless, the learned judge acted on his own initiative and relied on it in support of his construction of the statute. Apart from the question as to whether or not his interpretation of the Charter was informed, in the sense that it was arrived at on the basis of a complete exposition of competing arguments, there is the fundamental question of justice to the parties. This is of particular concern to the interest of the province in protecting a piece of its legislation from a ruling of constitutional *ultra vires* without the benefit of argument. This concern is not met, it is submitted, by the observation that the reasoning on the Charter is advanced only as "a corollary ground for the relief sought".<sup>13</sup> Secondly, this approach assumes, without argument, that the Charter can have a retrospective application. In this case, the statutory lien

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<sup>10</sup> S. 19(1).

<sup>11</sup> S. 19.1(1).

<sup>12</sup> S. 19.1(4).

<sup>13</sup> *Supra*, footnote 7, at p. 318.

arose prior to the enactment of the Charter; moreover, proceedings to enforce that lien by way of the issuance of a certificate and a seizure thereunder were commenced prior to the Charter. A decision which struck down the statutory grant of power to the sheriff as in conflict with the Charter would operate to give the Charter a retrospective application. In other cases in which the retrospective operation of the Charter has been considered the general conclusion has been that it is prospective in operation.<sup>14</sup> Yet Dickson J. makes no reference to this aspect of the problem. Nor is this omission excusable on the basis that his use of the Charter is not to render a statute void but merely as an aid to its proper construction. In either event, the Charter has become a relevant factor in defining the scope and legitimacy of powers exercised prior to its enactment.

The primary issue of substance concerned the legality of seizure of the property of someone other than the person in default of his obligations to remit tax collected under the Act. In the absence of any other constitutional objections to the legislation authorizing such a seizure, attention was focused on the question of constitutional protection of property rights. In finding such a right to be constitutionally protected Dickson J. relied on sections 7 and 26 of the Charter. However, neither section specifically recognizes property rights. It therefore became necessary to search elsewhere for the source of a right to property protected<sup>15</sup> from legislative interference. The identification of personal "rights" and the location of their source raises complex jurisprudential questions which have been the subject of considerable scholarly debate,<sup>16</sup> and it would be unrealistic to expect a busy trial judge to be sensitive to such issues. However, the approach taken in this case is one which exhibits the kinds of dangers inherent in the assignment of responsibility for the protection of fundamental rights to judges.

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<sup>14</sup> In *Regina v. Roblin*, May 28th, 1982, Que. Ct Sess. not yet reported, s. 7 was held to be a substantive rather than a procedural provision and hence not to be given a retroactive effect. See also *Re Potma and the Queen* (1982), 136 D.L.R. (3d) 69; *Re Gittens and the Queen* (1982), 7 W.C.B. 506. However, there can be cases where, for the purpose of determining whether or not a provision of the Charter has been breached, it is necessary to consider events occurring prior to April 17th, 1982. For example, in *R. v. Coghlin*, not yet reported, the court considered delays and adjournments occurring prior to the Charter as relevant for the purposes of deciding whether or not a trial, held after the Charter was passed, was held within a reasonable time as required by s. 11(b).

<sup>15</sup> Few would suggest that property rights should be enjoyed free of any regulation enacted in the public interest. Thus, regulation of the use of property is a legitimate state objective. However, attitudes differ on whether the state should be required as a matter of constitutional obligation, to provide compensation where property is taken for community purposes.

<sup>16</sup> See, for example, Dworkin, *Taking Rights Seriously* (1978); Rawls, *A Theory of Justice* (1971); Posner, *The Economics of Justice* (1981). A good general review of much of his writing may be found in Fried, *The Artificial Reason of the Law or: What Lawyers Know* (1981), 60 Texas L. Rev. 35.

The court begins with the statement that the Charter of Rights is "fairly all embracing in respect of those rights and freedoms to which all Canadians have been accustomed, whether under that portion of our Constitution which has heretofore been written or under that portion which has heretofore been unwritten".<sup>17</sup> Apparently this is intended to comprise the undeclared rights mentioned in section 26 as well as those specifically declared either in the Charter itself or in other Acts of constitutional stature.<sup>18</sup> However, the standard by which the existence of a right is to be measured is expressed rather vaguely. What are the rights and freedoms to which "all Canadians have become accustomed"? Are they to be found in the common law? the statute books? practices which have become acceptable over a period of time? To what extent, if any, can those individual rights co-exist with the right of the community to regulate and, if necessary, expropriate property in the public interest?

None of these considerations are addressed. Instead one finds an unargued judicial declaration that:<sup>19</sup>

. . . [the] right to enjoyment of property free from threat of confiscation without compensation has unquestionably been a right traditionally enjoyed by Canadians.

No authority is cited for this proposition. This is not surprising for, apart from this case, there is none. Indeed, there is respectable authority to the contrary.<sup>20</sup> Of course, it could easily be demonstrated that the statute law of many provinces recognizes a mechanism by which property owners can seek compensation for the expropriation of their property.<sup>21</sup> However, to find in that the source for a constitutionally protected right is to ignore completely the difference between those rights which enjoy protection by virtue of constitutional entitlement and those which exist at the sufferance of a popularly elected sovereign legislature. Similarly, to locate the right in common law doctrines of nuisance, trespass and conversion or in criminal prohibitions against thefts fails to recognize the unique character of an entrenched right. Finally, if the source of this right lies in the accepted rule of construction requiring that taxing statutes be strictly construed against

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<sup>17</sup> *Supra*, footnote 7, at p. 315.

<sup>18</sup> For example, provisions falling in this category would include those found in the Constitution Act, 1867 (formerly the British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)) or the Manitoba Act, 1870, 33 Vict., c. 3 (U.K.), the Saskatchewan Act, 1905, 4-5 Edw. 7, c. 42 (U.K.), or the Alberta Act, 1905, 4-5 Edw. 7, c. 3 (U.K.) respecting minority language education rights.

<sup>19</sup> *Supra*, footnote 7, at p. 316.

<sup>20</sup> See Hogg, *Constitutional Law of Canada* (1977), p. 397.

<sup>21</sup> See, Expropriations Act, R.S.O. 1980, c. 148, s. 13; Expropriation Act, R.S.A. 1980, c. E-16, s. 42; Expropriation Act, S.N.S. 1973, c. 7, s. 2; Expropriation Procedure Act, R.S.S. 1978, c. E-16, ss. 20-46.

the Crown,<sup>22</sup> that too lacks the fundamental immutable character of an entrenched constitutional principle.

This unargued assumption leads in two directions neither of which can be supported. It leads firstly to an interpretation of section 7 of the Charter which extends its application in a considerable degree; and, secondly it treats the undeclared rights contemplated by section 26 as if they were declared rights.

Section 7 provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It is clear that the right to property is not expressly mentioned. However, that omission is taken as requiring an assumption that:<sup>23</sup>

... the expression right to security of the person as used in s. 7 must be construed as comprising the right to enjoyment of the ownership of property which extends to "security of the person".

Why does the deletion of a specific reference to property rights require that such rights be introduced as extensions of personal security? Although ordinary rules of statutory construction may not be fully appropriate in constitutional interpretation, the construction adopted here certainly offends the *expressio unius* rule. Moreover, the specific exclusion of any reference to property rights in section 7 was not accidental. While a reference to legislative history is not ordinarily admissible as an aid to construction<sup>24</sup> it is well known that the inclusion of a right to property in section 7 was specifically proposed and specifically rejected.<sup>25</sup> That alone would suggest that the right to the enjoyment of private property and the right not to be deprived thereof without compensation was not constitutionally protected either directly or as an extension of personal security.<sup>26</sup>

The extension and application of section 7 in this case raises other problems. Even if it is said that the right to security of the person comprises a protection of those property rights which are an extension of personal security the application of that reasoning in the instant case assumes that the term "person" includes a corporation. While a corporation could easily be

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<sup>22</sup> There is some indication that this may be part of what is meant, in that Dickson J. refers to this rule along with the Charter as constituting supporting reasons for his construction. *Supra*, footnote 7, at p. 314.

<sup>23</sup> *Ibid.*, at p. 315.

<sup>24</sup> See Hogg, *op. cit.*, footnote 20, p. 85.

<sup>25</sup> See McWhinney, *Canada and the Constitution 1979-1982* (1982), pp. 88, 112.

<sup>26</sup> One can conceive of cases in which the enjoyment of personal security may depend on enjoyment of an interest in property. Thus, expropriation without compensation of a dwelling in circumstances under which the forced eviction of the home owner would expose him to a risk of personal harm might qualify as a threat to personal security. It is, however, difficult to apply that kind of reasoning where the property interest harmed consists of a soft-drink dispenser owned by a bottling company.

said to be capable of enjoying rights to property (assuming that such existed) the notion of a right to "life, liberty and security of the person" are not conceptually compatible with the notion of an artificial person.<sup>27</sup> They are more in the nature of human rights to be enjoyed, if at all, by natural persons.

Secondly, there is the difficult question of defining the scope and extent of the protection accorded by virtue of section 7. Assuming that property rights can be included does section 7 require, as a matter of constitutional imperative, that where property is taken, the owners be compensated? Certainly, Dickson J. appears to assume that to be the case. He treats the provisions of section 7 prohibiting a deprivation of the [right to property] "except in accordance with the principles of fundamental justice" as prohibiting confiscation without compensation. In other words, the standard by which one measures whether or not section 7 has been infringed in relation to an alleged deprivation of a property right is that of whether or not adequate compensation has been paid. However, it is not entirely clear that this is what the phrase "principles of fundamental justice" means. Is it limited to a procedural requirement of a fair hearing or does it go further and establish substantive rights to compensation? Although not relevant to the question of legal interpretation it may be noted that, in evidence before the Special Joint Committee on the Constitution, the witness testifying on behalf of the federal government (which had proposed the provision) stated that the phrase was not intended to do more than establish a requirement of procedural due process and did not contemplate judicial review of the substantive justification for the deprivation.<sup>28</sup> However, none of these limiting considerations are present in the judgment under review. The court, without argument and without citation of any supporting authority, not only writes property rights into the Charter but also defines them to include a right to compensation when taken. Thus, by judicial fiat articles 5 and 14 of the American Bill of Rights have been incorporated into Canadian constitutional law. Indeed, the judgment goes even further. In that the substantive justification for the taking is not a matter for judicial review, it appears to treat the right to compensation upon a taking of property to be absolute. This carries the notion of constitutionally protected interests to an absurd extreme.

A second major aspect in which this judgment is open to criticism concerns the treatment of undeclared rights. Section 26 of the Charter provides as follows:

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

<sup>27</sup> See Hogg, *Canada Act 1982 Annotated* (1982), p. 14.

<sup>28</sup> Referred to in Hogg, *op. cit.*, *ibid.*, p. 29. In this respect, s. 7, except for the fact that it omits specific reference to property rights, accomplishes the same objective for federal and provincial laws as does s. 1(a) of the Canadian Bill of Rights in respect of federal laws alone.

Section 26 is one of a number of sections which are included in the Charter for the purposes of preventing it from being used to cut down on the scope of those rights which, though they may be enjoyed by virtue of statute or under the common law, do not yet enjoy a constitutional status. Thus, section 25<sup>29</sup> was inserted to prevent an application of the non-discrimination provisions of Article 15 which would void preferential treatment of native people. Similarly, section 29 prevents the Charter from abrogating or derogating from constitutionally guaranteed denominational school rights. What these sections do is prevent judges from interpreting or applying the Charter in ways which would reduce the enjoyment of those rights not protected by the Charter. Those rights may enjoy independent constitutional protection as in the case of denominational school rights<sup>30</sup> or they may not enjoy any constitutional protection. However, these sections of the Charter, and particularly section 26 do not have, and were not intended to have, the effect of expanding upon the scope of those rights not found in the Charter. In effect the Charter freezes<sup>31</sup> them in place with their content as it was defined on April 17th, 1982. Consequently, where those rights do not, as of April 17th, 1982, enjoy any constitutional protection they are as vulnerable to legislative reduction as before. Although section 26 protects them from reduction by way of application of other provisions of the Charter it says nothing concerning the continuing competence of a sovereign legislature to deal with these rights at its pleasure.

In five lines bereft of any developed argument or citation of authority Mr. Justice Dickson turns section 26 completely on its head. His brevity permits a complete account of his reasoning. Having found the "right to enjoyment of property free from the threat of confiscation without compensation" to be "unquestionably" a right "traditionally enjoyed" he concludes:<sup>32</sup>

... [it] therefore [may] be considered a right embodied in our Constitution quite regardless of proclamation of the present Charter. Any statute of this Province purporting to destroy such a right must therefore be considered invalid and *ultra vires* in that respect.

If this passage says that rights which are traditionally enjoyed are automatically "embodied in our Constitution" it is, with respect, nonsense. Such a conclusion completely ignores the process by which rights come to be

<sup>29</sup> S. 25 provides that guarantees in the Charter are not to be construed in abrogation or derogation of aboriginal or treaty rights of aboriginal peoples.

<sup>30</sup> Constitution Act, 1867, *supra*, footnote 18, s. 93; Manitoba Act, *supra*, footnote 18, s. 22; Alberta Act, *supra*, footnote 18, s. 17; Saskatchewan Act, *supra*, footnote 18, s. 17; Terms of Union of Newfoundland with Canada 1949, 13 Geo. 6, c. 1 (U.K.), s. 17.

<sup>31</sup> In this respect the effect of the Charter parallels that given to s. 1(b) of the Canadian Bill of Rights. In a number of cases members of the Supreme Court of Canada defined equality before the law as meaning equality as it was understood in Canada immediately prior to the enactment of the Canadian Bill of Rights. See, for example, *R. v. Drybones*, [1970] S.C.R. 282, per Pigeon J.; *A.G. Can. v. Lavell*, [1974] S.C.R. 1349, per Ritchie J.; *R. v. Burnshine*, [1975] 1 S.C.R. 693, per Martland J.

<sup>32</sup> *Supra*, footnote 7, at p. 316. *Italics mine*.



recognized as enjoying constitutional protection. If it attributes this kind of effect to section 26 it is erroneous for it would, in effect, "constitutionalize" those rights and freedoms referred to therein. Yet if that is to be its effect, those rights and freedoms would acquire, by virtue of section 26, a status identical to those rights specifically listed in section 2 to 23 of the Charter. It is highly unlikely that section 26 was intended to be a catch-all provision that would incorporate into the Charter all undeclared rights and freedoms enjoyed by statute or under the common law. Many different interests lobbied for recognition as the proposed draft resolution incorporated in the Charter worked its way through the constitutional amendment process towards ultimate enactment. Some of those interests were successful and found protection through inclusion in the list of declared rights; others were not and were denied constitutional recognition.<sup>33</sup> The interpretation given to section 26 in this case ignores completely the vital distinction between rights and interests which are constitutionally protected and those which are not.

At the outset it was suggested that there are certain dangers inherent in charging judges with responsibility to interpret and apply the Charter. Any constitutional instrument which purports to limit the powers of the state over the lives and affairs of individuals who comprise it requires a sensitive balancing of community and private interests. It is neither possible nor desirable that the instrument specify in detail the manner in which that balance is to be struck in particular cases. That is the judicial function and it must be exercised with due regard for the interests competing for recognition. That did not occur in this case. What did occur was a judicial over-reaction to a provision which the court evidently found offensive.<sup>34</sup> That, in turn, led to an approach which is indefensible as a matter of elementary constitutional theory. It is impossible to say whether or not this would have occurred had the court sought submissions from counsel on the application of the Charter. One would expect that it should. However that aspect of the matter is viewed, it remains the case that decisions of this kind signify both the difficulties and the dangers involved in assigning primary responsibility for the reconciliation of competing entrenched rights to the courts.

G.J. BRANDT\*

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<sup>33</sup> See McWhinney, *op. cit.*, footnote 25 for a useful outline of the stage in the process at which various interests competed for recognition and how those interests came to be reconciled in the various provisions of the Charter. Of particular interest is the changing scope of the protection extended to the rights of women and native peoples as the process moved through its various stages.

<sup>34</sup> The court's disapproval of the legislation is reflected in some of the emotional language used. For example, the application of the lien to property other than that of the vendor is alternatively characterized as "reprehensible", "extreme" and "unconscionable". *Supra*, footnote 7 at p. 314.

\* G.J. Brandt, of the Faculty of Law, University of Western Ontario, London, Ont.

DROITS LINGUISTIQUES—INSTRUCTION DANS LA LANGUE DE LA MINORITÉ.—La décision de l'Honorable juge en chef Jules Deschênes dans l'affaire *Quebec Association of Protestant School Boards et al. c. Le procureur général du Québec*<sup>1</sup> illustre le caractère fondamental des droits linguistiques qui ont été enchassés dans la Constitution par la Loi constitutionnelle de 1982.<sup>2</sup> La Charte constitutionnelle a élargi, on le sait, les protections linguistiques minimales qui, avant le 17 avril 1982, étaient consacrées dans certains articles de la Loi constitutionnelle de 1867,<sup>3</sup> soit les articles 91.1 et 133, lesquels contenaient un embryon de bilinguisme officiel. On sait aussi que l'article 93 de la Loi constitutionnelle de 1867 n'a pas été interprété de manière à y comprendre la protection de la langue.

Avec l'entrée en vigueur des articles 16 à 23 de la Charte constitutionnelle, les garanties minimales d'ordre linguistique, antérieures au 17 avril, sont maintenues et ceci signifie que ni le Parlement ni les législatures provinciales ne peuvent les amoindrir. D'une part, l'article 33 de la Charte interdit l'utilisation du procédé de dérogation explicite pour mettre de côté quelque partie du dispositif linguistique; d'autre part, la modification constitutionnelle des articles 16 à 23 de la Charte exige le consentement unanime de tous les corps législatifs canadiens, mais certaines dispositions de la Constitution, applicables à certaines provinces, dont l'article 133, peuvent être modifiées avec l'intervention de tous les corps législatifs fédéraux et de la province concernée. Enfin, il ne faut pas perdre de vue que, selon l'article 31 de la Charte, les pouvoirs législatifs du Parlement et des assemblées législatives ne sont nullement élargis.

On ne se trompe guère en disant que les droits linguistiques se situent très nettement au sommet de la pyramide juridique et que l'intention des réformateurs constitutionnels était de leur assurer un caractère quasiment inviolable. Plus exactement, ces droits deviennent, dans la perspective de la Charte des droits, des valeurs vraiment fondamentales qui exprimeraient apparemment des consensus sociaux ayant fait l'objet d'une très large unanimité. Eu égard à d'autres dispositions de la Charte, ils sont devenus plus protégés dans la Charte que les droits fondamentaux classiques (liberté de conscience, de religion, de pensée, de croyance, d'opinion et d'expression, de presse, de réunion pacifique et d'association) que les législateurs fédéraux et provinciaux peuvent, dans la mesure de leurs compétences, restreindre en ayant recours à l'article 33 de la Charte.

Les droits linguistiques sont donc au coeur de la Charte constitutionnelle et représentent à leur façon une conception presque intangible des modes d'expression des institutions publiques et des choix en matière de

<sup>1</sup> [1982] C.S. 673.

<sup>2</sup> Annexe B, du Canada Act 1982, c. 11 (R.-U.).

<sup>3</sup> 30-31 Vict., c. 3 (R.-U.).

langue d'enseignement. Or c'est précisément de langue d'enseignement dont parle le juge Deschênes.

En vertu de l'article 23 de la Charte, trois catégories de citoyens canadiens ont le droit de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité. La première catégorie est visée à l'article 23(1)a et comprend les citoyens dont la première langue apprise et encore comprise est celle de la minorité linguistique de la province où ils résident. Il s'agit ici du critère de la langue maternelle des parents qui permet de faire instruire les enfants dans la langue de la minorité même si les parents n'ont pas reçu au Canada leur éducation dans cette langue. En vertu de l'article 59 de la Loi constitutionnelle de 1982, cette disposition entre en vigueur pour le Québec à la date fixée par proclamation fédérale et après autorisation de l'Assemblée législative ou du Gouvernement du Québec. Dans le projet de loi 62, sanctionné le 23 juin 1982,<sup>4</sup> l'Assemblée nationale a décrété que le critère de la langue maternelle ne s'appliquerait au Québec qu'avec le consentement de l'Assemblée nationale du Québec et du Gouvernement du Québec.

La deuxième catégorie comprend les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada: ces citoyens ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Mais ce dont il est question dans la décision du juge Deschênes a trait à la clause Canada qu'incorpore l'article 23(1)b qui prévoit qu'une dernière catégorie de citoyens peuvent faire instruire leurs enfants dans la langue de la minorité: il s'agit des citoyens qui ont reçu leur instruction, au niveau primaire, au Canada, dans la langue de la minorité linguistique de la province où ils résident. La Charte constitutionnelle ne prévoit à l'égard de cette clause aucune possibilité de dérogation, suspension ou entrée en vigueur différée. En d'autres termes, la clause Canada s'impose au Québec dès le 17 avril 1982.

Ceci n'allait pas sans poser quelques problèmes particuliers à cause de la Charte de la langue française<sup>5</sup> qui, elle, prévoit la clause Québec et dont nous citons ici les articles pertinents:

72. L'enseignement se donne en français dans les classes maternelles, dans les écoles primaires et secondaires sous réserve des exceptions prévues au présent chapitre.
73. Par dérogation à l'article 72, peuvent recevoir l'enseignement en anglais, à la demande de leur père et de leur mère, . . .
  - a) les enfants dont le père ou la mère a reçu au Québec, l'enseignement primaire en anglais,

<sup>4</sup> Loi concernant la Loi constitutionnelle de 1982.

<sup>5</sup> Loi 101 adoptée en août 1977, L.Q. 1977, c. 5.

- b) les enfants dont le père ou la mère est, à la date d'entrée en vigueur de la présente loi, domicilié au Québec et a reçu, hors du Québec, l'enseignement primaire en anglais,
- c) les enfants qui, lors de leur dernière année de scolarité au Québec avant l'entrée en vigueur de la présente loi, recevaient légalement l'enseignement en anglais dans une classe maternelle publique ou à l'école primaire ou secondaire,
- d) les frères et soeurs cadets des enfants visés au paragraphe c.

La Charte de la langue française qui représente probablement la pièce de législation la plus importante que le Gouvernement péquiste ait votée est, on le voit, plus restrictive que la Charte constitutionnelle et fait de l'accès à l'école anglaise un système d'exception. Or, selon le juge Deschênes, l'un des buts de la Charte "était de corriger la situation insatisfaisante au Canada en matière de langue d'éducation, plus particulièrement de remédier à l'article 73 de la Loi 101 et de supprimer les barrières qu'il avait érigées". En clair, la Loi 101 devait démanteler une loi, plutôt généralement acceptée au Québec. Le juge Deschênes devait se prononcer sur sa constitutionnalité ou sa compatibilité avec la Charte constitutionnelle, en ne perdant pas de vue, évidemment, que cette dernière s'applique à la législation antérieure. Pour lui, la conclusion s'imposait: savoir qu'il y a incompatibilité entre la Loi 101 et la Charte.<sup>6</sup>

L'article 23 de la Charte permet les conditions posées par les articles 72 et 73 de la Loi 101; mais la Loi 101 ne tolère pas la généralité des conditions posées par la Charte.

Plus exactement, pour l'Honorable juge en chef, la Loi 101 niait un droit, que ni le Parlement fédéral ni les législatures provinciales n'étaient en mesure de réaliser. Il ajoute:<sup>7</sup>

Il est évident pour la Cour, que la "restriction dans les limites raisonnables" est antinomique à la négation et qu'aucun effort d'imagination ne permet de glisser de la première à la seconde. Une législature ne peut donc nier un droit garanti par la Charte sous couvert de la restreindre en vertu de l'article 1.

Le procureur du Gouvernement québécois prétendait que les droits linguistiques ne constituaient pas des droits individuels, mais plutôt des droits collectifs énoncés en faveur de la minorité anglophone. Ces droits, que le Québec restreignait en privant des individus de leur droit à l'enseignement, ne changeait nullement le caractère restrictif et non prohibitif de la Loi. Le juge Deschênes rejeta cette conception plutôt totalitaire et déclara que les droits protégés étaient des droits individuels:<sup>8</sup>

C'est aux individus, citoyens canadiens et membres d'une minorité, que la Charte reconnaît des droits en matière de langue d'instruction; c'est à ces individus qu'elle ouvre la porte des tribunaux en cas de violation de leurs droits. Il semble bien qu'il s'agisse, dans l'article 23, de droits individuels plutôt que de droits collectifs.

La conclusion de la Cour selon laquelle l'application de la clause Québec entraîne la négation des droits individuels dont les citoyens cana-

<sup>6</sup> *Supra*, note 1, à la p. 682.

<sup>7</sup> *Ibid.*, à la p. 690.

<sup>8</sup> *Ibid.*, à la p. 692.

diens peuvent se réclamer nous paraît plutôt inévitable. L'on ne saurait se convaincre que le Québec pouvait se réfugier derrière l'article 1 pour défendre sa clause Québec. En effet, l'effet de la Loi 101 est de refuser carrément à un citoyen canadien, bénéficiaire d'un droit clair en vertu de l'article 23 de la Charte, la faculté de l'exercer lorsqu'il ne tombe pas dans les exceptions prévues à la Loi 101.

A notre point de vue, une conclusion différente ne correspondrait ni au texte de la Charte constitutionnelle ni à son économie générale. Il n'y a aucun doute dans notre esprit que la clause Québec ne peut tenir devant le texte clair et prépondérant de l'article 23 de la Charte constitutionnelle. Il n'est pas nécessaire de se livrer à une longue exégèse de cet article ou à l'étude de la preuve extrinsèque pour faire semblable affirmation.

Bien sûr, en termes politiques, le procédé de l'utilisation du mécanisme des lois constitutionnelles pour faire échec à une loi aussi importante est discutable et porte atteinte aux pouvoirs souverains que détenait l'Assemblée nationale avant avril 1982, en ces matières. Pour ma part, j'accepterais la clause Canada, mais il reste tout à fait regrettable qu'on l'ait imposée au Québec sans son consentement et sans la moindre possibilité d'y déroger. Le juge Deschênes était prisonnier des textes constitutionnels et ne pouvait, malgré quelque effort d'imagination, les rendre sans signification. S'il y a critique à formuler, ce n'est pas tellement à l'encontre du jugement articulé et solide de l'Honorable juge en chef, mais à l'égard d'un texte constitutionnel qu'il se devait d'appliquer.

Mais ce qui nous préoccupe dans la décision du juge Deschênes est la considération étendue donnée à la question subsidiaire soulevée par le Québec et selon laquelle ce dernier remplissait les conditions stipulées à l'article 1 de la Charte. C'est en effet curieux que la Cour examine les conditions d'application d'un article non pertinent. Mais, si elle l'a fait, c'est qu'elle croyait possible qu'un autre tribunal diffère d'opinion relativement à l'application de l'article 1. Aussi, estimait-elle de son devoir de passer à l'examen de cette question subsidiaire.

Personnellement, je suis en désaccord avec ce procédé. Si, comme je le crois, la Loi 101 constitue une négation et non pas une restriction des droits constitutionnels des citoyens, elle ne peut être qu'inconstitutionnelle et l'article premier de la Charte qui prévoit que les droits ne "peuvent être restreints que par une règle de droit, dans les limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique" ne mérite pas qu'on s'y arrête longtemps, d'autant plus qu'elle conduit inévitablement à examiner le caractère raisonnable de la Loi 101. A mon point de vue, les juges constitutionnels ne devraient jamais s'éloigner de notre pratique centenaire de "retenue judiciaire" et je ne vois pas pourquoi ils traiteraient l'argument constitutionnel d'une manière différente de celle qui prévalait avant le 17 avril 1982.

Il peut sans doute être intéressant, devant un texte aussi fascinant que la Charte, de vouloir lui imprimer des orientations, de diriger l'interprétation vers certaines avenues et d'assumer un "leadership" intellectuel dans l'élaboration judiciaire de la norme. Cela aurait pu être vrai en 1867 et dans les années qui ont suivi. Pourtant, dans ses premières grandes décisions qui ont influencé l'interprétation judiciaire de la Loi constitutionnelle de 1867, le Comité judiciaire du Conseil privé n'avait-il pas affirmé:

En accomplissant ce devoir difficile, il serait sage que ceux qui en sont chargés jugent de leur mieux chaque affaire qui se présente, sans pousser l'interprétation de l'acte plus loin que ne l'exige le règlement de la question soumise.<sup>9</sup>

Un an plus tard, le Conseil privé avait à nouveau lancé le même avertissement, mais cette fois en termes on ne peut plus clairs:

... dans toutes ces questions d'*ultra vires*, la plus sage ligne de conduite consiste à ne pas élargir le débat par l'introduction de considérations qui ne se rattachent pas directement à la solution du point en litige.<sup>10</sup>

Ces sages exhortations ne sont pas restées lettres mortes en jurisprudence, les juges les ayant généralement suivies avec constance. Pourquoi l'interprétation de la Charte ne serait-elle pas marquée par la même prudence dans l'approche, si libérale, si généreuse et si dynamique que puisse être la définition des contenus notionnels des droits qu'elle protège? Mon collègue José Woehrling de la Faculté de droit a tenu un langage critique comparable au mien, et sur ce point particulier je suis d'accord avec lui.<sup>11</sup>

Je traiterai donc la deuxième partie de la décision du juge Deschênes pour ce qu'elle m'apparaît vraiment représenter, soit des *obiter dicta*, mais des *obiter* de grande qualité en raison de la haute distinction du juriste qui les formule.

Dans cette partie subsidiaire de la décision, la Cour rappelle les conditions d'application de l'article 1 de la Charte: restriction par une règle de droit, dans les limites raisonnables, dont la justification puisse se démontrer, dans une société libre et démocratique. Pour elle, la Loi 101 constitue une règle de droit, le Québec représente une société libre et démocratique et il a démontré la justification de la Loi 101 par la preuve de la légitimité de son objectif: la sécurité et l'épanouissement de la société de langue française au Québec qui postule la francisation de l'enseignement. Jusqu'ici, je ne vois aucune difficulté et j'ajoute que, selon ma perception pour ne pas dire mon sentiment (ce n'est plus vraiment un discours juridique) la justification de la Loi 101 pouvait se démontrer. Mais est-ce que la dernière condition est remplie? Est-ce que la limite est raisonnable ou plutôt, pour employer les mots du juge Deschênes, le moyen législatif utilisé est-il proportionné à l'objectif visé? La Cour qui dit bien se garder de

<sup>9</sup> *Citizens Insurance Company of Canada v. Parsons* (1881-82), 7 A.C. 96, à la p. 109.

<sup>10</sup> *Hodge v. The Queen* (1883-84), 9 A.C. 117, à la p. 128.

<sup>11</sup> La Suisse serait-elle moins démocratique?, *Le Devoir*, mercredi le 15 sept. 1982.

substituer son opinion à celle du législateur ne peut faire autrement, dans cette dialectique, que s'ériger en juge de la sagesse du législateur, et cela quels que soient les critères de (rationalité) qu'elle formule en recourant aux conventions internationales, constitutions et lois étrangères, à la jurisprudence anglaise, américaine et canadienne. Les tests de rationalité qu'un juge peut appliquer en vertu de l'article 1 de la Charte sont en effet fluides, imprécis et laissent une très grande mesure d'appréciation au juge. Qu'est-ce qu'un moyen proportionné à l'objectif visé? Qu'est-ce qu'un moyen disproportionné qui heurte le sens commun? Pour reprendre les propos du juge Pigeon que cite le juge Deschênes,<sup>12</sup> l'adoption de la Charte "comporte l'attribution aux tribunaux d'une partie importante du pouvoir législatif".

Passant en revue les arguments des requérants et de l'intervenant, favorables et défavorables à la rationalité de la clause Québec, le juge observe en passant que la Loi 101 est rigoureuse à l'excès, que le maintien de la clause Québec pourrait dépasser le but visé, que l'article 23 ne mettrait pas en péril l'intégrité de la francophonie et que l'opposition à l'article 23 serait "donc déraisonnable et doit découler de motifs inadmissibles". Le discours judiciaire traditionnel a, on le voit, éclaté. Le juge Deschênes poursuit:<sup>13</sup>

Si la Cour devait absolument trancher le débat d'une façon affirmative, elle inclinerait à conclure que la clause Québec est disproportionnée au but poursuivi et qu'elle excède inutilement les limites du raisonnable.

Il est clair en effet que l'absence de la clause Québec n'amènerait aucun amoindrissement de la portée de la Loi 101 en général. Elle n'entraînerait non plus aucun affaiblissement dans le domaine de la langue d'enseignement qui demeure, en principe, le français.

En fait la preuve a révélé que l'article 23 de la Charte ne provoquerait qu'un influx négligeable de nouveaux élèves dans le réseau scolaire de langue anglaise. Chose certaine, il n'empêchera pas le déclin inéluctable d'ici la fin du siècle de l'importance relative du secteur anglophone dans l'ensemble du réseau scolaire québécois; tout au plus contribuera-t-il à un léger freinage de ce déclin, sans conséquence sur l'évolution prévisible du Québec.

et conclut:<sup>14</sup>

Il lui suffit en effet de constater que le Québec n'a certainement pas réussi à prouver d'une façon prépondérante que la clause Québec constitue une limite "raisonnable" au sens de l'article 1 de la Charte: les vives controverses dans la preuve en témoignent.

Le droit se révèle impuissant à commenter en termes traditionnels les conclusions du juge Deschênes. Le discours est inhabituel, les concepts sont nouveaux et l'art de juger original. Un juge différent pouvait conclure autrement sur la deuxième question, s'il devait l'aborder. En ce qui me concerne, je n'éprouve aucune difficulté à comprendre, voire à accepter, la

<sup>12</sup> *Supra.*, note 1, à la p. 697.

<sup>13</sup> *Ibid.*, à la p. 708.

<sup>14</sup> *Ibid.*

première partie de la décision; quant à la deuxième, aussi longue que la première, elle a au moins l'avantage de nous initier à l'art de l'appréciation de la rationalité des moyens législatifs employés pour atteindre un but législatif légitime. Je parie fort que la Cour d'appel du Québec et la Cour suprême ne sentent guère le besoin d'explorer les méandres de ce monde politique.

ANDRÉ TREMBLAY\*

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CANADIAN CHARTER OF RIGHTS AND FREEDOMS—CRIMINAL PROCEDURE—RETROSPECTIVE EFFECT.—The entrenchment of a Charter of Rights and Freedoms in Canadian constitutional law raises the issue of whether or not it will have any retrospective effect on the criminal trial process. By virtue of sections 8, 9 and 10 of the Charter, police conduct in carrying out searches and seizures, or effecting detention and imprisonment, is today subject to constitutional scrutiny. Failure by the police to respect the standards in sections 8, 9 and 10 will henceforth be considered unconstitutional behaviour and may result in the exclusion at trial of evidence thereby acquired. The possibility of evidentiary exclusion is found in section 24 of the Charter. Pursuant to this section, a judge is empowered to exclude evidence, even though relevant and otherwise admissible, which was obtained in a manner that infringed any of the rights in the Charter, if its admission in evidence, having regard to all the circumstances, would bring the administration of justice into disrepute. To what extent will this change in the rules of evidence be applicable to events which took place before the Charter's proclamation? For example, will an accused be able to claim a remedy pursuant to section 24 because of an unreasonable search and seizure, even though the crime of which he stands accused was committed two months before the coming into force of the Charter? Insofar as the accused is concerned, this question is far from academic for the exclusion of certain pieces of relevant evidence might considerably increase his chances of acquittal.

Circumstances which give rise to this time-related problem of application fall into three principle categories. Firstly, as already stated, an accused may come to trial after the proclamation of the Charter, but on charges emerging from a crime which predates it.<sup>1</sup> Secondly, a criminal

\* André Tremblay, Professeur titulaire, Faculté de Droit, Université de Montréal.

<sup>1</sup> This category could be further broken down to distinguish between cases where the investigation of a crime occurring before the proclamation of the Charter (April 17th, 1982) takes place before proclamation, from cases where the investigation of such a crime takes place after proclamation. As will become clear as we proceed, it is the date of police investigations that constitutes the most important element in solving the problem herein examined.



trial might actually be in progress when the Charter comes into force. Finally, a person found guilty of an offence may actually be serving a jail term when the Charter of Rights is proclaimed. The first two categories are clearly more manageable from a practical point of view. In the event that the Charter were found to operate with retrospective effect, the resultant changes in the law of evidence could be integrated into the trial before a final judgment was pronounced. With the third category, however, the trial is over and the conviction is entered, before any of the participants in the trial are aware of changes to the rules of evidence. Indeed, the third category is an undeniable case of *res judicata*, where guilt or innocence has been decided according to the law as it actually existed at the moment of judgment.

It is hardly surprising that the question of retrospective effect, at least at the constitutional level, cannot be unequivocally decided by reference to, and deduction from, a set of self-sufficient past judicial pronouncements. Canada has never had a constitutionally entrenched Bill of Rights, leaving the judiciary free to struggle with the issue by reference to analogy, foreign experience and the fundamental principles which might be seen to animate the Charter itself. The present treatment of the issue is divided into two basic sections. To begin with, there is an attempt to view the issue of retrospective effect against the background of existing judicial precedent concerning the problem of statutory interpretation. It is not unusual that legislation is changed, and our courts have already had the opportunity to examine the retrospective impact of legislative changes on pending litigation. The resultant case law is certainly pertinent as a guide to the possible attitude the courts might take with respect to the Charter of Rights. The second section approaches the problem by reference to the American experience in interpreting and applying their own Bill of Rights. As is well known, the American judiciary has participated in the application of a broad range of civil rights relevant to the criminal process through its interpretation of "substantive due process". As the scope of these rights evolved through time, the question of whether this expanding list of rights had only prospective effect was extensively debated. The identification of rights where none had been thought to exist before, at least at the level of state jurisdiction, is clearly analogous to the advent of the Charter of Rights in Canada. In both cases, the issue of retrospective effect must be faced. The American response to the problem, albeit conditioned by a different legal and constitutional history, should prove at least edifying to those who must grapple with the same problem in Canada.

### *Retrospective Effect and Statutory Interpretation*

The common law has long since established the general principle that statutes dealing with substantive rights are not to be given retrospective application unless a clear intention to that effect is manifested. In contrast, a statute which concerns only questions of procedural law is viewed as

operating with retrospective effect, subject, of course, to any contrary intent expressed by the legislative body which enacted it.<sup>2</sup> Thus, the common law chooses as a point of departure the distinction between substantive and procedural law. In the result, statutory provisions of a substantive character will not normally apply to events which occur prior to their enactment.<sup>3</sup>

This general principle of the common law has been examined in a line of Canadian cases dealing with legislation regulating rights of appeal.<sup>4</sup> In addition to supporting the general principle described above, these cases clearly establish that a right of appeal is not a mere matter of procedure and that the law with respect to those rights which is in existence at the time of the commencement of an action or prosecution will govern in any subsequent appeal. In other words, if legislation affecting rights of appeal is enacted after a prosecution has begun, it will have no application to those proceedings—that is, the legislation will have no retrospective effect. This same reasoning applies whether a statutory amendment gives a right of appeal or takes a right of appeal away; unless, of course, the statute expressly provides otherwise.

Judicial precedent focusing exclusively on rights of appeal, however, is certainly not determinative of the issue of the degree of retrospective effect, if any, of the Charter of Rights. The main reason for this is obvious. The definition of rights of appeal is largely unrelated to the nature and quality of the events which gave rise to the cause of action or criminal prosecution. They can be amended without any effect upon the behaviour of the individuals involved in events from which emerged a criminal prosecution. In a very important sense they are neutral and of no effect on the course of events prior to the commencement of a prosecution. This is hardly the case when we stop to consider the legal rights guaranteed in sections 8, 9 and 10 of the Charter. These rights establish standards which will presumably influence the behaviour of law enforcement officials in the investigation of crime. Such rights therefore bear an important relationship to events which take place before the commencement of a prosecution. Any view which accorded complete retrospective effect to the Charter would

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<sup>2</sup> See *Singer v. The King*, [1932] S.C.R. 70; *Howard Smith Paper Mills v. The Queen*, [1957] S.C.R. 403; *Royal Bank of Canada v. Concrete Column*, [1971] S.C.R. 1038; *Gervais v. R.* (1978), 4 C.R. (3d) 161, for illustrations of this basic principle.

<sup>3</sup> I say normally, because this general rule that statutory amendments of a substantive character do not have retrospective effect is not necessarily applied in an automatic fashion. Examples which seem to demonstrate that certain types of benevolent statutory amendments will be given retrospective effect can be found in *Nadeau v. Cook*, [1948] 2 D.L.R. 783 and *Acme Village School District v. Steele-Smith*, [1933] S.C.R. 47. Given the nature of the issues involved in these cases, they will probably have little impact on the problem of the retrospective application of ss 8, 9 and 10 of the Charter.

<sup>4</sup> *Hyde v. Lindsay* (1898), 29 S.C.R. 99; *Rex v. Rivet* (1944), 81 C.C.C. 377; *Boyer v. The King*, [1949] S.C.R. 89; and *R. v. Vallières (No. 2)* (1973), 17 C.C.C. (2d) 361. See also, *supra*, footnote 2.

have to respond to the criticism that law enforcement officials could not be expected to conform to legal standards which were non-existent at the time of a particular criminal investigation.

Although the appeal rights cases provide us with very little insight into the more peculiar ramifications of a retrospective Charter, they nonetheless reaffirm the basic principle in common law that amendments to substantive law operate only prospectively, subject to any contrary intention announced in the legislation. This basic principle was cited and applied by the Ontario Court of Appeal in *Regina v. Lesarge*<sup>5</sup> in circumstances quite pertinent to the issue of the retrospective effect of the Charter. Briefly, this case deals with the application of amendments to the Criminal Code as they pertain to wiretapping. The Crown attempted to introduce wiretap evidence gathered before the amendments to the Code, in a manner which did not conform to the procedure established by these amendments. The amendments, all enacted before the commencement of the trial, established the rule, *inter alia*, that private communications were inadmissible in evidence if intercepted in an unlawful manner, that is, not in conformity with the new procedures.<sup>6</sup> Objection was taken, of course, to the admission of the Crown evidence. In responding to the issue of retrospective effect, Houlden J.A. remarked:<sup>7</sup>

As the wiretapping that was carried out in this case was not unlawful prior to the enactment of the Protection of Privacy Act, is it caught by the provisions of s. 178.16(1)? Or putting it another way, should s. 178.16(1) be given a retrospective operation?

There is a well-established principle of statutory interpretation that penal legislation is ordinarily not to be given a retrospective effect: 36 Hals, 3rd ed., p. 425, para. 645. On the other hand, there is an equally well-established principle of statutory interpretation that a statute which deals with matters of procedure only is ordinarily to be given a retrospective application: Maxwell, *Interpretation of Statutes*, 12th ed. (1969), p. 222. In the present case, the Protection of Privacy Act does not deal with procedural matters only. Rather, it creates three new substantive offences, namely: wilful interception of a private conversation (s. 178.11(1)); possessing, selling or purchasing a device for surreptitious interception of a private communication (s. 178.18(1)); and wilful disclosure of information obtained by interception of a private communication (s. 178.2(1)). Section 178.16 is so inextricably bound up with the substantive provisions of the Protection of Privacy Act that, in my opinion, it cannot be given a retrospective operation.

Furthermore, as the Act was not in force at the relevant time, it would have been impossible for the police to have complied with the provisions of s. 178.16.

In short, not only did *Lesarge* reaffirm the importance of the distinction between substantive and procedural law, it underscored the fact that it is patently unreasonable to expect police officers to conform to legal rules which are non-existent at the time investigations take place.

<sup>5</sup> (1975), 26 C.C.C. (2d) 388.

<sup>6</sup> S. 178.16 Crim. Code, R.S.C. 1970, c. C-38 as am.

<sup>7</sup> *Supra*, footnote 5, at pp. 395-396.

The Supreme Court of Canada has recently reexamined the issue of the retrospective effect of Criminal Code amendments in *R. v. Ali*,<sup>8</sup> and once again emphasized the distinction between substantive and procedural law. This case arose from changes to the evidentiary rules, found in section 237, concerning the breathalyzer offence. Section 237 deals essentially with the conditions under which a certificate of a qualified technician shall constitute *prima facie* evidence of its contents as to the proportion of alcohol in the blood of an accused. This section was amended in May 1976 so as to require the taking of two samples of breath rather than one, as had previously been the case.

Although the offence of which the accused was charged occurred before the amendment, his trial took place several months after May 1976. It was argued that the requirement of a double sample of breath should be the standard applicable at the accused's trial. In favour of the position of the accused was the fact that the amendment in question was concerned exclusively with the method of proof and the nature of the presumption created by the production of the technician's certificate. As these could be construed as matters of mere procedure, it would seem to follow that they should be given retrospective effect.

In rejecting the submission of the accused, the majority judgment did not quarrel with the distinction between substantive and procedural law and its effect on the issue of retrospective effect. It did emphasize, however, that although amendments to procedural law were normally given retrospective effect, such a rule was not absolute: "... it is only a guide that is intended to assist in the determination of the true intent of Parliament which is the main objective of statutory construction".<sup>9</sup> In his judgment Mr. Justice Pratte made two important observations. First, the procedural amendments to section 237 were so inextricably connected to the substantive breathalyzer offence in section 235 that it could not have been the intent of Parliament to accord them a retrospective effect. Second, statutory amendments, even if procedural in character, had to be interpreted with reference to the Interpretation Act,<sup>10</sup> one of whose sections provides:

36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,

...  
(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal; . . .

<sup>8</sup> [1980] 1 S.C.R. 221.

<sup>9</sup> *Ibid.*, at p. 235.

<sup>10</sup> R.S.C. 1970, c. I-23.

In effect, this section imposes a practical restriction on the common law rule that procedural amendments are presumed to have retrospective effect. It prescribes that the retrospective operation of procedural enactments should take place only to the extent that the new rules of procedure may be adapted to proceedings taken in respect of matters occurring before the amendments. The extent to which the new procedures are "adaptable" is, of course, a matter of judicial interpretation.

The Canadian jurisprudence concerning the retrospective effect of legislative amendments provides us with at least three propositions which might be relevant to the Charter of Rights. Firstly, it seems beyond question that the legal rights guaranteed in sections 8, 9 and 10 are matters of substance and not procedure. Working by analogy, it would then seem to logically follow that the enunciation of these substantive rights cannot be given any retrospective effect, unless it is somehow considered inadmissible to apply vintage common law principles to the matter of constitutional interpretation. Some may hold the view that constitutionally entrenched rights are so sacrosanct that it is most inappropriate to apply common law principles to the issue of their retrospective effect. It may be felt that once rights have been raised to the constitutional level they somehow escape the application of principles of interpretation developed for the less ethereal realm of statutory law. Admittedly there is a valid distinction to be made between constitutional and statutory law; but in the absence of any specific principles of constitutional interpretation which can assist us in resolving the issue of retrospective effect raised here, it would seem extraordinarily premature to dismiss as irrelevant the jurisprudence concerning the retrospective effect of statutory amendments. Further light will be shed on the possibility of constitutional principles of interpretation when we turn below to examine the American experience with their own Bill of Rights.

Emphasis might, however, be placed on the inherently procedural aspects of section 24 of the Charter to support a view of retrospective effect. It might be argued, for example, that the issue of the exclusion of evidence under section 24(2) is nothing more than a question of procedural law; hence, the new rule of evidence should be given a retrospective effect. The response to this line of argument is clear. Since a presupposition exists here that the common law use of the distinction between substantive and procedural law is relevant and applicable, it follows that the refinement of *Lesarge* must also apply. As will be remembered, the court in *Lesarge* underscored the inextricable link between the substantive and procedural legislative amendments under review. This link made it untenable that the procedural element be given a retrospective effect. Similarly, the procedural elements of section 24 of the Charter are intimately connected to the substantive rights declared in sections 8, 9 and 10. Indeed, they balance the equation or correlation between the declaration of substantive legal rights and the necessary enforcement provisions which insure their respect. And just as the court reasoned in *Lesarge*, so too could another court be urged to

give only prospective effect to new procedural rules whose existence is nonsensical in isolation from the substantive rights to which they relate.

To further support the view which denies retrospective effect to sections 8, 9 and 10 of the Charter, one can point to the argument in *Lesarge* that it is fundamentally unreasonable and unfair to expect police officers to adhere to legal standards and procedures which were unarticulated and even non-existent at the time investigations took place. A police officer's behaviour is circumscribed by the law at any given point in time. Theoretically, a change in the relevant law will affect the boundaries of legitimate police behaviour. To give such changes retrospective effect, however, can in no way alter past events. Surely it is fundamental to our legal heritage that past events be judged according to principles and standards then in existence.

The arguments thus far advanced, especially when viewed in their cumulative effect, place in a very serious doubt any purported retrospective effect of the exclusionary rule created by section 24, in conjunction with sections 8, 9 and 10. It must be admitted, of course, that the Charter of Rights gives rise to questions of constitutional interpretation, rather than the type of legislative interpretation underpinning the existing Canadian jurisprudence. In the interest of enlarging our perspective on the problem, therefore, we will now turn to examine the American constitutional experience insofar as the issue of retrospective effect has been raised in interpreting their own Bill of Rights.

### *Retrospective Effect and the American Bill of Rights*

As previously stated, the issue of retrospective effect was raised in the United States of America because of Supreme Court judgments recognizing a series of specific constitutional safeguards applicable to the criminal trial process which had not hitherto been applied at the level of state jurisdiction. These involved the manner in which police interrogations were held, an accused's right to counsel, the rule against self-incrimination, and questions of search and seizure.<sup>11</sup> The recognition of exigent constitutional standards, particularly in *Escobedo* and *Miranda*, raised the issue of whether or not they would apply to cases which were either already on appeal, pending prosecution or in the midst of trial. With literally hundreds of cases of collateral attack on prior convictions pending, the Supreme Court responded quickly by rendering judgment in *Johnson v. New Jersey*,<sup>12</sup> one week after *Miranda*. The court approved a three-fold

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<sup>11</sup> See *Mapp v. Ohio* (1961), 367 U.S. 643; *Malloy v. Hogan* (1964), 378 U.S. 1; *Murphy v. Waterfront Commissioners* (1964), 378 U.S. 52; *Gideon v. Wainwright* (1963), 372 U.S. 335; *Escobedo v. Illinois* (1965), 378 U.S. 478; *Miranda v. Arizona* (1967), 384 U.S. 436.

<sup>12</sup> (1966), 384 U.S. 719.

test<sup>13</sup> to be applied in determining if new constitutional standards with respect to criminal procedure should be given retrospective effect, and thus be applicable to trials already commenced when the new standards were articulated:

- (i) what is the purpose to be served by the new standards?;
- (ii) to what extent did law enforcement officials rely on the old standards?; and
- (iii) what would be the effect on the administration of justice of a retrospective application of the new standards?

With respect to the first question, the Supreme Court insisted that retrospective effect was only appropriate where the primary purpose of the new rule was to ensure the reliability of the fact-finding process. It is the importance of this latter process which might make it appropriate to apply a newly recognized constitutional standard to trials in progress or to convictions already pronounced. In addressing his mind to this rationale, one American commentator has remarked:<sup>14</sup>

[W]hen a constitutional guarantee is heightened or added to in a manner calculated to improve the reliability of a finding of guilt, the new interpretation essentially establishes a new required level of confidence as the condition for criminal punishment. . . .

Valuing the liberty of the innocent as highly as we do, earlier proceedings whose reliability does not measure up to current constitution standards for determining guilt may well be considered inadequate justification for continued detention. . . .

On this basis, habeas corpus would assess the validity of a conviction, no matter how long past, by any current constitutional standards which have an intended effect of enhancing the reliability of the guilt-determining process.

Where new constitutional standards are more concerned with the protection of personal dignity and integrity, so it is reasoned, they should not be given any retrospective effect. This point of view has been criticized because it tends to erect an undesirable hierarchy of constitutional rights—some rights being so absolute that they warrant retrospective effect whilst others do not.<sup>15</sup> If a constitution encompasses rights considered fundamental to a free and democratic society, how can a court indulge in the comparison of one right against another in an effort to choose which one will have full retrospective effect? This type of criticism focuses attention on the inherent contradiction between an effort to categorize rights in deciding the issue of retrospective effect and the effort to declare that these same rights are fundamental to a free and democratic society. But it must be

<sup>13</sup> This test first emerged in *Linkletter v. Walker* (1965), 381 U.S. 618. See also, *Gosa v. Mayden* (1973), 413 U.S. 665.

<sup>14</sup> Paul Mishkin, *The Supreme Court, 1964 Term Forward: The High Court, the Great Writ and the Due Process of Time and Law* (1965), 79 Harv. L. Rev. 56, at pp. 80-82. The American doctrinal debate on retrospective effect can be understood in considerable detail by comparing Mishkin's article with one by Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin* (1966), 33 U. Chi. L. Rev. 719.

<sup>15</sup> Allen, *Federalism and the Fourth Amendment*, [1961] Supreme Ct Rev. 1.

remembered that no right can be considered absolute; its scope must ultimately be defined by reference to other fundamental values of the community. Fundamental rights, just like any given legal rule, do not exist *in vacuo*, but must be related to the purpose for which they were conceived. Short of according immediate retrospective effect to any and all judicial interpretations of fundamental rights touching criminal procedure in order to conform to an absolutist theory of civil rights, there is no more rational approach to the problem than the examination of the primary purpose for which a rule was created. Thus, where the main purpose of a new constitutional standard is to significantly enhance the reliability of a prior conviction, it should be given retrospective effect.

As can be appreciated, this test greatly restricts any retrospective effect of the American Bill of Rights insofar as criminal procedure is concerned. With respect to the specific standards enunciated in *Miranda* (rule against self-incrimination and the nature of a police warning before interrogation) and in *Escobedo* (the right to consult counsel while in custody pending interrogation and to be warned of constitutional right to remain silent), the Supreme Court denied any retrospective effect. This denial was principally based on the fact that the primary purpose of these new standards was not to enhance the reliability of the fact-finding process, but rather to protect the dignity and integrity of individual citizens. Although the court recognized that there was some relationship between the new standards and the fact-finding process, it was not significant enough to warrant the recognition of a retrospective effect.<sup>16</sup>

The Supreme Court also recognized that it would be unfair to law enforcement authorities to impose on them new standards of conduct when they had no fair notice of their expanded obligations prior to the landmark decisions. Curiously, however, the Supreme Court decided that the new standards enunciated in *Miranda* and *Escobedo* would only apply to trials beginning subsequent to each decision.<sup>17</sup> Thus, cases on appeal, those subject to possible collateral attack and trials in progress at the time of any given Supreme Court decision would be subject to the "old" rules. But if one of the concerns of the Supreme Court were to give "authorities" the

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<sup>16</sup> It should be emphasized, however, that some aspects of the right to counsel have been given full retrospective effect. These are: (i) the right to counsel at trial, *Gideon v. Wainwright* (1963), 372 U.S. 335; (ii) the right to counsel at arraignment where defense of insanity lost if not pleaded at that time, *Hamilton v. Alabama* (1961), 368 U.S. 52; (iii) the right to counsel on appeal, *Douglas v. California* (1968), 372 U.S. 353; (iv) the right to counsel at hearings involving breach of probation, *McConnel v. Rhy* (1968), 393 U.S. 2. These rights are so clearly related to the fact-finding process that full retrospective effect has been given.

<sup>17</sup> The same conclusion was reached insofar as the constitutional right to a jury trial for other than petty offences was concerned. This right was recognized in *Bloom v. Illinois* (1968), 391 U.S. 194 and *Duncan v. Louisiana* (1968), 391 U.S. 145, and its purely prospective effect was affirmed in *DeStefano v. Woods* (1968), 392 U.S. 631.



opportunity to adjust their behaviour in light of new constitutional standards, why should the new standards apply to trials commencing subsequent to any Supreme Court decision but involving crimes and investigations which took place before such a decision? Logical consistency would seem to require that the new rules not apply to any investigations conducted prior to a court's decision, regardless of the trial date. Indeed, this would seem to be the intent behind the second part of the three-pronged retroactivity test adopted by the court. Since reliance of authorities on the old rules is an important consideration in determining the question of retroactivity, the cut-off date established by the Supreme Court would appear to be inappropriately arbitrary. In contrast, however, the Supreme Court chose a different cut-off date for the right to counsel at line-ups and the rule that evidence obtained through unlawful wiretaps is inadmissible. In both these instances, the official behaviour under scrutiny escaped the application of the new standards if it occurred before the date of the Supreme Court judgments.<sup>18</sup> This is precisely the conclusion that logic would require if a court is concerned about fair notice of new standards to law enforcement officials.

The third prong of the American retroactivity test enjoins a judge to assess the impact of retrospective effect on the general administration of justice. This part of the test is most relevant with respect to challenges to prior convictions by way of collateral attack, in that it emphasizes the difficulties inherent in reconsidering evidentiary matters long after a trial has concluded. Witnesses may be missing, memories may be dim or other evidence destroyed, missing or deteriorated when a court comes to reassess the admissibility of relevant evidence against a new constitutional standard. The American Supreme Court was obviously very reluctant to have important questions of fact redetermined, where it was possible that the attrition of time would seriously hamper the effectiveness of this fact-finding process.

Apart from the logical inconsistency mentioned above, the American Supreme Court's response to the issue of retrospectivity provides a rational framework within which to assess the impact of new constitutional standards on criminal trials already in progress or completed at the time of a court decision. In short, the Supreme Court has explicitly recognized that an indiscriminate approval of retrospective effect does not serve the administration of justice in general, nor necessarily relate to the purposes for which constitutional standards are enforced.

### *Conclusion*

Since writing this comment, there have been a number of decisions on the possible retrospective effect of the Charter. Surprisingly, there appears

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<sup>18</sup> For right to counsel at line-ups see: *U.S. v. Wade* (1967), 388 U.S. 218 and *Gilbert v. California* (1967), 388 U.S. 263. As to unlawful wiretaps see: *Katz v. United States* (1967), 389 U.S. 347.

to have been no reference to the American experience. Although most of the judgments so far rendered have decided against any retrospective effect of the Charter, they have been based on the general rule that amendments to substantive law are not to be given a retrospective operation unless such is expressed on the face of the statute under consideration, or is necessarily so intended.<sup>19</sup>

It has been suggested throughout this comment that other reasons can be advanced, when it comes to the exercise of police powers, to justify the non-retrospective operation of the legal rights in sections 8, 9 and 10 of the Charter.

It would be unfortunate if the retrospective operation of the legal rights in sections 8, 9 and 10 of the Charter were disposed of, in a somewhat peremptory fashion, by reference only to the common law distinction between procedural and substantive law amendments. The careful development of a solid constitutional law approach, even with respect to this transitional issue, would constitute a welcomed signal that our courts are prepared to undertake their new constitutional duties with the solemn poise we have every right to expect.

The importance of the constitutional arguments developed in the American jurisprudence is underscored by the unsatisfactory reasoning found in both the Ontario Provincial Court and Supreme Court judgments in *R. v. Shea*.<sup>20</sup> The case involved the possible application of section 8 of the Charter to a seizure of hash oil in the apartment of the accused where the original entry into the apartment was to repair a plumbing malfunction which was leaking water into the lower apartment. A peace officer had attended with the landlord at the latter's request. The events took place, of course, before the proclamation of the Charter. At the accused's trial for possession for the purposes of trafficking, which took place after the proclamation of the Charter, a motion was made to exclude the hash oil seized without a warrant in the accused's apartment.

On the issue of the retrospective operation of section 8 of the Charter to a seizure predating its proclamation, Provincial Court Judge C.E. Perkins simply stated:<sup>21</sup>

It is my view that the issue of retroactivity does not apply here. The Act is in effect today and it is today that the issue of admissibility of this evidence is before the court, so the Act is applicable.

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<sup>19</sup> *Re Potma v. The Queen* (1982), 67 C.C.C. (2d) 19 (Ont. H.C.); *Regina v. Silber* (1982), 8 W.C.B. 43 (B.C. Prov. Ct); *Re Gittens and the Queen* (1982), 7 W.C.B. 506 (F.C.T.D.); *R. v. Shea* (1982), 7 W.C.B. 365 (Ont. Prov. Ct); Ont. S.C., Sept. 15th, 1982, not yet reported.

<sup>20</sup> *Ibid.*

<sup>21</sup> The full text of this judgment remains unreported, as does that of the Ontario Supreme Court, at the writing of this comment.

Assuming that the "Act" referred to is in fact the Charter of Rights and Freedoms, this position of Judge Perkins provides us with very little guidance in establishing a well-reasoned constitutional approach to the issue of retrospectivity examined in this comment. However, in reversing this Provincial Court judgment, the Supreme Court of Ontario was hardly any more helpful. The Supreme Court simply adopted the common law rule based on the distinction between procedural and substantive law amendments and concluded that the rights guaranteed by the Charter took effect only on and after the Charter became law.

Regardless of the merits of the *Shea* case, it provided a good opportunity for the Supreme Court of Ontario (and counsel involved) to examine the problem of retrospectivity from the constitutional perspective developed in the United States. Failure to do this has left the resolution of the issue of the retrospective operation of section 8 of the Charter somewhat incomplete.

The American view that legal rights relevant to criminal procedure should be evaluated in light of the fact-finding process makes eminent sense. Where the primary purpose of any given legal right is not to appreciably enhance the reliability of standards of proof, the desirability of giving it retrospective effect is greatly reduced. On this basis alone, a significant argument can be developed that the rights in section 8 (to be secure against unreasonable search and seizure), or section 10 (the rights to be promptly informed of reasons for arrest and to retain and instruct counsel without delay) should not be given retrospective effect.<sup>22</sup> Such rights are important in protecting the dignity and integrity of individual citizens, as the American Supreme Court has ruled, but much less relevant in enhancing the reliability of the fact-finding process of a criminal trial. The opposite is most likely the case with respect to section 11(d) of the Charter which guarantees the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. This right does relate to the fact-finding process of a trial, with the result that the first part of the American three-fold test would be insufficient to deny it a retrospective effect.<sup>23</sup>

The second prong of the American test of retrospectivity has already been clearly enunciated by the Ontario Court of Appeal in *Lesarge*. This view of the Ontario Court of Appeal is given added weight by its use as a constitutional rule of interpretation by the American Supreme Court. Once again, it is eminently sensible to consider the degree of reliance of law

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<sup>22</sup> It should be stressed, however, that there are aspects to the right to counsel which may indeed be closely linked to the fact-finding process and thus eligible for full retrospective effect. See *supra*, footnote 16.

<sup>23</sup> Even so, the Ontario High Court of Justice has ruled in *Re Potma v. The Queen*, *supra*, footnote 19, that s. 11(d) of the Charter is not retrospective, relying only on the traditional common law rule.

enforcement officials on previous standards of conduct. Law enforcement officials are not Cassandra-like soothsayers who can foresee future changes to the legal standards which define the perimeter of legitimate conduct.

The one problem which was not adequately resolved by the American jurisprudence is that relating to the cut-off date for the application of the "new" standards. As will be remembered, the "new" standards of *Miranda* and *Escobedo* are to apply to all trials commencing after any given Supreme Court judgment, regardless of the fact that some police investigations would have taken place before that date. If any weight is to be given to the rule of "fair notice" to law enforcement officials, it does not seem logical to apply the new constitutional standards just because a trial commenced subsequent to a given Supreme Court judgment. Logic requires that the cut-off date relate to the time criminal activity and police investigations took place. The old standards should apply to these events for the simple reason that the law enforcement officials could not possibly have had any fair notice of changes to a citizen's constitutional rights. There is no reason in principle why a Canadian court should be expected to adopt the arbitrary cut-off date established by the American Supreme Court. This issue should be decided by reference to the basic principles relevant to the issue of retrospectivity. Thus, where the fact-finding process is not placed in question, where the conduct of law enforcement officials scrupulously conforms to standards of behaviour in effect at the time of an investigation, and where the substantive-procedural law distinction militates against any retrospective effect, it seems unlikely that a new standards should apply to past events.

RICHARD A. GOREHAM\*

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\* Richard A. Goreham, of the Alberta Bar, legal advisor in the Department of Justice, Ottawa. The views expressed here are those of the author and do not necessarily represent those of the Department of Justice.