NORTH AMERICAN AT LAST? THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AT 25

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There are many takes on the Canadian Charter of Rights and Freedoms. For civil libertarians, it marked a great stride forward on the road to constitutionally-entrenched liberties. For Quebec nationalists, it represented a stab in the back to Quebec and to the workings of Canadian federalism. For critics of the judiciary, e.g. members of the so-called Calgary school, it represented a step towards excessive court power, allowing pressure groups, for the most part on the political left, to impose their agenda upon the country.[1] For so-called Charter Canadians, i.e. those who identify with specific sections of the charter, e.g. 15, 25, 27, or 35, it represented a move in the direction of a Canada in which minority groups (and majority groups such as women) would finally have their place in the sun.

Public opinion polls have shown significant support for the Charter. Back in 2002, a CRIC survey measured support running as high as 90%, including, interestingly enough, in the province of Quebec.

It has been two decades since the Canadian *Charter of Rights and Freedoms* became part of the Constitution. In that time, it has rallied the support of a vast majority of Canadians. They embrace the values it upholds, especially guarantees for bilingualism, multiculturalism and equality rights, including those of gays and lesbians.

[1] Rainer Knopff and F. L. Morton, *The Charter Revolution and the Court Party*, Peterborough: Broadview, 2000.

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Nationally, 88% say it is a “good thing for Canada,” and 72% say it adequately protects the rights of Canadians. Support for the Charter is strong in all regions, running from a high of 91% in Quebec to a low of 86% in western Canada.

And more than seven out of 10 Canadians say that the Supreme Court of Canada — not Parliament — should have the final say when the Court declares a law unconstitutional on the grounds that it conflicts with the Charter.” [2]

While not nearly as overwhelming in 2007, support for the Charter remains significant, with margins of over 2-1 in favour. A survey done by SES in Feb., 2007 showed that 58% of respondents thought the Charter is moving Canada in the right direction vs. 26% with the opposite view. 54% favoured the Courts as having the final decision related to rights issues vs. 30% favouring Parliament.[3]

There are numerous cases that have been dealt with since 1982 that have left their mark. These include

1) The Oakes case, in which the Supreme Court struck down a "reverse onus" provision that forced defendants to prove that they did not intend to traffic marijuana found in their possession. The Oakes ruling said the offending law must be "proportionate" and "rationally connected" to its ultimate goal, and it must also breach the right as little as possible.

2. Reference re B.C. Motor Vehicle Act, 1985: Using the Charter's Section 7 guarantee of life, liberty and security of the person, the Supreme Court struck down a law under which anyone caught driving with a suspended licence was subject to a jail term.

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[2] **CRIC poll shows Charter part of Canadian reality.** By Andrew Parkin http://www.cric.ca/en_html/guide/charter/charter.html#cric

[3] SES poll cited in Nik Nanos, “Charter Values don’t Equal Canadian Values: Strong Support for Same-Sex and Property Rights,” *Policy Options*, Feb., 2007.

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3. Hunter v. Southam Inc., 1984. One of the Supreme Court's first Charter rulings, it found that warrantless searches were unreasonable.

4. Regina v. Morgentaler, 1988: The experts called it "a blockbuster . . . a significant Supreme Court foray into a highly controversial moral, ethical and political debate about women's reproductive rights and abortion. By virtue of Parliament's inability to enact successor legislation, abortion has effectively been legalized in Canada."

5. Andrews v. Law Society of B.C., 1989: In striking down a requirement that lawyers in British Columbia be Canadian citizens, the court "definitively rejected a formal definition of equality based on same treatment, in favour of a conception which would focus on remedies for discrimination."

6. Regina v. Stinchcombe, 1991: It cemented the right of an accused person to have disclosure of the case against him include all relevant information in the Crown's possession.

7. Regina v. Sparrow, 1990: An aboriginal fishing case, the ruling "articulated a dynamic, progressive and expansive approach to aboriginal rights," the experts said.

8. Vriend v. Alberta, 1998: By adding sexual orientation to a list of protections in the Alberta human rights code, it set the stage for a series of pro-gay-rights rulings.

9. Ford v. Quebec, 1988: The ruling struck down Quebec legislation prohibiting English on outdoor advertising, which the experts called "an important test of the Supreme Court's resolve."

10. Law v. Canada, 1999: In defining discrimination under the Charter's equality guarantee, the ruling established "human dignity" as the guiding concept at

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the same time as it added controversial new layers of complexity to equality claims.[4]

So it is not surprising that the Spanish Association of Canadian Studies should have chosen the Charter as its theme for the seminar being held in Zaragoza. Even though Canada's new government, as the Harper Conservatives like to proudly call themselves, pointedly avoided commemorating the Charter's 25th anniversary on April 17, 2007.

I want to broaden the context for discussion of the Charter from an exclusively Canadian one to something larger. If we think of Spain and the drafting of the Constitution of 1978, we know that the Constitution represented a key symbolic moment in the passage from dictatorship to democracy. After intense negotiations for a period of over a year, the wide range of democratic parties represented in the Cortes agreed to the constitutional text. Its ratification in the referendum of Dec., 1978 – though with a high number of abstentions in the Basque Country – gave democratic legitimacy to the new Spanish regime.

Let me turn from the Spanish case to two important examples of constitution-making in the New World – the United States and Mexico. In the American case, the War of Independence and revolutionary break from Great Britain set in motion an even more radical departure in the design of political institutions. In breaking with the British Empire, the American colonists were inevitably drawn to a republican rather than a monarchical form of government. At the same time, they were faced with the challenge of weaving a shared political community out of what had been a collection of 13 separate colonies and endowing it with political institutions that could pass the test of time.

We are all familiar with the debates that took place in Philadelphia in 1787-8, in the arguments made by the defenders of the new constitution of the

[4] Kirk Makin,"Ten Court Rulings that Cemented Canadian Freedoms," *Globe and Mail*, April 12, 2007

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U.S. in the *Federalist Papers,* and by key elements of the American constitution that, with amendments, has endured down to today. These include a separation of powers at the federal level as between executive, legislative, and judicial branches; a two-chambered legislature with representation by population in one house and with equal representation of the states in the other; a Bill of Rights with the Supreme Court coming to play the role of ultimate interpreter of the Constitution; and so on. What is no less striking is the iconic role that the American Constitution, along with the Declaration of Independence and with such symbols as the flag, has come to play in American popular consciousness. Thomas Jefferson may have derided the tendency to treat the American Constitution as immutable, even arguing the case for periodic rebellions to keep governments in check. But to question the basic institutional ballasts that derive from the American constitution is to risk being taxed as un-American. The difficulty of amending the American constitution – only 27 amendments to date - further underlines its embedded character. To a significant degree the civic identity of Americans has been and is caught up with the Constitution, viz. the oath of allegiance to the constitution recited by every newly naturalized American citizen.

A key feature of the revolutionary era was the forging of what Seymour Martin Lipset would call "the first new nation."[5] The background of most inhabitants of the 13 colonies may have been British, and their religion Protestant in its many denominational forms; still, the need for a shared identity in the newly created United States of America was paramount. To a considerable degree this identity would be civic rather than ethnic – a factor reinforced in the centuries that followed by the tens of millions of immigrants, first of European and then of non-European background, that flocked to the United States. Though nativism towards newly arrived immigrants has seldom been lacking in the United States along with a more deeply-seated racism in the

[5] Seymour Martin Lipset, *The First New Nation: The United States in Historical and Comparative Perspective*, New York: Norton, 1979

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relationship between whites and blacks, the fact remains that an ultimately egalitarian form of civic identity has won through. This has been reinforced by ideas such as that of American exceptionalism and of the United States as the shining light on the hill to other nations.

In the Mexican case, the constitution of 1917 was also the result of a revolution – the Mexican Revolution that began with the overthrow of Porfirio Diaz in 1911. The document is a much longer text than the American, and one that has been amended numerous times, unlike the American example. Yet in it own way it has also taken on an iconic character.

A number of features are of particular importance – its extensive sections on labour rights, on land ownership, and on limiting the role of the Church. (Articles 27, 123, 130) In many ways, the Mexican constitution was the most progressive one of its day, lauded by outside observers like Frank Tannenbaum.[6] Individual rights play a significantly smaller role in the Mexican document than in the American constitution or the Canadian Charter, bespeaking a more Rousseauian quality where the underlying philosophy of government is concerned. In the words of E.V. Niemeyer: "The Constitution of 1917 is the legal triumph of the Mexican Revolution, the first great social upheaval of the twentieth century. . .To the everlasting credit of its framers, strong disinterest in everything except the resolution of pressing national problems resulted in a famous document of social and economic change. If their hopes could be condensed into one expression, this might be stated as the demand for social justice."[7]

This brings me, by what may seem a circuitous route, to the Canadian case. Until the coming of the Charter, it would be difficult to attribute the same

[6] Frank Tannenbaum, *Mexico: The Struggle for Peace and Bread*, N.Y.: Alfred Knopf, 1950, p. 112

[7] E.V. Niemeyer Jr., *Revolution at Querétaro: The Mexican Constitutional Convention of 1916-1917*, Austin: The University of Texas, 1974, p. 233

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iconic quality to the Canadian constitution. The British North America Act, now known as the Constitution Act 1867, was the result of debates in Charlottetown and Quebec City among the leading politicians of the united Canada and the Maritime colonies. These debates have come down to us, along with the text of the document that was to be their permanent handiwork. Yet with the exception of the passage in section 91 that speaks of "peace, order, and good government", there is little in the original Canadian constitution that captured the public imagination.

Is this entirely surprising? The Constitution Act 1867 was an act of the British Parliament, bespeaking the slow emancipation of North American colonies not prepared to turn their back on the mother country. The preface to the document speaks of a constitution "similar in principle to that of the United Kingdom." And the participants in the Confederation debates went on at great length to stress the inherently British character of the new Dominion that was being created and its close and continuing ties to the British Empire. For Charles Tupper: "I am not wrong in assuming that the desire of every British North American is to remain in connection with the people of Great Britain. If there is any sentiment that was ever strong in the breast of our people, it is a disinclination to be separated in any way from the British Empire, or to be connected in any manner with the United States of America." For E.-P. Taché: "If we were anxious to continue our connection with the British Empire, and to preserve intact our institutions, our laws, and even our remembrances of the past, we must sustain the Quebec resolutions." For Joseph Trutch: "Confederation is the union and consolidation of British interests in British territory on this continent, for the security and advancement of each province individually, and of the whole collectivity, under the continued support of the British flag."[8]

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[8] Janet Ajzenstat et al., eds., *Canada's Founding Debates*, Toronto: University of Toronto Press, 2003, pp. 170, 180—181, 194

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It is fair to say that the Constitution Act 1867 was to prove primarily a politicians' document. Though ordinary Canadians might have passing acquaintance with some of its key provisions, particularly the federal-provincial division of powers, they rarely encountered the document as a whole. Not unless they were students of Canadian history, politics, or law, or judges, lawyers and politicians involved with the operation of the Canadian political system at either the federal or provincial levels. So that debates about the role played by the Judicial Committee of the Privy Council in London in interpreting the Constitution Act 1867, at least down until 1949 when appeals to this body were abolished, rarely captured the political high ground in the way in which constitutional politics were to do from 1980 on.

The politics preceding the adoption of the Charter was in itself quite riveting. Extraordinary drama surrounded the Quebec referendum of May, 1980; the1980-1 constitutional debates; appeals to London by eight recalcitrant provinces; round the clock negotiations in Ottawa on Nov. 4-5, 1981 with Quebec ultimately the lone dissenter; aboriginal protests over the initial exclusion of their concerns from the document. The bottom line was to see an enhanced role for the federal government, through the courts, in the interpretation of the constitution, notwithstanding the attempts at the time of the Meech Lake and Charlottetown Accords to give the provinces a role in the nomination of Supreme Court judges.

It might also be worth noting two claims that Pierre Trudeau made regarding the Charter, the first at the time of the Meech Lake debate, the second in the aftermath of the 1995 Quebec referendum. He was quite up-front about the nation-building quality that he attributed to the Charter, when he wrote: "The Canadian Charter was a new beginning for the Canadian nation; it sought to strengthen the country's unity by basing the sovereignty of the Canadian people on a set of values common to all, and in particular to the

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notion of equality among all Canadians."[9] And when asked whether the near victory for the YES side in 1995 had given him any second thoughts about his role in the patriation battle of the early 1980s that resulted in the Charter, he responded – "We had to end the colonial connection."[10]

The amount of attention the Charter and the Courts have gleaned since the early 1980s is quite staggering when compared to the attention paid to judicial decisions in an earlier day. The Ford case of 1988 on the language of signs in Quebec triggered off the Bill 178 override by the Bourassa government, contributing directly to the failure of the Meech Lake Accord. The Quebec secession decision of 1998 by the Canadian Supreme Court, with its careful balancing of rights and obligations of both the federal government and any would-be seceding province, received international attention, e.g. in Spain with its own national question, and led to the Clarity Act of 2000, governing any future sovereignty referendum. Aboriginal rights have a more consecrated place in Canadian political debates than before, in good part because of the Charter and of Court decisions in the Sparrow and Delgamuukh cases.

Polarizing political debates have surrounded major attempts to amend the Canadian constitution since 1982. This was most conspicuous during the Meech Lake debate, but also in the debate surrounding the Charlottetown Accord of 1992. Trudeau's personal intervention against both accords certainly played an important role in firming up popular opposition. But one might also point to the strong involvement of Charter groups, e.g. the National Action Committee on the Status of Women (NAC), in spearheading opposition to the accords. The Charter seems to have become a document not subject to major amendment. At the same time, the notwithstanding clause allowing provinces or the federal government to override a judicial decision for a period of 5 years

[9] Pierre Trudeau, "The Values of a Just Society," in Thomas Axworthy & Pierre Trudeau, eds., *Towards a Just Society: The Trudeau Years*, Toronto: Viking, 1990, p. 363.

[10] This was Trudeau's response to a question from one of the participants at a McGill Law Faculty function in 1996. Personal communication from James Tully.

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seems to have fallen by the wayside. It may have been the deal-maker in 1981 in getting the Premiers of Manitoba and Saskatchewan onside. But by the late 1990s, the Alberta government under Ralph Klein, despite its strongly conservative social values, was reluctant to use it in opposing the inclusion of gay rights under section 15 following the Vriend decision. Section 33, the notwithstanding clause, resembles the nuclear deterrent in international politics – too powerful for the federal government or provincial governments to use in normal circumstances.

The Charter has come to be posted in public libraries, citizenship courts, and schools across the country. It has been translated into many of Canada's minority languages. It is often cited in newspapers and the media. It does not follow that it is a document that ordinary Canadians know by heart, any more than ordinary Americans or Mexicans know their constitutional texts. Yet its significance should not be underestimated.

The language of rights has become for more prevalent in Canada over the past 25 years than before. The judicialization of politics has taken on a whole new dimension, sparking significant academic and legal debates in the process, about the relative power of courts vs. parliament, about the nature of judicial appointments, about the workings of Canadian federalism.[11] For his part, Alan Cairns coined the term Charter Canadians to refer to the enthusiasm for the Charter among Canadians affected by some of its key provisions, so-called outsiders as opposed to insiders who had dominated constitutional

[11] Knopff & Morton, op. cit.; Paul Howe and Peter H. Russell, eds., *Judicial Power and Canadian Democracy*, Montreal: Institute for Research on Public Policy, 2001; Janet Hiebert, *Charter Conflicts: What is Parliament's Role?*, Montreal: McGill-Queen's University Press, 2002; Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada*, Vancouver: UBC Press, 2006; Peter Russell & Kate Malleson, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, Toronto: University of Toronto Press, 2006

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politics in the first century of Canada's existence.[12] He was right about this, more so than the various critics of the excessive role that has come to be played by the courts or by special interest groups in advancing their own agendas.

What the Charter has also done is make Canada a lot more North American. I say North American, and not American, (as Lipset might have argued[13]), for a simple reason. The Charter marked the formal passage from the more British-oriented phase of Canada's existence to a more consciously New World one. Canada may not have been born of revolution, or marked by revolution in its key constitutional documents, as was to prove the case for both the United States and Mexico. But the Charter helped consolidate and finalize the break with Great Britain, not only through an entirely made-in-Canada amending formula, but though an updated version of Canadian identity no longer rooted in the British North American past.

Like the American or Mexican constitutions, it has its own innovative characteristics. The most striking would be its provisions allowing for forms of affirmative action (section 15), its extensive discussion of language rights (sections 16-23), and its upholding of diversity as an underlying Canadian value. (sections 25, 27, 35) Some things are fleetingly addressed – e.g. aboriginal identity, or not at all – e.g. Quebec's place within the larger Canadian

[12] "The Charter provided a new definition of what it meant to be a Canadian, which then informed the identities of those who digested Charter rights and claimed possession of them. The phrase "Charter Canadians" directed attention to the Charter's political purposes, with its reminder that the Charter was as much about nation-building as about rights protection, or perhaps more accurately it was about the relation between them." Alan Cairns, "My Academic Career," in Gerald Kernerman and Philip Resnick, eds., *Insiders and Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship*, Vancouver: UBC Press, 2005, p. 344.

[13] "Perhaps the most important step that Canada has taken to Americanize itself – far greater than the signing of the free trade treaty – has been the incorporation into the Constitution of . . .the Charter of Rights and Freedoms. . . The Charter makes Canada a more individualistic and litigious culture. . .By enacting the Charter, Canada has gone towards joining the United States culturally." Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada*, New York: Routledge, 1990, pp. 225-6.

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scheme of things. And there is ongoing controversy, both about some of the things that have been read into the Charter, e.g. gay rights, and about matters which have been excluded, e.g. property rights, as well as about the way in which Courts have struck the balance between the rights of criminals as opposed to the rights of victims.

Yet looking back at this document, at the jurisprudence it has generated, at the impact the Court decisions taken pursuit to this document have had, one must conclude that it has taken on far more of the character of a people's constitution than was ever true for the Constitution Act of 1867. In new world societies, such as Canada, no less than the United States or Mexico, one of the key functions of written constitutions is to help provide some of the civic glue for an ethnically heterogeneous and regionally disparate population. Where the British North American and British imperial references may have done the job, however imperfectly, almost a century and a half ago, the Charter, at least for a clear majority of Canadians, now fulfills a similar role. In the process, Canada, despite its non-revolutionary history, has come to resemble the two North American states with revolutionary trajectories, the United States and Mexico, in imparting to constitutions a larger-than-life symbolic role. It is this symbolic role, far more than the particulars that the document contains, that I want to emphasize as the longer-term significance of the Charter for the Canadian political system. And that is why the Spanish Association of Canadian Studies, unlike our foolish federal government, is perfectly right to have chosen to commemorate the Charter's passage 25 years ago at this seminar in Zaragoza.

Zaragoza, 7 de junio de 2007.

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