

The Canadian *Charter*: A Time for Bold Spirits, Not Timorous Souls

McGill Law Journal Lecture
Conférence de la Revue de droit de McGill

The Honourable Fred Kaufman*

This is a partial text of the Second Annual McGill Law Journal Lecture, which was given by Mr Justice Kaufman (who was the second Editor-in-Chief of the McGill Law Journal) at the Faculty of Law, McGill University on 30 October 1985. The author points to the need for bold and original interpretations of the *Canadian Charter of Rights and Freedoms* by judges and lawyers alike. In particular, he calls for a reassessment of the value and relevance of the *Canadian Bill of Rights*.

Voici une partie de l'exposé prononcé par Monsieur le juge Kaufman (qui fut le deuxième rédacteur en chef de la Revue) lors de la seconde Conférence annuelle de la Revue de droit de McGill qui eut lieu à la Faculté de droit de l'Université McGill le 30 octobre 1985. Dans son texte, l'auteur insiste sur la nécessité, tant pour les avocats que pour les juges, d'interpréter la *Charte canadienne des droits et libertés* de façon audacieuse et originale. Plus particulièrement, l'auteur tient à ce que soit réévalué la pertinence de la *Déclaration canadienne des droits*.

*Of the Quebec Court of Appeal. The author acknowledges with gratitude the assistance of his wife, Donna Kaufman, B.C.L., LL.M., now of the Bar of Quebec, in the research for this paper.

I take as my text part of a paragraph from the dissent of Lord Justice Denning (as he then was) in *Candler v. Crane, Christmas & Co.*:

This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White*, *Pasley v. Freeman* and *Donoghue v. Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.¹

These words were written by Lord Denning in 1951, but the message is still valid today. The *Canadian Charter of Rights and Freedoms*² is entrenched in the new Constitution; it is part of the "supreme law of Canada".³ It was, as noted at the time by an observer, "apparently supported by the Canadian people generally and expectations [were] ... created".⁴

But, as Professor Lyon warned, "if judges fail to perceive the Charter as a new mandate",⁵ the will of Parliament — and with it the expectations of the Canadian people — will be frustrated, as happened with the *Canadian Bill of Rights*,⁶ a statute much acclaimed when it was first enacted, but soon dismissed as ineffective.

This "quasi-constitutional document" (as Mr Justice Beetz came to call the *Bill of Rights* more than twenty years later)⁷ was preceded by a ringing preamble and a fine "Recognition and Declaration of Rights and Freedoms". Let me remind you of the words.

First the Preamble:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth

¹(1951), [1951] 2 K.B. 164 at 178, [1951] 1 All E.R. 426 [references omitted].

²Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter the *Charter*].

³*Ibid.*, s. 52.

⁴N. Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to Do with Vague but Meaningful Generalities" (1982) 4 Sup. Ct L. Rev. 57 at 58.

⁵*Ibid.*

⁶Part I of *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III [hereinafter the *Bill of Rights*].

⁷*Singh v. Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. 177 at 224, (*sub nom. Re Singh and Minister of Employment and Immigration*) 17 D.L.R. (4th) 422 [hereinafter *Singh* cited to S.C.R.].

of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada;

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows ...

Now for Part 1:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

The right words were there but, with all-too-few exceptions, notably *R. v. Drybones*,⁸ the *Bill of Rights* was cautiously (some may say timidly) applied by the courts. The result was that, after the first few years, counsel rarely bothered to invoke the *Bill*: to do so seemed to be a waste of time and effort.

Examine the record and you will see what I mean: *A.G. Canada v. Lavell*,⁹ about the rights (or rather loss of rights) of female Indian band members who marry non-Indians; *Hogan v. R.*¹⁰ and the admissibility of evidence obtained in violation of rights guaranteed by the *Bill*; *R. v. Chow*,¹¹ which held that violation of an accused's right to counsel was merely a factor to be considered in deciding whether to admit a confession; *Duke v. R.*,¹²

⁸(1969), [1970] S.C.R. 282, 9 D.L.R. (3d) 473. The *Bill of Rights* also proved useful in some prison and parole-related cases.

⁹(1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481 [hereinafter *Lavell* cited to S.C.R.].

¹⁰(1974), [1975] 2 S.C.R. 579, 48 D.L.R. (3d) 427.

¹¹(1978), 43 C.C.C. (2d) 215 (B.C.C.A.).

¹²(1972), [1972] S.C.R. 917, 28 D.L.R. (3d) 129.

about the Crown's obligation (or, once again, the lack of obligation) to provide information to an accused; *R. v. Ewing and Kearney*¹³ and the absence of counsel at trial. I could go on, but the above examples suffice: the approach was cautious in the extreme, innovation was not encouraged and the overall result was highly disappointing. It was, in short, a clear frustration of the will of Parliament as set out in the preamble.

Why did this happen? Professor Lyon suggests that it was, in part at least, owing to "[t]he almost universal belief among Canadian lawyers that the common law is best for securing rights",¹⁴ coupled "with a tenacious commitment to the supremacy of Parliament".¹⁵

I interject to say that not everyone felt so constrained, and I quote from Abbott J.'s dissent in *Lavell*:

In my view the Canadian Bill of Rights has substantially affected the doctrine of the supremacy of Parliament. Like any other statute it can of course be repealed or amended, or a particular law declared to be applicable notwithstanding the provisions of the Bill. In form the supremacy of Parliament is maintained but in practice I think that it has been substantially curtailed. In my opinion that result is undesirable, but that is a matter for consideration by Parliament not the courts.¹⁶

It was, however, more than "a tenacious commitment to the supremacy of Parliament" which accounted for this early conservatism, and I suggest that suspicion and fear were partly to blame: suspicion of an act of Parliament which told us how to construe and apply other acts, and fear that chaos might result from bold and progressive interpretations. Look at the United States, it was said. The hands of the police are tied; the courts are clogged with pre-trial motions of every conceivable kind; the criminals go free.

These are powerful arguments, and if you add to that the fact that the *Bill of Rights* was but another statute — not constitutionally entrenched —

¹³(1974), [1974] 5 W.W.R. 232, (*sub nom. Re Ewing and Kearney and the Queen*) 29 C.R. (N.S.) 227 (B.C.C.A.).

¹⁴See, e.g., *R. v. Burnshine* (1974), [1975] 1 S.C.R. 693 at 702, 44 D.L.R. (3d) 584 [hereinafter *Burnshine* cited to S.C.R.], where Martland J. wrote as follows:

I am not prepared to accept the respondent's submission as to the meaning of the phrase "equality before the law" in s.1(b) of the *Bill of Rights*. Section 1 of the Bill declared that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and further by s.2, to protect them from infringement by any federal statute.

¹⁵Lyon, *supra*, note 4 at 58.

¹⁶*Lavell*, *supra*, note 9 at 1374.

one can begin to understand (though not, perhaps, condone) the reticence which marked these *Bill of Rights* decisions.

Happily, this has now changed, and here I still speak of the *Bill of Rights*: it has been re-examined — and we find that it is good!

Let me give you examples. In *R. v. Landry*,¹⁷ the Quebec Court of Appeal found that the reverse onus provisions of the *Narcotic Control Act*¹⁸ contravened the *Bill of Rights* and that they were, therefore, inoperative. You may say this is not new. After all, did the Ontario Court of Appeal not already say so in *R. v. Oakes*?¹⁹ Indeed it had, but that was under the *Charter*, and *Landry* was a pre-*Charter* case.

Let me read to you what was said by Mr Justice Malouf in *Landry*:

In *Oakes*, the court came to the conclusion ... that the language used in s. 2(f) of the *Bill of Rights* is “identical to that contained in s. 11(d) of the Charter, save for the substitution of ‘an offence’ in the Charter for the words ‘a criminal offence’ in s. 2(f)”. I, too, hold the view that said section of the *Bill of Rights* is in essence identical to that contained in said section of the Charter. The arguments put forward by the court in *Oakes* apply as well to the present case.

...

Both the *Bill of Rights* and the Charter recognize the right of an accused to be presumed innocent until proven guilty according to law. I cannot accept that such a basic and fundamental principle can be set aside by such a reverse onus provision.

I realize that s. 2(f) of the *Bill of Rights* has not previously been invoked against the validity of s.8 of the *Narcotic Control Act* despite the passage of 13 years since it became law. Any argument based on this fact is not, in my view, valid. Since, as stated above, the provisions contained in s. 2(f) of the *Bill of Rights* are essentially the same as the provisions contained in s. 11(d) of the Charter, the reasons given above apply to both.

I am therefore of the opinion that s.8 of the *Narcotic Control Act* contravenes s. 2(f) of the *Bill of Rights* and is therefore constitutionally invalid.²⁰

The point I make is this: had it not been for the advent of the *Charter*, I doubt, first of all, whether counsel would have invoked the *Bill of Rights*, secondly, even if counsel had done so, the Court may not have been moved to act. But our *perception* has changed, and right there you have proof that

¹⁷(1983), [1983] C.A. 408, 2 D.L.R. (4th) 518 [hereinafter *Landry* cited to D.L.R.].

¹⁸R.S.C. 1970, c. N-1. S. 8 of this *Act* provides that where possession of a narcotic has been established, the accused “shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking”. Should he fail to do so, he will be convicted of the more serious offence of having had a narcotic in his possession for the purpose of trafficking, rather than of simple possession.

¹⁹(1983), 40 O.R. (2d) 643, 145 D.L.R. (3d) 123 (C.A.), aff’d (1986), 65 N.R. 87 (S.C.C.).

²⁰*Landry, supra*, note 17 at 523-25.

the *Charter*, with all its imperfections, has brought about a new and refreshing redirection of thought. And that is only the beginning.

Let me give you a second example, this one from more Olympian heights. In *Singh*,²¹ Mr Justice Beetz (with the concurrence of two of his colleagues) held that, even with the *Charter* securely in place, the *Canadian Bill of Rights* still retains its force and effect, and that the Appellant's rights — to be specific, paragraph 2(e) of the *Bill* — had been violated by the authorities. This paragraph states, in part, that “no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”.

Let me quote from the reasons of Beetz J.:

Section 26 of the *Canadian Charter of Rights and Freedoms* should be kept in mind. It provides:

26. 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.

Thus, the *Canadian Bill of Rights* retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect. It is particularly so where they contain provisions not to be found in the *Canadian Charter of Rights and Freedoms* and almost tailor-made for certain factual situations such as those in the cases at bar.²²

It is interesting to note that this argument was not advanced by counsel when the appeal was first argued on 30 April and 1 May 1984. However, on 7 December of that year, the deputy registrar wrote to counsel to inform them that “the members of the Court would like to have their submissions in writing on the application of the *Canadian Bill of Rights*.”²³ Counsel, of course, complied, and three of the six judges who took part in the judgment accepted the argument. The other three judges, led by Wilson J., preferred to rely on the *Charter*, but even here we find a significant passage concerning the potential strength of the *Canadian Bill of Rights*, and I quote from Madam Justice Wilson's reasons for judgment:

The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the *Canadian Bill of*

²¹*Singh*, *supra*, note 7.

²²*Ibid.* at 224.

²³*Ibid.* at 223.

Rights, as is apparent from the judgment of Martland J. in *Mitchell v. The Queen*, [where he] said:

The appellant also relies upon s.2(e) of the *Bill of Rights*, which provides that no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. In the *McCaud* case Spence J., whose view was adopted unanimously on appeal, held that the provisions of s.2(e) do not apply to the question of the revocation of parole under the provisions of the *Parole Act*.

The appellant had no right to parole. He was granted parole as a matter of discretion by the Parole Board. He had no right to remain on parole. His parole was subject to revocation at the absolute discretion of the Board.

I do not think this kind of analysis is acceptable in relation to the Charter. It seems to me rather that the recent adoption of the Charter by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the Canadian Bill of Rights ought to be re-examined. I am accordingly of the view that the approach taken by Laskin C.J. dissenting in Mitchell is to be preferred to that of the majority as we examine the question whether the Charter has any application to the adjudication of rights granted to an individual by statute.²⁴

Post-hearing requests by a court for additional arguments are, of course, rare, but some of the judges of the Supreme Court of Canada clearly felt that there was life yet in the *Bill of Rights*. This shows an open, indeed activist, mind and, with respect, I applaud this turn of events.

These recent developments, more than ever before, demonstrate that counsel must be bold and diligent and imaginative, no matter what the issue. The *Bill of Rights*, as well as the *Charter*, is here for all of us to use, and we should not lose sight of the existence of either. These are not merely instruments (as is sometimes said) to help the criminals escape the consequences of their evil acts. Rather, they exist to protect the rights and freedoms of all who are in Canada — yours and mine — and certainly those of your clients.

Of course, not every case calls for an argument based on the *Bill of Rights* or the *Charter*. As Mr Justice Zuber said in *R. v. Altseimer*²⁵ (an early *Charter* case), “bizarre and colourful arguments” will lead to “[e]xtravagant interpretations” which, in the end, “can only trivialize and diminish respect for the Charter”. But this does not mean that counsel should be reluctant to invoke the *Bill* or the *Charter* — or both. The reasons of Beetz J. provide the argument that we need the *Bill*, the *Charter* and the provincial charters, and that they complement each other. This, I suggest, is welcome, and if

²⁴*Singh, supra*, note 7 at 209 [emphasis added and footnotes omitted].

²⁵(1982), 38 O.R. (2d) 783 at 788, 142 D.L.R. (3d) 246 (C.A.).

we apply these safeguards with the broad brush which Parliament provided in the *Bill's* preamble, the human rights and fundamental freedoms of all who find themselves in Canada will be secure.

I spoke of the preamble to the *Bill*. What of the *Charter*? Here, there is no ringing preamble: "Whereas Canada is founded on principles that recognize the supremacy of God and the rule of law". Not only is this not particularly quotable, but some will not agree with the first proposition, while others — notably laymen — won't understand the second. Indeed, with all due respect, I think you and I could have done better. But there it is, followed at once by the "subject only" limitation.²⁶ I have no quarrel with this clause — without it we might not have had a Charter at all — but the single "Whereas" of the *Charter*, read together with section 1, might well have brought about a very cautious approach to human rights and freedoms. Fortunately, this was not the case, and I give you, by way of example, the judgment of Deschênes C.J. in *Quebec Association of Protestant School Boards v. A.G. Quebec*,²⁷ which was decided in 1982. In His Lordship's view, the change brought about by the *Charter* was fundamental, and this new spirit must not be stifled by the courts. He quoted a celebrated passage from Lord Wilberforce in *Minister of Home Affairs v. Fisher*,²⁸ which dealt with the new Constitution of Bermuda. This document, Lord Wilberforce wrote, calls "for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."²⁹

So, too, with the *Charter*. Nothing could frustrate the expectations of the Canadian people more quickly than an "austerity of tabulated legalism", to use Lord Wilberforce's phrase. It is, I suggest, a time for Lord Denning's "bold spirits" — a time to innovate, when needed, a time to cast aside the restraints of the past, a time to look ahead and state clearly that this is what we want.

These proposals are not as shocking as they may sound to some. The *Charter* itself, I suggest, imposes them, and I refer in particular to section 24.

²⁶S. 1 reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

²⁷(1982), [1982] C.S. 673, 140 D.L.R. (3d) 33, rev'd (1983), [1983] C.A. 77, aff'd (1984), [1984] 2 S.C.R. 66.

²⁸(1979), [1980] A.C. 319, [1979] 3 All E.R. 21 (P.C.) [hereinafter *Fisher* cited to A.C.].

²⁹*Ibid.* at 328.

This section deals with the enforcement of guaranteed rights and freedoms, and it provides, in subsection (1), that “a court of competent jurisdiction” may order, upon application, “such remedy as [it] considers appropriate and just in the circumstances.” The section also provides, in subsection (2), that where evidence was obtained “in a manner that infringed or denied any rights or freedoms guaranteed by [the] *Charter*, the evidence shall be excluded” if it is established that, “having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

The very wording of this section — “such remedy as the court considers appropriate and just” — is, of course, a call for judicial ingenuity or, if you will, an open door to activism. Indeed, some might say, and not without reason, that Parliament, in giving this power to the judges, virtually opened the door to the promulgation of laws by the judiciary.

Perhaps, in 1985, this idea doesn't shock us — at least not as much as it did in the early part of this century, when Mr Justice Cardozo, according to Grant Gilmore, made his “hesitant confession [in his *Nature of the Judicial Process*] that judges were, on rare occasions, more than simple automata, that they made law instead of declaring it”.³⁰ Yet, this pronouncement, again in the words of Professor Gilmore, “was widely regarded as a legal version of hard-core pornography”.³¹

We have come a long way since 1920 and now, with the blessing — if not, indeed, the command — of Parliament we, the judges, not only can declare what the law is, but also we can search for remedies which are appropriate and just when that law is not respected, subject only to conscience, and ultimately the Supreme Court of Canada.

I do not stand alone on this point. Professor Hogg, writing in 1982, said this about subsection 24(1):

Conceivably, totally new remedies could be invented. In any event, a court of general equitable jurisdiction can tailor the injunction to meet new situations, as is illustrated by the development since 1954 of the civil rights injunction to enforce the provisions of the Bill of Rights in the United States.³²

Today, the first of the *Charter* cases have been decided by the Supreme Court of Canada. Many more have been heard on trial and appellate levels.

³⁰G. Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977) at 77.

³¹*Ibid.*

³²P.W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 65.

The remedies have varied, from monetary compensation³³ to a stay of proceedings in a criminal trial.³⁴

As I wrote in the latter case, “[t]he new *Canadian Charter of Rights and Freedoms* is a bold document which, to be effective, deserves a bold approach by the courts.”³⁵

I stand by this statement. As Chief Justice Dickson said on 18 April 1985, at the Call to the Bar Ceremony at Osgoode Hall, the *Charter* is “a glorious chapter in the constitutional development of [this] nation”. It opens up “exciting new frontiers”, and while, in the past, the “zeal of the student was to obtain proficiency in the rules of law and maturity in the art of penetrating all the intricacies of legal doctrine”, today “we must focus increasingly on gaining a real understanding of the ends to which those skills [must] be directed”.³⁶

And the Chief Justice concluded as follows:

The law’s primary function is not to restrict or prohibit but to safeguard and protect persons, their privacies and freedoms. The social responsibilities of the profession must be appreciated and, equally important, the consequences of the failure of the profession to bear its social responsibilities. Our preoccupation must be not only with the mechanics of the law but with the great principles of justice and freedom and humanity which give it meaning and purpose.³⁷

Some time ago, Professor Ackerman concluded a dissertation on the state of the law in the United States by saying that “[w]hile the future of America depends on the American people, the future of American law depends, in a special way, on the way American lawyers interpret their calling”.³⁸

If I may paraphrase these words, the future of Canada depends on the Canadian people, but the future of Canadian law depends, in a special way, on the way Canadian lawyers — and judges — interpret their calling. Be bold, be forward, be inventive! In short, be lawyers as you and I understand the term.

³³*Crossman v. R.* (1984), [1984] 1 F.C. 681, 12 C.C.C. (3d) 547 (T.D.), where Walsh J. awarded \$500 (in an action for damages) for violation of the plaintiff’s *Charter* rights (in this case his right not to be questioned by the police before the arrival of counsel).

³⁴*R. v. Vermette (No. 4)* (1984), [1984] C.A. 466, 16 C.C.C. (3d) 532 [hereinafter cited to C.A.]. In this case, the Quebec Court of Appeal (3:2) confirmed the trial judge’s order to quash an indictment when the Premier of Quebec, in answer to a question in the National Assembly, made highly disparaging remarks about a key witness and, indirectly, about the accused.

³⁵*Ibid.* at 470.

³⁶B. Dickson, “Remarks” (Address to the Call to the Bar Ceremony, Osgoode Hall, Toronto, 18 April 1985) [unpublished].

³⁷*Ibid.*

³⁸B.A. Ackerman, *Reconstructing American Law* (Cambridge, Mass.: Harvard University Press, 1984) at 110.