THE *CHARTER* AND RACISM

David Matas

The *Canadian Charter of Rights and Freedoms* is a passive instrument. It does not require governments or legislatures to do anything. It just prevents governments and legislatures from doing certain things. A government or a legislature that was totally inactive in every respect would be an awful government, a terrible legislature. But it would be a government, a legislature, that complied with the *Charter*.

The *Charter* prohibits racial discrimination in law.[1] But it does not require governments or legislatures to promote racial equality. A government that did absolutely nothing about racial equality would be in full compliance with the *Charter*.

The discrimination that is prohibited by the *Charter* is not just discrimination in the law. It is also discrimination under the law. A discriminatory impact is prohibited as much as a discriminatory intent. Even if a law, on its face, is neutral, it nonetheless may violate the *Charter* where the law, in its operation, has an adverse discriminatory racial effect.[2]

Once a legislature passes a law that is discriminatory in nature, once a government institutes a programme that is discriminatory in impact, the courts have the power to require the offending government to remove the discrimination by giving equal benefits to all, as opposed to no benefits to anyone. The *Charter* allows the courts power to grant such remedy as the courts consider appropriate and just in the circumstances.[3] It may be more appropriate and just to order the extension of a discriminatory government programme to all, rather than to strike it down as invalid, because it is discriminatory, and make it available to none.[4]

When a law, however, does not discriminate, either in intent or impact, then the government or the legislature have done their *Charter* duty. The *Charter* does not reach into the private sector to prevent one group of citizens discriminating against another. As long as governments are not actively promoting inequality, they can, legally, wash their hands of what goes on in society generally.

Human rights fall into two categories. There are political and civil rights. And there are economic, social and cultural rights. Many economic, social and cultural rights, by their very nature, require government activity. For instance, the International Covenant on Economic, Social and Cultural Rights sets out the right to work. The Covenant goes on to state that, to realize this right, there shall be policies and techniques to achieve steady development and full employment.[5] In other words, the Covenant commits governments to full employment policies. A government that has no employment policy at all violates the Covenant. A government that does nothing is in breach of its international obligation in relation to the right to work.

While economic, social and cultural rights tend to require activity on the part of government, and political and civil rights can be more easily realized by government inaction, it is not true to say that all political and civil rights are merely passive rights. The international human rights instruments impose a number of positive obligations on governments to realize political and civil rights. For instance, the International Covenant on Civil and Political Rights, which Canada has signed and ratified, requires Canada to prohibit by law advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[6] The International Convention on the Elimination of all Forms of Racial Discrimination, which Canada has also signed and ratified, commits signatories to declare illegal and prohibit organizations which promote and incite racial discrimination, and to recognize participation in such organizations or activities as an offence punishable by law. The Convention commits Canada to encourage means of eliminating barriers between races.[7]

The Principles on War Crimes and Crimes Against Humanity, a General Assembly resolution which Canada supported, states that war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation.[8] The persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial, and, if found guilty, to punishment. And one could go on.

None of these obligations are in the *Charter*. The *Charter* does not prohibit hate propaganda. It does not prohibit racist organizations. It does not set out the offenses of war crimes and crimes against humanity.

International obligations do not require that these offences be in the *Charter*. It is enough if they are in the law. Hate propaganda has been part of Canada's statute law since 1970, well before Canada ratified the International Covenant on Civil and Political Rights in 1976. War crimes and crimes against humanity are also offenses at Canadian law, but only since 1987, long after the obligation to enact such laws arose. The duty to prosecute has existed, at the very least, since the end of World War II, and arguably even before that. But Canada did not comply with the duty till decades later.

Regarding the duty to prohibit racist organizations, there is still not compliance. Canada has not legislated, nor has the government indicated it would introduce legislation to prohibit racist groups. The obligation exists internationally, but it is nowhere to be found in the Canadian statute books.

The Honourable Jules Deschênes, in the Report of the Commission of Inquiry on War Criminals, has taken a different point of view. The Report argues that international offenses are part of Canadian law by virtue of the *Charter*, whether the Canadian Parliament has legislated the offenses or not.[9]

The *Charter* states[10] that any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations. This is what Commissioner Deschênes said of that provision. He wrote "In entrenching that provision in its Constitution, Canada could not have more clearly acknowledged its respect for international law; it could not have bowed more reverently to the universal belief in a basic law common to all mankind; it could not have more eloquently adopted that law into its own legal system."[11] He concluded, "war crimes can now form the basis of criminal prosecution in Canada, notwithstanding the lack of any domestic law, or even any domestic law to the contrary." Though what the learned judge said was restricted to war crimes, his remarks would be equally true of propagating hatred, organizing racist groups or any other international law offences not part of Canadian legislation.

That is the view of the Commission of Inquiry on War Criminals. But it is not the view of the Government of Canada, nor of any of the provincial governments. No prosecutions have ever been launched relying solely on the *Charter* and international law, without reference to Canadian legislation.

Nor is it likely that any Crown prosecutor would ever launch such a prosecution. The legal theory of the Honourable Jules Deschenes could be tested. But it would have to be by way of a private prosecution. The Canadian *Criminal Code* states that anyone who on reasonable and probable grounds believes any offence has been committed may lay an information. The laying of the information does not have to be done by a person in an official capacity. Laying an information is, essentially, charging a person with an offence and starting the proceedings.[12] Once the information is laid, the person who charges can assume conduct of the prosecution. "Prosecutor" is defined in the Criminal Code to include the person who institutes the proceedings and includes his or her counsel.[13]

The Crown can intervene, either to stay the proceedings or to take them over.[14] But if the Crown does nothing, the private prosecutor can carry the case of its conclusion. Should anybody wish to try this avenue of legal recourse, it is open to them. For now, it remains untested. There have been many private prosecutions, historically, in Canada. But there have been none for offenses at international law which are not offenses according to Canadian statute law.

Leaving aside the possibility raised by Deschenes in his Royal Commission report, we are left with the situation where the *Charter* is a brake rather than a spur. It hampers governments in what they can do, but does not push them to do anything. The impediments the *Charter* throw in the way of government are not just impediments to inflicting discrimination. They can be as well impediments to government in combatting discrimination.

Every law a Canadian legislature passes is subject to *Charter* scrutiny, including laws designed to combat racial discrimination. A law is not exempt from *Charter* scrutiny simply because it has as its purpose the combatting of discrimination. So, for instance, in the *Keegstra* case in Alberta, the hate propaganda law in the *Criminal Code*[15] was held to be unconstitutional by the Alberta Court of Appeal. The Court held that the provisions violated the presumption of innocence requirement in the *Charter*.[16] The offence of hate propaganda has, according to the *Code*, four defenses — truth, religious opinion, public interest and removal. The burden of proof for establishing these offences is on the accused. The Court held that imposing the burden of proof on the accused to establish these defenses violates the presumption of innocence. The Court also held that the hate propaganda law violates the freedom of expression guarantee in the *Charter*.[17] Finally, the Court held the law was not a reasonable limit to the rights to freedom of expression and presumption of innocence guaranteed by the *Charter*. So the law failed.[18]

The Ontario Court of Appeal held exactly the opposite, in the case of *Andrews and Smith*.[19] That Court held the Canadian hate propaganda law to be constitutional. The issue came up for decision at the level of the Supreme Court of Canada. The Supreme Court heard the appeals from the *Keegstra* and *Andrews and Smith* cases in December, 1989. The Court came down with a decision, one year later in December, 1990, that the hate propaganda law is constitutional.[20]

From June 6, 1988, when the *Keegstra* decision came down, till December, 1990, when the Supreme Court of Canada decided the hate propaganda law was constitutional in Alberta, hate propaganda circulated in Alberta without hindrance. Throughout the whole of Canada, the *Keegstra* decision had a chilling effect on potential hate propaganda prosecutions. The Canadian ability to combat hate propaganda was temporarily wounded in Alberta and hampered everywhere.

A similar comment can be made about the laws against war crimes and crimes against humanity. While these laws have not been law struck down as unconstitutional by any court, they have suffered one constitutional challenge after another. Before Alberta Helmut Rauca was extradited for prosecution for war crimes in West Germany in 1982, his counsel argued in Court that Rauca should not be extradited because of the statement in the *Charter* that every citizen of Canada has the right to remain in Canada.[21] When Imre Finta was prosecuted for war crimes,

his counsel argued that there was a violation of the guarantee of fundamental justice in the *Charter* on the grounds the war crimes law was retroactive. Counsel for Finta also argued that the equality guarantee of the *Charter* was violated by the war crimes law because the law applies to acts committed outside Canada, but not to acts committed inside Canada.[22] These challenges did not succeed. But they had to be answered.

One reason why the government has not legislated a prohibition against racist groups, which it has committed itself to do by means of the International Covenant on the Elimination of All Forms of Racial Discrimination, is the *Charter*. The *Charter* guarantees freedom of association.[23] The government is worried that any law prohibiting racist organizations would run afoul of that provision.

If the positive international obligations of Canada about combatting discrimination and racism, as well as the negative ones, were in the *Canadian Charter of Rights and Freedoms*, none of these problems would arise. The hate propaganda law could not have been struck down. The war crimes law could not be challenged. A law against racist groups could be enacted without fear of its being declared invalid.

The Supreme Court of Canada has already held, in a case about Roman Catholic school funding in Ontario, that one part of the constitution cannot be used to invalidate another part of the constitution. Even if the hate propaganda law violated freedom of expression, the courts would have had no power to declare it invalid for that reason once it became part of the constitution.[24]

The international instruments on which the *Charter* draws are unlike the *Charter* in form. In Canadian law we see the negative prohibitions entrenched in the constitution and the positive obligations enacted only in legislation, if at all. The positive obligations must pass the tests of the negative prohibitions. The negative prohibitions sit in judgment on the positive obligations.

In international instruments, on the other hand, negative prohibitions and positive obligations sit side-by-side, equal in stature. The prohibitions do not have a higher legal standing than the positive obligations. The positive obligations and the negative prohibitions must be balanced off against each other, or read together as a whole.

In Canada, the negative prohibitions can defeat and have defeated the positive obligations. The *Charter* does not just do nothing to promote racial equality. It stands in the way of the promotion of racial equality by requiring all such promotion to meet the tests of the negative prohibitions set out in the *Charter*. When an act of a government or legislature to promote racial equality is struck down because of the *Charter*, as the hate propaganda law was for a time in Alberta, the *Charter* becomes an obstacle to racial equality. Hate propaganda was temporarily flourishing unchecked in Alberta because of the *Charter*.

If the *Charter* had positive obligations as the international instruments do, the obligations would be effective. But the positive obligations are not there. The point I would make about the *Charter* and racial discrimination is that the *Charter* as a spur or a prod to combatting racial discrimination is a dead loss, a non-starter. Positive efforts to combat racial discrimination are completely and totally absent from the *Charter*.

The *Charter* is not meant to be a spur. But it is meant to be a brake. And it is as a brake that it can be effective. But even as a brake there are real, acute problems. The *Charter* is not brake enough.

What I have in mind, in particular, is the behaviour of the Government of Canada overseas. In the book *Closing the Doors: The Failure of Refugee Protection* I have co-written with Ilana Simon, I describe in detail the problems of racism in immigration and refugee processing.

Contemporary problems are three fold. There is the points system for independent immigrants and assisted relatives that has a discriminatory racial and national impact, favouring some nationalities over others in fact, if not in law.

There is the maldistribution of visa offices and visa officers abroad. India, for instance, has only one visa office though the distances are huge, and transportation is difficult. The United States, by contrast, from which Canada admits a similar number of immigrants each year, has twelve Canadian visa offices distributed throughout the country. In all of Africa there are only four visa offices each with one or two visa officers. In the United Kingdom, by contrast, there are sixteen visa officers in London alone.

This maldistribution in offices and officers leads to widely differing speeds of processing. In India and Africa, the delays in processing are inordinate. In the United States and Western Europe, applications proceed expeditiously. Canada does not have a quota system by nationality in its law. But the effect of the maldistribution of offices and officers, and the consequent variations in delay is to create, in effect, an informal quota system.

The third problem is visa imposition itself. For some countries, including India, a person who wants to come to Canada as a visitor must obtain a visa. In other countries, such as the United States or most of the countries of Western Europe, no visa is necessary.

The Government of Canada imposes country visa requirements for those countries where there is fear of abuse of the Canadian immigration system from spontaneous arrivals. In

other words, if some nationals are suspected of potential abuse, then all nationals are penalized with a visa requirement. A visa requirement is as blatant a discrimination on the basis of nationality as one can imagine. An innocent visitor is burdened with the requirement of obtaining a visa because the Government of Canada suspects all nationals of the country of the visitor of potentially abusing Canadian immigration law.

The problem with the *Charter* in this context is it provides no grip on the problem. Canadian immigration and visitor processing overseas discriminates. And the *Charter* does not prevent it.

The Federal Court of Canada has held, in a case decided in August of last year by Mr. Justice Muldoon, that in order to invoke the *Charter*, the person who brings the *Charter* case must be physically present in Canada.[25] The case was a case of sex discrimination, not race discrimination, but the principle would remain the same.

I have some difficulty with that decision. The Supreme Court of Canada held in 1985 that refugee claimants in Canada illegally, without status, could invoke the *Charter*.[26] If a person outside Canada cannot rely on the *Charter*, but a person in Canada illegally can invoke the *Charter*, then there is a legal incentive to enter Canada illegally simply in order to get the benefit of the *Charter*.

But if we assume the decision of Mr. Justice Muldoon is a correct statement of the law, then we must admit that the *Charter* fails not only as positive spur, but also as a negative brake. At least overseas, the Government of Canada can discriminate and the *Charter* will have nothing to say.

It may well be that a Canadian sponsor, or a Canadian assisting relative, can launch a *Charter* challenge when the foreign applicant cannot. But if there is no sponsor, or no assisting relative, the foreign applicant for entry to Canada can be a victim of discrimination and yet not have a *Charter* remedy.

The *Charter* has been important as an educational tool. Its value to Canada goes beyond its legal impact. Even if the *Charter* has not been a legal spur to action, it has been a practical spur. The problems I have mentioned are problems of incompleteness rather than a failure in what is already there. But the *Charter* is incomplete as an instrument in the battle against racism. It could be a better instrument than it is.

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1. Section 15(1).
2. *Andrews v. Law Society of B.C.* (1989), 56 D.L.R. (4th) 1 (S.C.C.).
3. Section 24(1).
4. *Schachter v. The Queen* (1990), 66 D.L.R. (4th) 635 (F.C.A.).
5. U.N.G.A. Res. 2200 (XXI) (1967) Art. 6.
6. 999 U.N.T.S. 171 (1966) Art. 20.
7. 660 U.N.T.S. 195 (1969) Art. 4.
8. Resolution 3074 (XXXVIII) 3 Dec. 1973, Article 1.
9. Canada, Commission of Inquiry on War Criminals, *Report*, Pt. 1: Public (Ottaw: Supply and Services, 1986) (Commissioner: Hon. Jules Deschênes) at 131-132.
10. Section 11(g).
11. *Supra*, note 9.
12. *Criminal Code*, R.S., c.C-34, s.504.
13. *Ibid.*, s. 2.
14. Barton and Peel, *Criminal Procedure and Practice*, 2nd ed., P-49.
15. *Supra*, note 12, s. 319.
16. Section 11(d).
17. Section 2(b).
18. (1988), 60 Alta. L.R. 1 (Alta. C.A.).
19. (1988), 28 O.A.C. 161 (Ont. C.A.).
20. *R. v. Keegstra*, [1991] 2 W.W.R. 1 (S.C.C.).
21. *Re F.R.G. and Rauca* (1983), 145 D.L.R. (4th) 638 (Ont. C.A.).
22. *R. v. Finta* (1989), 61 D.L.R. 4th 85 (Ont. H.Ct.).
23. Section 2(d).
24. *Re Education Act* (1987), 40 D.L.R. (4th) 18 (S.C.C.).
25. *Ruparel v. M.E.I.*, T-1322-88, August 8, 1990.
26. *Singh v. M.E.I.* (1985), 17 D.L.R. (4th) 422 (S.C.C.).

The Search for Reasonable Limits (Notes cont'd)

1. *McKinney v. University of Guelph, Harrison (Connell) v. University of British Columbia.* A third case, *Douglas/Kwantlen College Faculty Association v. Douglas College*, raised the issue of mandatory retirement at a community college, but the Supreme Court of Canada decision considers only the issue concerning the application of the *Charter*.
2. *Stoffman v. Vancouver General Hospital Legislature Building.*
3. See *Ontario Human Rights Code*, S.O. 1981, c.53, s. 9(a) and the *British Columbia Human Rights Act*, S.B.C. 1984, c.22, ss.1 & 8. *Stoffman, supra*, note 2, did not consider the human rights legislation since doctors were not employees of the hospital and thus would not come within the prohibition of discrimination by employers in any event.
4. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
5. *Ibid.* at 163-164.
6. *McKinney, supra*, note 1 at 30-32.
7. *McKinney, supra*, note 1 at 79.
8. Only Sopinka J. seemed to have doubts about the matter.
9. *R. v. Oakes*, [1986] 1 S.C.R. 103.
10. See, e.g. *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 992ff.
11. *McKinney, supra*, note 1 at 35.
12. He found the objective of providing employment for youth to be less convincing.
13. Cory J. also dissented in the *Stoffman* case, though he agreed with the majority's application of s.1 in the other cases.
14. *McKinney, supra*, note 1 at 37, quoting *Irwin Toy, supra*, note 9 at 994.
15. It is not clear, however, that all claims of competing individuals and groups raise issues of equality coming within section 15 protection.
16. See C.L. Smith, "Dimensions of Equality", paper presented at the Supreme Courts Conference on Constitutional Law, April 5, 1991, Duke University.
17. In this regard, presumptions about a correlation between ability and an enumerated or analogous ground of discrimination are troubling. In particular, it could weaken protection for those with physical and mental disabilities, especially if we did not take account of our historical prejudices and stereotypes with regard to the effects of a disability.