THE CANADA CLAUSE THAT WAS: HOW COURTS USE INTERPRETATIVE CLAUSES

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INTRODUCTION

The death of the Charlottetown Accord was due to many factors, one of which was the objections of some members of the public to the Canada Clause. Some asserted that it created a hierarchy of rights; others argued that it subverted gender equality provisions; still others felt that it subjugated individual rights to collective rights. It is my contention that the Canada Clause, while not ideal,[1] failed largely because of the public's lack of knowledge of how courts have used interpretative clauses in the past, and how the Canada clause might have been used by courts in the future.

BACKGROUND

> Coming to terms with our history, we believe, means coming to terms with the distinct societies which make up Canada's society and culture. Not to acknowledge that Quebec is distinct from the rest of Canada seems to be an attempt to rewrite Canadian history; not to recognize Canada's unique commitment to multiculturalism seems to be an attempt to ignore our history; not to acknowledge Canada's debt to its Aboriginal people, we believe, is to deny our history.[2]

The Canada Clause was to "guide the courts in their future interpretation of the entire Constitution, including the *Canadian Charter of Rights and Freedoms*." Both the stated purpose and the clear wording of the clause confirmed that it was to be interpretative and not substantive:

> 2. (1)The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:
>
> (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
>
> (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
>
> (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
>
> (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
>
> (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
>
> (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
>
> (g) Canadians are committed to the equality of female and male persons; and
>
> (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

The Canada Clause provided constitutional recognition of the Canadian reality. The interpretative value of the Canada Clause would have been important in providing a larger vision of the country to appointed judges in their traditional analysis of the *Charter*, not unlike interpretative clauses already existing in the *Charter*.

Indeed, many of the clause's provisions are well accepted legal tenets of Canadian society such as Canada being a democracy and being committed to the rule of law. The Supreme Court has recognized the fact that the "rule of law" is a "cornerstone of our democratic form of government" and that it "guarantees the rights of citizens to protection against arbitrary and unconstitutional government action."[3]

Others are already explicitly provided for in other portions of the Constitution. For example, the affirmation of commitments to gender equality and to racial and ethnic equality are encompassed within s. 15 of the *Charter*.

Some appeared to slightly and subtly expand our existing vision of Canada. For example, the notion that "Canadians and their governments" are committed to the vitality and development of official language minority communities throughout Canada is entrenched to some extent in the "Official Languages of Canada" and "Minority Language Educational Rights" provisions of the *Charter*. For example, s. 16 (3) provides: "Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English or French." Here, some argue, there is no commitment to advance the use of English or French by gov-

ernments; whereas the Canada Clause advanced this linguistic right. However, other Charter provisions such as s. 23 commit Canadian governments to specific action.

Other provisions of the clause provided novel acknowledgements of the Canadian reality which do not presently exist explicitly in the Constitution. For example, the recognition of the Aboriginal peoples of Canada as the first peoples to govern this land, with rights to promote their languages and cultures and traditions, to ensure the integrity of their societies, and a recognition that their governments constitute one of three orders of government in Canada was a positive acknowledgement of the contribution of Aboriginal peoples to Canada. It surpassed the rather begrudging tone of s. 35 which recognizes and affirms "existing and aboriginal treaty rights". The Canada Clause provided a context for the self-government provisions which appeared in other portions of the Charlottetown Accord.

The recognition of the distinctiveness of Quebec in light of its language, unique culture and civil law tradition validated Quebec's historical contribution to Canada.

A commitment to both individual and collective rights was perhaps the most dramatic departure from an individualistic society. It marked an attempt to acknowledge the concerns of Aboriginal peoples, women, unions and other groups who wish to make systemic discrimination and class complaints.

THE POSSIBLE INTERPRETATION

The clear wording of the Canada Clause prevented it from supplanting existing Charter rights and freedoms. Instead, it would have provided an interpretative guide to Courts — a national context for interpretation. However, given the range and diversity of items prescribed by the clause and the range of rights and freedoms encompassed in the *Charter*, it was difficult to definitively state how various provisions of the clause would have been interpreted by the courts in various contexts. Clearly, a case by case analysis would have developed.

i. General Principles of Charter Interpretation

Still, analysis of the Canada Clause would not have departed from the principles of Charter interpretation as they have developed to date. For example, it has been held from the early Charter days that the *Charter* is a purposive document. The rights and freedoms it enshrines are to be defined by an analysis of the purpose of the guarantees, through an understanding of the interests they were meant to protect.[4] This analysis is to be undertaken and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined and, where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.[5] The courts have consistently espoused the position that the *Charter* was not enacted in a vacuum. Both the purpose and effect of intrusive legislation or governmental action are to be examined in determining whether Charter rights or freedoms have been infringed.

Accordingly, had the Charlottetown Accord been passed, courts could have considered the provisions of the Canada Clause in three ways: 1) in the definition of the right or freedom itself; 2) in the analysis of whether a breach had occurred; or, more likely, 3) in the section 1 analysis. Given that the interpretation of the right or freedom is to be a generous one rather than a legalistic one, aimed at fulfilling the purpose of the guarantee,[6] the use of the Canada Clause would probably have received consideration in the delineation under s. 1 of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The Canada Clause would have served as an addition to existing interpretative clauses within the *Charter*, such as ss. 27 and 28 of the *Charter*. An examination of the use of such interpretative clauses provides guidance in understanding some of the potential effects of interpretative clauses such as the Canada Clause.

ii. Section 27

Section 27 states: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." This wording is parallel to that of the Canada Clause with the omission of the phrase "fundamental characteristics", the multicultural heritage presumably being a fundamental Canadian characteristic.

In the case of *R.* v. *Big M. Drug Mart Ltd.*,[7] the Supreme Court used s. 27 in finding a breach of freedom of religion. It held that the *Lord's Day Act* was of no force and effect by reason of its violation of the guarantee to freedom of conscience and religion enshrined in s. 2(a) of the *Charter*. To accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians as expressed in s. 27. For non-Christians, the practice of their religion at least implies the right to work on Sunday if they wish. Any law which is purely religious in purpose surely infringes religious freedom. Further, the protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of religious freedom in our society.

Dickson J. used s. 27 to find that the federal statute infringed freedom of religion and only thereafter dealt with the s. 1 analysis. Of course this early case was the beginning of the "pioneering" in Charter interpretation.

Subsequently, in *R.* v. *Edward Books and Art Limited*,[8] the Court again used the s.27 interpretative clause as it did in *Big M. Drug Mart*.[9] It was held that freedom of religion as guaranteed by s. 2(a) of the *Charter* is to be interpreted in light of Canada's multicultural heritage. A law infringes freedom of religion if it makes it more difficult and more costly to practice one's religion. Such a law does not help to preserve and certainly does not serve to enhance or promote that part of culture which is religiously-based. Section 27 recognizes that Canadian society is an open and

pluralistic one which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements. Wilson J. dissented in part, using the s. 27 interpretative clause in her s. 1 analysis, finding that the Ontario legislation did not constitute a reasonable limit.

More recently, in *R.* v. *Keegstra,*[10] the Supreme Court has indicated a preference for using interpretative clauses in the s. 1 analysis, rather than in the definition of the rights and freedoms. Dickson C.J., for the majority, there held that communications which wilfully promote hatred against an identifiable group are protected by s. 2(b) of the *Charter* and, accordingly, s. 319(2) of the *Criminal Code* is an infringement of freedom of expression. The argument was made that ss. 15 and 27 of the *Charter* provide interpretative aids "...that inextricably infuse each constitutional guarantee with values supporting equal societal participation and the security and dignity of all persons."[11] Dickson C.J. rejected the argument by indicating that it is preferable to use such sections in the s. 1 analysis, rather than in defining the guaranteed right or freedom. He stated:

> Suffice it to say that I agree with the general approach of Wilson J. in *Edmonton Journal, supra*, where she speaks of the danger of balancing competing values without the benefit of a context. This approach does not logically preclude the presence of balancing within s. 2(b).... I believe, however, that s. 1 of the *Charter* is especially well suited to the task of balancing, and consider the Court's previous freedom of expression decisions to support this belief.[12]

His position is in keeping with the minority position that these sections do not reduce the scope of expression protected by the *Charter.*[13] Subsequently, Dickson C.J., in his s. 1 analysis, found that Canada's commitment to the values of equality and multiculturalism in ss. 15 and 27 strengthen the "legitimacy and substantial nature of the government objective".[14] The court also referred to the work of many study groups, to historical knowledge of the potentially catastrophic effects of the promotion of hatred, and to international commitments to eradicate hate propaganda. In finding that the section meets the proportionality test, he referred to the objectives of protecting target group members and of fostering harmonious social relations in a community dedicated to equality and multiculturalism. Thus the interpretative clause is one of the factors used in the s. 1 analysis.

In *R.* v. *Zundel,*[15] the Court considered the constitutionality of section 181 of the *Criminal Code* (wilful publication of a false statement). McLachlin J., writing for the majority, confirmed the broad purposive interpretation of the freedom guaranteed in s. 2(b) and used the s. 27 interpretative clause in her s. 1 analysis.

The Court held that the section infringes the guarantee of freedom of expression because s. 2(b) of the *Charter* protects the right of a minority to express its views, however unpopular.[16] Section 181, which may subject a person to criminal conviction and potential imprisonment because of words he or she published, undeniably has the effect of restricting freedom of expression, and therefore imposes a limit on s. 2(b).

Subsequently, in her s. 1 analysis, McLachlin J. distinguished s. 319 (considered in *Keegstra*) from s. 181 and found that the latter section is not justifiable under s. 1 of the *Charter*. The greatest danger of s. 181 lies in the phrase "injury or mischief to a public interest" which is capable of almost infinite extension. To equate the words "public interest" with the protection and preservation of certain Charter rights or values, such as those enshrined in ss. 15 and 27, is to engage in an impermissible reading in of content foreign to the enactment. The range of expression potentially caught by the vague and broad wording of s. 181 extends to virtually all controversial statements of apparent fact which might be argued to be false and likely to do some mischief to some public interest, regardless of whether they promote the values underlying s. 2(b). It is overly broad and chooses the most draconian of sanctions to effect its ends — prosecution for an indictable offence under the criminal law. In fact, there is a danger that s. 181 may have a chilling effect on minority groups or individuals, restraining them from saying what they would like for fear they might be prosecuted.

In contrast, the minority used s. 27 in its s. 1 analysis, but used it rather innovatively to define the meaning of the legislation which was under attack. Cory and Iacobucci JJ., in a joint-decision, held that the section does infringe s. 2(b) but is sufficiently precise to constitute a limit prescribed by law under s. 1 of the *Charter*. The citizen must wilfully publish a false statement knowing it to be false. Further, the publication of those statements must injure or be likely to injure the public interest. They stated that the fact that the term "public interest" is not defined by the legislation is of little significance. The courts play a significant role in the definition of words and phrases. They postulated that the term is to be interpreted in light of the legislative history of the section and the legislative and social context in which it is used. In the context of s. 181, the term "public interest" refers to the protection and preservation of those rights and freedoms set out in the *Charter* as fundamental to Canadian society. A democratic society capable of giving effect to the Charter's guarantees is one which strives toward creating a community committed to equality, liberty and human dignity. The term should thus be confined to those rights recognized in the *Charter* as fundamental to Canadian democracy. It need not extend beyond that. Section 181 is contravened only if the false statements are deliberate and likely to seriously injure the rights and freedoms set out in the *Charter*. This test for defining "injury to the public interest" takes into account the changing values of Canadian society. Those values encompass multiculturalism and equality. The dissenting judges found that s. 181 is justifiable under s. 1 by using s. 27 to validate government objectives of preventing harm caused by wilful publication of injurious lies.

In *R.* v. *Gruenke,*[17] the Court used s. 27 to interpret the common law as it applied to privileged communications *vis à vis* freedom of religion. In reaching the conclusion that a privilege for religious communications is available on a case-by-case basis, Lamer C.J. specifically referred to s. 27 to note that the privilege is not limited to Christian denominations.

Accordingly, there has been a progression of development in use of the s. 27 interpretative clause as it relates to the *Charter of Rights and Freedoms*. A trend has developed of avoiding its use in the definition of the Charter rights and freedoms, as in the early cases, and of using it instead in the balancing task necessitated by s. 1. Further, the courts have found innovative, sometimes result-oriented, ways of using the interpretative provisions to bolster challenged laws, both statute and common law.

iii. Section 28

Section 28 states: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

In *R.* v. *Red Hot Video Ltd.*,[18] Anderson J. A. stated that determining whether the criminal prohibition against obscenity contained in s. 159 of the *Criminal Code* violates freedom of expression, or satisfies s. 1 of the *Charter*, should not be done in a vacuum. Regard should be had to the *Charter* as a whole, including s. 28. If true equality between male and female persons is to be achieved, it would be quite wrong to ignore the threat to equality resulting from the exposure of male audiences to violent material which degrades women. Such material has a tendency to make men more tolerant of violence towards women, and to create a social climate which encourages men to act in a callous and discriminatory way towards women.

In *Re Blainey and Ontario Hockey Association*,[19] the lower court decision held that s. 28 does not override the other sections of the *Charter* such as ss. 1 and 15(2). Rather, it was intended merely to emphasize that, under s. 15 and the other sections of the *Charter*, men and women are to be treated equally.

Similarly, in *Re Shewchuk and Ricard*,[20] the British Columbia Court of Appeal rejected the appellant's argument that s. 28 supports his argument that the *Child Paternity and Support Act* violated equality provisions by placing the state on the side of the mother against the interests of the putative father. The Court held that s. 28 does nothing more than emphasize and ensure that all of the rights and freedoms in the *Charter* are granted equally to male and female persons. It was not intended to require that a greater measure of equality be afforded on the basis of sex than on the basis of other potential grounds of discrimination.

In *R.* v. *Nguyen*,[21] Wilson J. in her s. 1 analysis discussed the role of s. 28, stating that it does not prevent the legislature from creating an offence that as a matter of biological fact could only be committed by one sex. But it does mean that it is not open to the legislature to deny an accused who is charged with such an offence rights and freedoms guaranteed to all persons under the *Charter*.[22]

In *R.* v. *Seaboyer*,[23] L'Heureux-Dubé J., in dissent, used s. 28 as additional "support for a broader analysis of the rights invoked by the appellants". She writes: "In the context of this case, this section would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of ss. 7 and 11(d) advocated by the appellants."[24] She used the interpretative clause in a larger discussion favouring a broad view of the rights to a fair trial and against the deprivation of fundamental justice as not being confined to the interests of the accused. Accordingly she found no breach of the Charter rights.

A similarly broad-based approach was used by Mahoney J. A. in *Native Women's Association of Canada* v. *The Queen*[25] in dealing with the issue of whether the exclusion of the plaintiff (NWAC) from the constitutional negotiating process infringed its freedom of expression. He held that ss. 2(b) and 28 were violated by the government in inviting and funding the participation of groups opposed to application of the *Charter* to Aboriginal self-governments, but excluding NWAC. The government had thereby accorded advocates of male-dominated Aboriginal self-government a preferred position in the exercise of expressive activity within the meaning of s. 2(b) which, under s. 28, is to be guaranteed to males and females equally. It is my contention, however, that it would have been more appropriate for the court to have found a violation of s.2(b) and then used s.28 to find the limit not reasonable within the meaning of s.1 of the *Charter*.

In summary, s. 28 has been interpreted as emphasizing existing s. 15 rights rather than creating independent rights. However, as illustrated by the comments of L'Heureux-Dubé J. and Mahoney J.A. above, s. 28 has the potential of expanding the interpretation of existing Charter rights.

iv. Section 29

Section 29 states: "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

In *Reference Re: Bill 30 An Act to Amend the Education Act (Ont)*[26] this interpretative clause was used to protect constitutionally guaranteed denominational school rights from Charter review. Statutory rights concerning denominational schools granted pursuant to the Province's plenary power in relation to education under s. 93 of the *Constitution Act, 1867* are also protected by s. 29.

However, the constitutional context of the case distinguishes this use from the manner in which other interpretive clauses have been used. Wilson J. held that since it was never intended that the *Charter* could be used to invalidate other constitutional provisions, ss. 15 and 2(a) of the *Charter* have no application to special or unequal treatment specifically provided for by the Constitution. Both rights and privileges protected by s. 93(1) of the *Constitution Act, 1867* and legislation enacted pursuant to the province's plenary power in relation to denominational, separate or dissentient schools are therefore immune from Charter review, and s. 15 has no application to legislation providing full funding to Roman Catholic separate high schools. Canada was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The educational rights granted specifically to Protestants in Quebec and to Roman Catholics in Ontario at Confederation render it impossible to treat all Canadians equally in this respect. But Wilson J. emphasized that, in her view, s. 29

was not required in order to achieve this result.[27] Accordingly the case did not turn on the interpretive clause.

Further, there are other Charter sections, such as s. 23, which specifically provide for the special promotion of French and English rights. Advocates of other heritage language instruction are no doubt distressed by the decision of *Mahe* v. *Alberta*[28] in which Dickson J., in interpreting s.23, held that it was not helpful to consider ss. 15 or 27. Section 23 provides a comprehensive code for official language rights; it has its own internal qualifications and its own method of internal balancing. The section is an exception to the provisions of ss. 15 and 27 in that it accords special status to the English and the French in comparison to all other linguistic groups in Canada.

Regardless of whatever legitimate concerns that multicultural language advocates have, it is difficult to see how the Canada Clause, in and of itself, would have debilitated multicultural language rights.

CONCLUSION

Based upon the foregoing review of the use thus far made by the courts of interpretative clauses, I conclude that the Canada Clause would not have threatened existing Charter rights and freedoms. Rather, it would have provided a national context for their interpretation. I believe that the use of the Canada Clause would have been progressive and largely centred on balancing competing visions of Canada through the definition of "reasonable limits" in Canadian society under s. 1. The risk of result-oriented decisions existed under the Canada Clause. But this is true of any interpretative clause, present or future. Perhaps the most immediate and progressive change resulting from the Canada Clause would have been a broader interpretation of Charter rights and freedoms from a collective perspective.

Unfortunately, lack of legal certainty is inherent in any legal document subject to the scrutiny of the courts. It may be of concern for those who are afraid that an affirmation of collective rights can only be to the detriment of individual rights, that a commitment by governments to minority language education can only be to the detriment of such commitment to heritage languages, that a commitment to Aboriginal governments can only be to the detriment of existing governments, and that a commitment to Quebec can only be to the detriment of the rest of Canada. In fact, the contrary is true. The potentially more forceful affirmation of some aspects of Canadian society in the Canada Clause would not, of itself, have been a detriment to others affirmed in the clause. The Canadian Constitution is an evolving entity. Even the most ideal Constitution on paper does not guarantee that the enshrined rights and freedoms will be protected in practice. The Constitution of the former Soviet Union is a testament to this fact.

Rather the translation of legal rights into "living rights" is subject to the good-will of the citizens of the country who work individually, and collectively with their elected representatives and other communities, to ensure that all persons are treated with dignity, respect and fairness. Canadians, more than their Constitution, are the ultimate guardians of equality and justice.

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1. For example, it excluded a reference to persons with disabilities.

2. Charter of Rights Coalition, *Report of the Manitoba Constitutional Task Force* by J. Bjornson (28 October 1991) at 11.

3. See *Canadian Council of Churches* v. *Canada*, [1992] 1 S.C.R. 236, in which Cory J. interpreted the enshrinement of the "rule of law" in the preamble of the *Charter*.

4. *R.* v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

5. *Ibid.*

6. *Ibid.*

7. *Supra*, note 4.

8. [1986] 2 S.C.R. 713. Four Ontario retailers were charged with failing to ensure that no goods were offered for sale by retail on a Sunday contrary to the provincial *Retail Business Holidays Act*.

9. *Supra*, note 4.

10. [1990] 3 S.C.R. 697.

11. *Ibid.* at 733.

12. *Ibid.* at 734.

13. *Ibid.* at 833-837.

14. *Ibid.* at 758.

15. [1992] 2 S.C.R. 731.

16. All communications which convey or attempt to convey meaning are protected by s. 2(b) unless the physical form by which meaning is conveyed excludes protection (for example, a violent act). The content is irrelevant. The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false.

17. [1991] 3 S.C.R. 263.

18. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.).

19. (1985), 21 D.L.R. (4th) 599; reversed on other grounds, 54 O.R. (2d) 513 (C.A.).

20. (1986), 28 D.L.R. (4th) 429 (B.C.C.A.).

21. [1990] 2 S.C.R. 906. In this case the Court found that s.146(1) of the *Criminal Code*, which makes it an offence for a man to have sexual intercourse with a female under the age of 14 who is not his wife, violated the *Charter* because it expressly removed the defence that the accused *bona fide* believed that the female was 14 or older.

22. *Ibid.* at 932-933.

23. [1991] 2 S.C.R. 577. The majority held that s. 276 of the *Criminal Code*, which prohibited the accused from adducing evidence concerning the prior sexual history of the complainant in specified instances, violated the accused's ss. 7 and 11(d) rights, and was not saved under s. 1 of the *Charter*.

24. *Ibid.* at 698-699.

25. (20 August 1992), (Fed.C.A.) [unreported].

26. [1987] 1 S.C.R. 1148.

27. *Ibid.* at 1197-1198.

28. [1990] 1 S.C.R. 342.