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SUPREME COURT OF CANADA

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND CANADIAN SOCIETY

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I have been asked to speak about the important changes in Canadian society that were brought about by the adoption of the *Canada Act* of 1982. The amendment to the Constitution of that year is best known for adopting the *Canadian Charter of Rights and Freedoms*,[1] or more simply, the *Charter*. Put simply, the *Charter* is an entrenched bill of rights, which as its title suggests, guarantees certain fundamental rights and freedoms to citizens and individuals. Its purpose is to prevent government, which in Canada includes the federal and provincial governments, from passing laws or acting in ways that violate those rights in a manner that cannot be justified in a free and democratic society. When a government does enact a law that unjustifiably violates one of the guarantees in the *Charter*, for example, by prohibiting public servants from speaking out in favour of a particular political party or a particular candidate,[2] the courts have the power, and indeed the constitutional responsibility, to strike down the legislation. Similarly, when agents of the state, such as police officers, carry out unreasonable searches or seizures or when the law provides for cruel and unusual treatment or punishment on an individual, that individual is entitled to a remedy under the *Charter*.

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

[2] *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

As you might imagine, then, the *Charter* is a significant part of our constitutional framework. Before 1982, the fundamental rights of Canadians were protected not by the Constitution but by a combination of ordinary legislation, tradition, political practice, and judicial doctrines. But these were safeguards, not guarantees. Ultimately, there was no judicial recourse for the individual whose rights and freedoms had been trampled by state action. The enactment of the *Charter* in 1982 formed part of what our former Prime Minister, Pierre Trudeau, called the "people's package", which included a number of constitutional reforms aimed at erasing the remaining legal vestiges of colonial rule by Britain and modernizing our constitutional structure. Mr. Trudeau wanted to improve the welfare of the citizens of his country and recognized the need to ensure that the rights and freedoms that Canadians cherished were put on a surer footing so that every person could be "free to fulfill himself or herself to the utmost, unhindered by the arbitrary actions of governments."[3] The enshrinement of the *Charter* in the Constitution was both a promise to the Canadian people that, henceforth, the rights and freedoms that they held dear would be protected by law and a "renewal of hope" that Canada could live up to the lofty values which found expression in the *Charter*.

While the *Charter* is still relatively young, it is safe to say that it has had a profound impact on Canadian society over the last twenty five years. It is this impact that I would like to discuss with you today. I will try to make the case that the Charter has changed Canadian society in the following three ways:

(i) it has changed our understanding of Canadian democracy and the legal order;

(ii) it has created a culture of rights which has given rise to a substantial revision of past legislation and practice; and

[3] Pierre Elliott Trudeau, Remarks at the Proclamation Ceremony, April 17, 1982.

(iii) it has given rise to a number of important public debates reflecting the difficult balance between individual and collective rights.

Lastly, I will address what Canadians think about these impacts and whether they feel that the *Charter* has lived up to its promise.

Before tackling this main task, I would like to note that I do not wish to suggest that Canada is by any means unique in its bid to offer constitutional protection to fundamental human rights. After the unparalleled violence of the Second World War, there was a collective recognition that the power of the modern state, regardless of the political ideology that underpinned it, needed to be made subject to the rule of law in order to secure the well-being of its citizens. This was true even in democracies, where it was recognized that the will of the majority may not always be sufficient to protect the interests of vulnerable minorities.

It is my hope that you will find discussing Canada's experience with constitutional protection of human rights of interest. But there is another reason why I think the impact of Canada's *Charter* could be of interest to you. The introduction of the *Canadian Charter*, while firmly within the Canadian tradition, represented a new beginning. It provoked profound changes in the executive, legislative and judicial branches of government, the law profession and Canadian society as a whole. Canada is of course but one example of how the legal and political institutions of a country can evolve, and how that evolution can impact on the governance of the state, and ultimately, the welfare of the people which it serves, but it is one that has proved successful.

A. The *Charter*'s impact on Canadian democracy and the legal order

Let me begin with a story to illustrate the *Charter*'s impact. In 1973, a doctor by the name of Henry Morgentaler was charged with carrying out an abortion contrary to the *Criminal Code*. At the time the *Criminal Code* prohibited all abortions except those which were medically necessary and which were first authorized by a hospital committee. By the time the case reached the Supreme

Court, it had created a great amount of controversy. Supporters of the right to abortion saw it as a chance to do away with what they perceived to be a problematic law in terms of women's rights. The Court, however, had very little room to manoeuver. The *Criminal Code* prohibition had been validly passed by our democratically elected Parliament and there was nothing in the Constitution that prevented it. The Court had struck down legislation before that violated the *Canadian Bill of Rights*,[4] but this was controversial and did not have a firm basis in the Constitution since the *Bill of Rights* was an ordinary statute. When it came time to pass judgment, the Court refused to entertain arguments that the prohibition on abortion was unconstitutional. Speaking for the majority Dickson J., who would later become Chief Justice, said that the Court had

> not been called upon to decide, or even to enter, the loud and continuous public debate on abortion which has been going on in this country. ... The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.[5]

The Court upheld Mr. Morgentaler's conviction.

In the early 1980s, Mr. Morgentaler was again charged with performing illegal abortions. But by this time the *Charter* had become part of the Constitution. This meant, as Dickson C.J. noted with some understatement, "added responsibilities" for the Court.[6] The task for the judicial branch was momentous:

> Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public

[4] S.C. 1960, c. 44.

[5] *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 at p. 671.

[6] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 46.

> policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*.[7]

Section 7 of the *Charter* guarantees that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 1 establishes that *Charter* rights, such as s. 7, may be infringed, so long as that infringement is justifiable in a free and democratic society. Interpreting the *Criminal Code* provisions on abortion in light of the *Charter*, a majority of the Court was forced to conclude that the procedure for approving abortions did not work in practice and as a result many women were subjected to emotional and physical harm. The restrictions on abortion procedures violated s. 7 and could not be justified in a free and democratic society. Mr. Morgentaler was allowed to go free and the restrictions on abortion were struck down.

As this brief story demonstrates, the *Charter* changed Canadian democracy by making courts important levers of social change. Traditionally, under the British system of government, Parliament is supreme and is the sole institution charged with enacting legislation. The doctrine of parliamentary supremacy, however, never applied with full force in Canada by virtue of the federal nature of our Constitution. Because the constitution attributed specific legislative powers to the federal government on the one hand and to the provincial governments on the other, it was the responsibility of the courts to ensure that these limits were respected. Any legislation that was enacted outside of the jurisdiction of a particular level of government had to be struck down by the courts in order to preserve the Constitution. This was an important power and gave Canadian courts a very different role from the one performed by their British counterparts. However, judicial review on jurisdictional grounds was a relatively narrow function. It did not directly engage fundamental rights or the protection of

[7] *Ibid.*

minorities. Of course, these issues may have played a role in the background of some decisions but they were never the prime principles at play. If fundamental rights were being infringed, or vulnerable minorities were being excluded, the only recourse was to the will of Parliament or, failing that, the election ballot.

With the advent of the *Charter*, courts became engaged in a form of judicial review that was much wider and much more profound in scope. Any legislation or government action that affected a *Charter* right was potentially subject to review, and, ultimately, to being struck down. This was a great change from the limited form of jurisdictional review that existed before the *Charter.* Where a *Charter* right was infringed, courts were required to assess both legislative objectives and the means used to achieve those objectives. This inevitably engaged courts in important societal debates, like abortion, in a way that it had not been before. Courts became another means by which individuals could push for legislative change. The *Charter* also conferred important powers on the courts to safeguard individual rights. This created great expectations within the public. *Charter* rights were worded in broad and general terms, creating legitimate questions about how far they extended, and what restrictions they placed on government action.

It is important to note, however, that while the *Charter* did give courts a more influential role in Canadian democracy, it did not really elevate them over and above Parliament or the government. Section 1 of the *Charter* establishes that no right is absolute, and will have to be balanced against broader public interests. A preliminary finding of unconstitutionality may not lead to a declaration of invalidity. Even more, when courts do strike down legislation under the *Charter,* that is not the end of the story. It is always open to government to enact new legislation in a way that conforms with the requirements of the *Charter.* For example, in the case of abortion, the Court's decision in *Morgentaler* did not legalize abortion. Instead, it gave government instructions that if it wanted to restrict a woman's right to control her pregnancy, it would have to do so by different, and less infringing, means. In this way, the relationship between courts

and government under the *Charter* has been described as a "partnership"[8] or a "dialogue"[9] between both branches, rather than an adversarial confrontation. All branches of government are responsible for ensuring that the rights enshrined in the *Charter* are protected. While the courts may be responsible for interpreting what those rights require, it is up to government to determine how it will go about meeting them. Finally, although little used, the *Charter* provides an escape clause by which governments can override most judicial decisions. Section 33 of the *Charter* allows legislation to be enacted notwithstanding the *Charter*, thus bypassing its requirements. Such a power may only be used for a period of 5 years at a time before it expires or is renewed. Fortunately, so far the dialogue between our courts and legislatures has been civil and s. 33 has been invoked only rarely.

Various decisions of the Supreme Court have created controversy; many have expressed concern that courts are interfering with the will of the people as expressed through their democratically chosen institutions. In the context of these concerns, it is appropriate to ask what is the proper role of the judge in *Charter* adjudication. Professor Dworkin in "Freedom's Law" advocates a moral reading of broad constitutional protections with its basis in the rule of law, and assuring the rule of law is what the courts do all the time. More importantly, the Charter can be viewed as a declaration of the fundamental prerequisite for genuine membership by individuals in our political community. Dworkin uses this argument to reject what he calls the "majoritarian premise" that courts which interfere with legislative enactments necessarily foil democracy. His premise is that in our conception of democracy, the majority rule is concerned not only with the statistical majority, but also with the equal status of citizens and their sense of community. Individuals must have some control over their fate; minimal guarantees are therefore necessary. These minimal guarantees reflect the need

[8]See W.R. Lederman, "Democratic Parliaments, Independent Courts, and the *Canadian Charter of Rights and Freedoms*" (1985-1986) 11 Queen's L.J. 1.

[9]P.W. Hogg & A.A. Bushell, "The *Charter* Dialogue between Courts and Legislatures - or Perhaps the *Charter* Isn't Such a Bad Thing After All" (1997) 35 Osgoode Hall L.J. 75.

to enforce universal rights, but also particular rights which are grounded in the actual society, taking into account its history and structure. This explains for instance the recognition of language rights and aboriginal rights in Canada. In essence, there has to be in the ethical evaluation within legal decisions a legal analysis whose hallmarks are coherence and consistency with the ongoing legal discourse, and, perhaps more importantly, a candid articulation of the theme which a judge sees in that discourse. The view in Canada is that judges support democratic institutions by ensuring that individuals can participate as independent and equal moral agents within the community. It is clear that judges can be wrong but there is comfort in the fact that judges apply the law within an established legal framework with true guarantees of objectivity and independence; the challenge of adjudication is in resolving the paradox posed within democracy itself.

The new perceived power of the Supreme Court is not entirely derived from the role it plays in defining the major values which are recognized by the *Charter* and from which all the citizens of Canada take inspiration. It is also dependent on the expanding role of judicial review; this enlargement of the scope of judicial review is very apparent with regard to numbers and intensity. The control over government action has traditionally been there to protect the right of access, the right to a fair and unbiased tribunal, the right to a timely decision. Courts are now exercising the right to a legally correct and to a reasonable decision, creating great expectations within the public. Lord Diplock said in the famous *Inland revenue Commissioners* [10] case in 1982 that judicial review was one of the greatest achievements of the English Courts in his lifetime. The expansion of judicial review was caused by the explosion of the regulatory power but also, and this is why I address it here, by the adoption of the *Charter*. Review under the *Charter* has increased public scrutiny of all government decisions and forever changed the role of the judiciary, in my view. Judicial review has therefore become a more and more central feature of a modern democracy; it requires new and increased efforts to maintain judicial independence and public

[10] *Inland Revenue Commissioners v. National federation for Small businesses and Self-Employed Ltd.*, [1982] A.C. 617, at p. 641.

confidence in the judiciary in this context. But these changes have not affected the reputation of the Supreme Court. The power of the Court is symbolic in that the Court is one of our major national institutions and the accepted guardian of the Constitution. To quote Justice Oliver Wendel Holmes, "We live by symbols". In other words, the Court is a permanent, almost perpetual institution in the people's minds; it represents stability, tradition. It personifies the rule of law. It is criticized, often because public expectations regarding its role as a agent of social change are questionable and uneven, but it is seen playing its role.

B. A Culture of Rights & Revision of Legislation and Past Practices

Individuals and organizations took their *Charter* rights seriously from the beginning. A culture of rights emerged where there existed a heightened level of consciousness about *Charter* rights and their significance. More and more cases were brought before the courts challenging legislation or government practices. Of course not all of these challenges were successful. Sometimes courts found that no right had been infringed. Other times they concluded that the infringement was capable of being justified in a free and democratic society. Indeed, this is the outcome in a majority of cases.[11] However, in a not insignificant number of cases, courts have held that legislative restrictions cannot be justified or that government action failed to properly take into account the strictures of the *Charter.* Over its 25 year life the *Charter* has resulted in substantial change to a number of areas of law and has been responsible for significant reforms in the way government acts towards its citizens. In this section, I will briefly review some of the significant changes that have taken place in two important areas: protection of minorities and the criminal law.

[11]S. Choundhry, & C. E Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" Case Comment (2003) 48 McGill L.J. 525.

I. Protection of minorities

One of the most important guarantees in the *Charter* is the guarantee provided in s. 15 to equal treatment without discrimination. This ensures that groups which may be different from the majority because of, for example, their race or ethnic or national origin, their age, their sexual orientation, or their disability are not excluded or treated in a way which is demeaning to human dignity. Underlying it is the same animating spirit and commitment to equality that finds expression in articles 41 to 44 of the Cuban Constitution.

In Canada, although s. 15 continues to provoke lively debates about its exact scope and proper interpretation, there is little question that it has been an important tool for the advancement of equality in Canada in all areas of society.

In one case,[12] the Supreme Court of Canada held that excluding persons over the age of 65 from receiving unemployment benefits was contrary to s. 15 of the *Charter* and could not be justified in a free and democratic society. The legislative exclusion was premised on the assumption that persons over 65 were no longer employable in the labour market. As such, it failed to take into account the personal circumstances of individuals and unnecessarily impeded on their dignity.

In another case, the Supreme Court was confronted with legislation that failed to properly take into account disabled persons.[13] The claim had been brought by a group of people whose sole means of communication was through sign language. The group took issue with the fact that while provincial health services were supposed to be freely and publicly accessible, the effect of their

[12] *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*,[1991] 2 S.C.R. 22.

[13] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

disability meant that they could only access public health care by paying for an interpreter. The Court agreed that the costs of a sign-language interpreter had to be covered by the government in order to meet its obligations under s. 15. Otherwise, a particularly vulnerable group of society – those with hearing disabilities – would face an extra burden on account of their disability that other Canadians did not face.

In Canada, sexual-orientation is also a prohibited ground of discrimination since it involves a relatively immutable personal characteristic – that is, one that cannot be changed or could be changed only at an unacceptable personal cost.[14] As such, legislation which excluded same-sex partners from the definition of "spouse" was discriminatory because it was based on the demeaning assumption that same-sex couples could not form stable, caring and interdependent relationships in the same manner as opposite sex-couples.[15]

Running through these decisions is the notion that the value of equality requires that governments treat every individual with respect and with regard to their personal circumstances, rather than on the basis of stereotypical or generalized assumptions. In the seminal case to date on discrimination,[16] the Supreme Court held that the fundamental value underlying the equality guarantee is the notion that all human beings are of equal worth and that all deserved to be treated with dignity.

In addition to s. 15, other provisions of the *Canadian Charter* are aimed at protecting specific groups. The notion of "group rights" is an important feature of the Canadian Constitution since it recognizes the multi-cultural and multi-linguistic nature of our federation, and the need to preserve our cultural diversity. An important example is the language rights contained in the *Charter.* Section 16 establishes that English and French are the official languages of Canada and

[14] *Egan v. Canada*, [1995] 2 S.C.R. 513 at p. 528.

[15] *M. v. H.*, [1999] 2 S.C.R. 3.

[16] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497

that they have equal status. Flowing from this is the right of individuals to use either French or English in parliamentary debates,[17] in proceedings before a federally established court,[18] or in communications with the government of Canada.[19] Rights are also accorded to parents wishing to have their children educated in their first language despite the fact that that language may not form the majority linguistic community in the province in which they reside.

The language obligations imposed on government are some of the most serious since minority language communities tend to be vulnerable and susceptible to assimilation. In one case, it was deemed to be constitutionally acceptable for a court to oversee the provision of French school facilities and programs in a timely manner because further delay imperilled the very existence of the French-speaking community altogether.[20] Courts in Canada will not hesitate to order the construction of minority-language schools in order to give effect to the purpose of the linguistic guarantees in the *Charter*.[21]

II. Criminal law

The *Charter* has also had a major impact on criminal law and criminal procedure. A good number of provisions in the *Charter* are aimed at ensuring that persons suspected of having committed a crime are given a fair trial and that criminal prosecutions – from investigation, to arrest, to trial – are conducted in accordance with the rule of law.[22] As applied by the courts, they have effected profound change in the criminal justice system.

[17] *Charter*, s. 17.

[18] *Charter*, s. 19.

[19] *Charter*, s. 20.

[20] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

[21] *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3.

[22] *Charter*, ss. 7 - 14.

The provision of the *Charter* which has perhaps had the most impact on the substance of the criminal law is s. 7. Section 7 guarantees everyone the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. But what are the principles of fundamental justice? The Supreme Court has stated that they must be found in the "basic tenets of the legal system"[23] – in other words, in the core principles that underlie our criminal justice system, such as the presumption of innocence, and the legal system more broadly.

One of the early cases that brought the question of fundamental justice to the forefront was about a provision that made it an offence to drive if one's driver's licence had been suspended or if one was prohibited from driving.[24] The offence was punishable with imprisonment regardless of whether the driver knew that their licence had been suspended or they were prohibited from driving. The Supreme Court held that this violated one of the principles of fundamental justice, namely, that no person should be imprisoned unless they also have a guilty mind. Because the offence provided for imprisonment regardless of whether the driver knew that they were committing the offence it violated the important guarantee in s. 7.

The same principle found application in relation to the definition of murder. At one time a person could be convicted of "felony murder" if they had caused death during the commission of a serious offence with an armed weapon, regardless of their subjective intentions. In an important case,[25] the Supreme Court held that it was contrary to the principles of fundamental justice to convict someone of murder without proving that they also had a guilty state of mind. The stigma and penalties associated with murder were so great that wrongful acts

[23] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 31.

[24] *Ibid.*

[25] *R. v. Vaillancourt*, [1987] 2 S.C.R. 636.

alone could not be a basis for a conviction. It also required that the accused had some knowledge that their actions might cause death.

In another case, the Supreme Court held that s. 7 prohibited a person who did not act voluntarily from being convicted of a crime.[26] The case involved a woman who had been charged for attempting to import drugs into Canada. The evidence suggested that the woman had been told that unless she went through with the crime her mother would be harmed. Given this, it could not be said that she had acted voluntarily and she therefore had to be acquitted.

The *Charter* also changed how the criminal justice system operates. In order for state officials to carry out a search and to seize any evidence they must first have a warrant, issued by an impartial arbiter and reasonable and probable grounds that an offence has been committed and that evidence of the offence is to be found in the place to be searched.[27] If a person is detained they must be informed of the reasons for their detention,[28] and of their right to obtain legal counsel without delay. Punishments for crimes must not be disproportionate to the offence.[29]

These are just a few examples of the important impact the *Charter* has had on our criminal law and our criminal justice system. The treatment of accused and convicted criminals is one of the hallmarks of a just society. Since its existence, I believe, the *Charter* has gone some way to safeguarding the rights of the accused and those convicted of an offence, and in this way, has been beneficial to Canadian society more generally.

[26] *R. v. Ruzic*, [2001] 1 S.C.R. 687.

[27] *Hunter v. Southam*, [1984] 2 S.C.R. 145.

[28] *R. v. Smith*, [1991] 1 S.C.R. 714.

[29] *R. v. Smith*, [1987] 1 S.C.R. 1045.

C. Public Debates about the Balance between Individual and Collective Rights

Many of the issues raised by the *Charter* could be characterized as controversial social issues. They often pit the rights of individuals against the broader interests of society. Because of the values at stake, achieving the appropriate balance can be a difficult task. Courts try their best to interpret the *Charter* in a way that gives effect to its guarantees but also which respects limits on individual rights that can be justified in a free and democratic society. The importance and the media attention given to many of the case that deal with these questions of balancing has meant that the public has become engaged in legal debates like never before. This can only lead to healthy and strong democracy where differing viewpoints are respected and where social issues are resolved with respect for both individual and collective rights. I will try to briefly give you a flavour of some of the debates which the Supreme Court has faced under the *Charter*.

One area that has been open to conflicting values is the area of freedom of expression. Freedom of expression is protected by s. 2(b) of the *Charter*, and there is no question that the ability to express oneself freely on any topic however unpopular is fundamental to the maintenance of a free and democratic society. Nevertheless, not all expression is harmless. A statement which is made deliberately out of hate with the intent to harm a particular group is one example of expression which can cause harm to society as a whole. The issue then is what is the appropriate balance to strike between an individual's right to speak freely and society's right to prevent expression that might cause harm. The Supreme Court was faced with that issue in *R. v. Keegstra*.[30] Mr. Keegstra was a teacher who had been discovered to be communicating various anti-Semitic statements to his students. He was convicted under the *Criminal Code* for unlawfully promoting hatred, but challenged the conviction on the basis that the offence of promoting hatred violated his freedom of expression. The Court found

[30][1990] 3 S.C.R. 697.

that his anti-Semitic teachings were protected by the *Charter* – in order to fulfill its purpose freedom of expression had to be interpreted expansively to include any non-violent form of expression. However, a majority ruled that the limited prohibition on hate propaganda was justifiable in order to protect vulnerable minorities and to promote social solidarity. The offence was targeted only at those who wilfully promoted hatred and did not apply where the statements were in fact true. As such it represented only a minimal impairment of freedom of expression which was justifiable given the important objective of suppressing hate.

Similar considerations are raised by the issue of pornography. In *R. v. Butler*[31] the Court was faced with a challenge to the *Criminal Code* provision outlawing the possession, the sale and the exposition of obscene material. The accused was the owner of a video shop that dealt in explicit pornography. The Court was prepared to accept that the material in question fell under the broad umbrella of freedom of expression, but the limiting of material that could cause harm to society, and to women in particular, and which served no wider artistic, literary or other social objective was deemed to be justifiable under s. 1 of the *Charter.*

Other cases have pitted freedom of religion against broader societal interests or even the individual interests of others. One notable case involved the refusal of parents to authorize a potentially life-saving blood transfusion to their child because it violated their beliefs as Jehovah's Witnesses.[32]The child protection services had ordered the transfusion performed despite the parent's wishes. The Court was thus confronted with the sincerely held religious beliefs of the parents, which were protected by the *Charter*, and the interests of preserving the safety and well-being of the child. It was clear that the parents' freedom of religion had been infringed, the question was whether that infringement was justifiable. The Court took into account the importance of securing the safety of

[31][1992] 1 S.C.R. 452

[32]*B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315.

minor children, and the procedural protections that had been afforded parents and decided that the infringement was saved under s. 1.

Some of the debates engendered by the *Charter* have centred on significant moral issues. We have already seen how abortion was raised by the case of Mr. Morgentaler. In another case,[33] the Court was confronted with a claim by a terminally ill women who wanted to strike down the *Criminal Code* prohibition on assisted suicide so that she could secure the help of her physician to end her life. Again the Court had to decide whether Parliament had struck the right balance between the autonomy of the individual and the important objective of preserving human life. It was, however, hard to imagine other workable measures that would enable assisted suicide but which would not unduly compromise the goal of protecting human life. For this reason, a majority of the Court upheld the prohibition on assisted suicide.

As I hope these examples have shown, the *Charter* has raised issues which concern all of us who live in secular, liberal and multi-cultural democracies. They are issues that must be grappled with if we are to give effect to our cherished values – values which sometimes might be in conflict, but which are nevertheless worth the struggle to preserve.

D. Conclusion: Canadians' perceptions of the *Charter*

As you might imagine, the Court's resolutions of many of these issues have not been without controversy. Some have alleged that the Court is anti-democratic and that, under the *Charter*, it has usurped the proper role of the legislator.[34] Others have suggested that the Court has not gone far enough in protecting *Charter* rights. On the whole, however, I think that the controversy has been healthy for our country since debate is the sign of a vibrant democracy.

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[33] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

[34] See *e.g.* F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (2000).

Even though some issues may seem divisive, in general it would appear that Canadians view the *Charter,* and the Supreme Court's interpretation of it, in a positive light. A survey conducted for the 20th anniversary of the *Charter* found that the overwhelming majority of Canadians think that the *Charter* is a good thing for the country.[35] A majority also reported being satisfied with the way the Supreme Court of Canada is working.[36] Seventy-one percent stated that the courts, and not Parliament, should have the final say on the correct interpretation of the constitution.[37] Fifty-five percent thought that the *Charter* has helped unite the country.[38]

Although these numbers do not suggest that opinion on the *Charter* are unanimous they do suggest that the claims about undue judicial activism and the dangers of the *Charter* for democracy are unfounded. Most Canadians support the *Charter* and see it as having effected positive change in our country.

As I hope my remarks have made clear, the *Charter* has brought about significant change in Canadian society, in the relationship of our democratic institutions, in people's expectations of government and of the courts, in how the important social issues of the day are debated, and in the very character of our laws and judicial institutions. Looking back, we can proud that the *Charter* has managed to live up to the weighty expectations that were placed upon it. Looking forward, we can be optimistic that it will continue to be a source of hope for the future.

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[35]Centre for Research and Information on Canada, "The Charter: dividing or uniting Canadians?" The CRIC Papers (April 2002), p. 8.

[36]*Ibid.*, p. 20.

[37]*Ibid.*, p. 22.

[38]*Ibid.*, p. 28.