



Osgoode Hall Law Journal

Volume 28
Issue 1 *Volume 28, Number 1 (Spring 1990)*

Article 3

1-1-1990

The Evolution of the Limitation Clause

Janet Hiebert

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Constitutional Law Commons](#)

Article



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Hiebert, Janet. "The Evolution of the Limitation Clause." *Osgoode Hall Law Journal* 28.1 (1990) : 103-134.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol28/iss1/3>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

The Evolution of the Limitation Clause

Abstract

The evolution of the limitation clause reveals a rigorous and changing political discourse about the nature of rights and limitations. While the larger issue in the entrenchment debate focussed on whether legislatures or courts were best suited to protect Canadians' interests, a fundamental concern underlying the debate was the scope of permissible limitations on protected rights. Many commentators argued that an explicit limitation clause was not necessary because courts would fashion the appropriate limits on rights. Provincial and federal drafters, however, rejected the assumption implicit in this suggestion: that the Charter was to provide an exhaustive statement of all values fundamental in Canada. Drafters, particularly those representing the provinces, insisted that enumerated rights contain explicit limitations so that they would not unduly impair governments from pursuing their policy agendas. Since the debate about entrenched rights was placed on the national political agenda in the late 1960s, a requirement for provincial support was a provision enabling governments significant latitude in enacting limits on protected rights. The Canadian Charter of Rights and Freedoms reflects this demand. An essential purpose of the limitation clause in section 1 is to ensure that legislators, in certain circumstances, be able to ensure the primacy of non-enumerated values over specified Charter rights.

Keywords

Constitutional law; Canada. Canadian Charter of Rights and Freedoms; Canada

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

THE EVOLUTION OF THE LIMITATION CLAUSE[©]

BY JANET HIEBERT*

The evolution of the limitation clause reveals a rigorous and changing political discourse about the nature of rights and limitations. While the larger issue in the entrenchment debate focussed on whether legislatures or courts were best suited to protect Canadians' interests, a fundamental concern underlying the debate was the scope of permissible limitations on protected rights. Many commentators argued that an explicit limitation clause was not necessary because courts would fashion the appropriate limits on rights. Provincial and federal drafters, however, rejected the assumption implicit in this suggestion: that the Charter was to provide an exhaustive statement of all values fundamental in Canada. Drafters, particularly those representing the provinces, insisted that enumerated rights contain explicit limitations so that they would not unduly impair governments from pursuing their policy agendas. Since the debate about entrenched rights was placed on the national political agenda in the late 1960s, a requirement for provincial support was a provision enabling governments significant latitude in enacting limits on protected rights. The *Canadian Charter of Rights and Freedoms* reflects this demand. An essential purpose of the limitation clause in section 1 is to ensure that legislators, in certain circumstances, be able to ensure the primacy of non-enumerated values over specified *Charter* rights.

I. INTRODUCTION

One of the most distinctive features of the *Canadian Charter of Rights and Freedoms* is the general limitation clause that precedes the enumerated individual and collective values.¹ While Charter

[©] Copyright, 1990, Janet Hiebert.

* Janet Hiebert is a graduate student in the political science department at the University of Toronto. This article is a shortened version of a chapter in her Ph.D. thesis.

¹ *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

advocates of the late 1960s through the early 1980s expressed an unqualified enthusiasm and optimism for what could be achieved by entrenching rights, Charter drafters exercised more modesty in their abilities to capture all of the fundamental values in Canadian society. The limitation clause of section 1 is significant because it provides a means of reconciling the interests in the *Charter* with other fundamental values not specifically enumerated. This clause, which tempers the impact of entrenched rights on collective values, subjects the rights in the *Charter* to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society.

The debate about entrenched rights, which has been an important part of the national political agenda since the late 1960s, was carried out on two fronts. The larger issue centered on what was the best way of protecting Canadians' interests. The pertinent concerns in this debate were whether legislatures or courts should decide on the appropriate bounds of state action in the pursuit of collective values, and in the event of conflicts, who should determine limits on entrenched rights. The second front was extremely important in terms of reconciling those who would have preferred not to entrench rights to the *Charter*. This underlying debate reflected divergent views about what guidelines ought to inform decisions about acceptable limitations on rights, as well as whether the legislatures or the courts should determine limits. Participants in this second debate looked to the *European Convention on Human Rights*,² which includes specific limitations in the actual description of the enumerated rights and freedoms, as well as to the American example,³ which is silent on limits and leaves all decisions about qualifying rights to the courts. In the end, the *Charter* reflected neither the European nor the American model. The limitation clause can be considered the Canadian contribution to systems of entrenched rights. While the idea of limiting rights was certainly not innovative, the method of doing so was.

² *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, U.K.T.S. 1953 No. 71, 1 E.T.S. No. 5 [hereinafter *European Convention on Human Rights*].

³ U.S. CONST. amend. I-XV [hereinafter *American Bill of Rights*].

The evolution of the limitation clause reveals a rigorous and changing political discourse about the nature of rights and limitations. This paper will analyse the development of section 1 to explain why the drafters of the *Charter* arrived at the idea of including a general limiting clause and how the wording, as we know it, came about. The wording of the clause, the scope of the limitations it allows, and its exact location in the *Charter* have fluctuated considerably since it was first proposed. The paper will show that the debate about the limitation clause is also a debate about the nature of rights and freedoms in Canada. The legislative history of the clause reveals that a fundamental issue in the Charter debate has been what latitude legislatures should have in order to protect and promote non-enumerated values which conflict with specified *Charter* rights. The significance of the clause as a means of reconciling non-entrenched values with *Charter* rights goes beyond the recognition that rights are not absolute.

II. EARLY DISCUSSIONS OF ENTRENCHED RIGHTS

The subject of constitutionally entrenched rights was placed on the national political agenda in 1968 when Pierre Trudeau, then Justice Minister, published the policy paper *A Canadian Charter of Human Rights*.⁴ The following year, the government issued another policy paper involving a more detailed discussion of the rights the government wished to see entrenched.⁵ These earliest Liberal government proposals recognized that entrenched rights are not to be enjoyed in any absolute sense. The first policy paper, for example, suggested that the enumerated rights and freedoms, particularly freedom of expression and freedom of conscience and religion, might have to be qualified for reasons of preserving public safety and order:

⁴ P.E. Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968).

⁵ P.E. Trudeau, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (Ottawa: Queen's Printer, 1969).

Freedom with respect to the individual's internal belief or conscience might well be considered absolute and not qualified in any way. It is the external manifestation of the exercise or furtherance of beliefs which may give rise to problems and the need for limitations in the interest of public safety and order.⁶

The 1968 policy paper did not contemplate a general limitation clause. In acknowledging the need to qualify certain rights and freedoms, Trudeau proposed two other means of doing so. The first of these, which he referred to as the "simple" form, was to list the right without any specific restrictions and leave the determination of limits up to the courts.⁷ Trudeau indicated a faith in the judiciary's ability to develop the appropriate limits on rights when the exercise of the right conflicts with an important social value:

Opponents of an unconditional declaration [of freedom of expression] fear that such wording might restrict the application of Criminal Code prohibitions against obscene or seditious publications, or provincial laws pertaining to defamation or film censorship. This is unlikely, however, for free speech as it developed in England was never equated with complete licence. It has long been recognized, even before the Americans expressly guaranteed this right in their constitution, that free speech was subject to limitations for the protection of public order and morals. The United States courts have given the guarantees of the First Amendment very wide scope, but have upheld laws which prohibit speech inciting to unlawful acts, and laws which punish the publication of matter which is purely obscene with no significant redeeming social value.⁸

The alternative approach considered by Trudeau was to specify, within the description of the right, circumstances in which limits would be imposed. The model for this approach was the *European Convention on Human Rights*. Trudeau felt that the advantage of a highly specified set of limitations was that it removed possible uncertainties of whether the enumerated right would conflict with other social values.⁹ The disadvantage, he thought, was that this method lacked flexibility and would be difficult to adapt to

⁶ *A Canadian Charter of Human Rights, supra*, note 4 at 18.

⁷ *Ibid.* at 16.

⁸ *Ibid.*

⁹ *Ibid.* at 17.

changing circumstances. His preferred method was to describe the rights without any specific qualifications.¹⁰

The subsequent policy paper of 1969 was faithful to Trudeau's preference to avoid explicit limitations, with one noticeable exception. It included a clause which provided that in times of emergency, governments would not be paralysed by having to confine their activities to those which did not conflict with enumerated rights. The proposed clause was accompanied by an explanatory note advising the public that it was sometimes necessary to limit certain human rights during wars and similar emergencies.¹¹ Parliament's ability to override rights in emergency situations was provided for in section 7:

7. It should be provided that where Parliament has declared a state of war, invasion or insurrection, real or apprehended, to exist, legislation enacted by Parliament which expressly provides therein that it shall operate notwithstanding this Charter, and any acts authorized by that legislation, shall not be invalid by reason only of conflict with the guarantees of rights and freedoms expressed Charter [sic].¹²

III. PROVINCIAL RESPONSE

The idea of entrenching rights was considered a highly innovative proposal in the late 1960s despite the fact that the *Canadian Bill of Rights*¹³ had been enacted less than a decade earlier. A system of constitutionally entrenched rights which would apply to the provinces as well as to the federal Parliament was considered a significant modification to our parliamentary system of government and in particular, a direct assault on the principle of *legislative supremacy*.

The federal proposal to constitutionally entrench rights was not greeted with enthusiasm by many of the provincial Premiers. They did not hold Trudeau's view that a Charter of Rights would

¹⁰ *Ibid.*

¹¹ *The Constitution and the People of Canada, supra*, note 5 at 60.

¹² *Ibid.*

¹³ *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III.

provide the path for an orderly reform of the constitution¹⁴ and did not see the need for constitutional reform to embrace entrenched rights. Many of the provinces had a different idea of what the constitutional priorities should be and felt the more urgent matters were the distribution of powers, particularly the spending and taxing power, an amending formula, the reform of federal institutions, such as the Senate, and of appointments to the Supreme Court of Canada, and the inclusion of a constitutional clause dealing with regional disparities.¹⁵

Trudeau was not successful in convincing the provincial Premiers to adopt a draft Charter of Rights at the 1968 Constitutional Conference. The issue, however, became the focal point of study in the next three years by the Continuing Committee of Officials and its Sub-Committee on Fundamental Rights.¹⁶ During this time, the debate about entrenched rights was carried on at a high level of abstraction. The two federal papers had been more an expression of ideas than firm policy. That the federal government did not have an articulated policy on entrenched rights was evident in the practice of allowing anyone who wished to submit a proposal on the subject.¹⁷ The open nature and high level of

¹⁴ P.E. Trudeau (Constitutional Conference, First Meeting, Ottawa, February 1968) at 269.

¹⁵ Canadian Intergovernmental Conference Secretariat, *The Constitutional Review 1968-1971: Secretary's Report/Canadian Intergovernmental Conference Secretariat* (Ottawa: Information Canada, 1972) at 71-72.

¹⁶ At the First Ministers Meeting, February 1968, the Prime Minister and the provincial Premiers announced their intention of undertaking a review of the Constitution. In order to carry out this task, they agreed to establish a Continuing Constitutional Conference, composed of the Prime Minister and the Premiers, or their delegates, to supervise the process of constitutional review. They also agreed to establish a Continuing Committee of Officials to assist the Constitutional Conference. The Committee was empowered to establish sub-committees on specific questions. Secretariat of the Constitutional Conference, "Constitutional Conference: Process of Constitutional Review" (Ottawa, 1971) at 2.

¹⁷ Information obtained from author's interview with B. Strayer (7 December 1987). Strayer was one of the senior federal officials involved in the process of constitutional renewal which began in 1968. Strayer, who was instrumental in drafting the limitation clause, served as an advisor to the Special Counsel on the Constitution at the time the 1968 Trudeau policy paper was developed. He was a director of the Constitutional Review section of the Privy Council from 1968-74 and was Assistant Deputy Minister of Justice in Public Law from 1974-83.

generality which characterized the discussion of entrenched rights did not encourage provincial agreement. The process of issuing general policy papers and reviewing submitted proposals did not produce any clear direction and collapsed under its own weight.

By the fall of 1970, the provinces had become impatient with the process of constitutional renewal. The Premiers, wanting to reach an agreement on constitutional reform, pressured the federal government for a settlement on patriation.¹⁸ From the standpoint of a number of provinces, entrenching rights was not a necessary condition for agreement. The provinces had provided little input into these earliest proposals, and many were largely unconvinced about the benefits of entrenched rights. Moreover, as the federal government expressed its ideas on the substance and scope of rights, it became apparent that not only were some of the provinces having serious reservations about entrenched rights, but even those provinces more inclined to support a constitutional Charter disapproved of the lack of explicit limitations on rights.¹⁹

The provincial response to Trudeau's proposals for entrenched rights ranged from conditional support to categorical rejection.²⁰ A major obstacle in negotiating an agreement was the desire of many of the provinces to retain legislative supremacy. This desire informed not only the debate about whether to entrench rights at all, but also the question of the scope of limitations on rights should the provinces agree to the principle of entrenchment.²¹

The western provinces (British Columbia, Alberta, Saskatchewan, and Manitoba) were the most vocal in their opposition to entrenchment.²² In the early stages of constitutional

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *The Constitutional Review, supra*, note 15 at 126-27.

²¹ Strayer, *supra*, note 17.

²² The western provinces commissioned a paper by Douglas Schmeiser, a legal academic, and relied frequently on the author's arguments that judicial review of entrenched rights is undemocratic, is prone to the personal values of judges, is ineffective, will lead to silly frivolous litigation and generate a "litigation syndrome," and will undermine the federal principle. D. Schmeiser, Preliminary Study on Entrenchment of Fundamental Rights and Judicial Review (Paper Commissioned by the Provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, 28 October 1969) [unpublished].

review, the chief critic of entrenchment was then Manitoba Attorney General Sterling Lyon: he blamed much of what is wrong with the United States on its Bill of Rights.²³ However, the June 1969 defeat of Manitoba's Conservative government altered the complexion of western opposition. The new Premier of Manitoba Edward Schreyer did not share the previous administration's opposition to entrenched rights. The remaining three western provinces, however, continued to oppose entrenchment. They argued that Canadians are better protected under the principles of responsible government and "parliamentary supremacy" than their American neighbours who have a constitutional Bill of Rights. They claimed that a constitutional Charter would result in Canadians rejecting a system "which works reasonably well in Canada" in favour of a system "that is working badly in the United States."²⁴ The provinces suggested that the most serious implication of entrenched rights was that courts would be given the final word on basic policy issues:

... [J]udicial review is a most undemocratic procedure, since it gives the court power to substitute their opinions for those of the electorate. Canada has always operated under the principles of responsible government, and the sovereignty of the people as expressed through their legislators who are accountable to the people. Judicial review would subject the opinion of the legislation and the operation of self-government to the opinion of the courts.²⁵

The provinces were concerned not only that entrenched rights would undermine legislative supremacy, but also that restrictions on legislatures' policy-making abilities would occur to a greater extent at provincial, rather than federal, jurisdiction. They believed that a principal effect of entrenched rights would be the undermining of provincial control over property and civil rights.²⁶

While not all provinces opposed the principle of entrenchment, those offering conditional support had reservations

²³ Strayer, *supra*, note 17.

²⁴ H. Strom, Premier of Alberta, "Alberta's Position on Reports of Sub-Committees On Fundamental Rights and Judicial Review" (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, December 1968) at 13-14.

²⁵ *Ibid.* at 13.

²⁶ W.A.C. Bennett, Premier of British Columbia, "Opening Statement of the Province of British Columbia to the Constitutional Conference" (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 10-12 February 1969) at 7-8.

about Trudeau's approach to limitations.²⁷ The subject of limiting rights had become an important issue in the negotiations for a constitutional Charter.²⁸ Ontario, the most flexible of the provinces on the issue of entrenched rights, became the leading proponent of establishing explicit limits on entrenched rights. A brief submitted at the 1968 Constitutional Conference indicated conditional support for entrenched rights but expressed the view that "[t]hese rights should be expressed in a form which will reflect their development in our laws over the years; any new expression of them must be applied so as not to diminish any existing right recognized by law or usage."²⁹ At a subsequent meeting called to discuss constitutional reform, Ontario addressed the need to entrench limits as well as rights. The Ontario submission referred to the *European Convention on Human Rights* as an example of a Charter which "defines the difference between one man's liberty and his interference with the liberties of others."³⁰ Ontario's position was that if political rights are entrenched, the drafters should either adopt the kind of limiting mechanism contained in the *European Convention on Human Rights*, where constraints on the exercise of rights are placed in the actual section outlining the rights, or include a general limiting clause in the preamble of the constitution.³¹

As federal and provincial officials met throughout the winter of 1970-71, it became apparent that Trudeau's preferred method of stating rights without explicit limitations would have to be

²⁷ In a briefing paper, the Continuing Committee on the Constitution expressed the concern that entrenched rights could conceivably conflict with collective concerns. It urged that care be taken to ensure that certain freedoms are not guaranteed to the extent that they can be used to violate other freedoms. For example, the Committee suggested that free speech should not extend to the point that defamation of character cannot be prevented. The Committee also expressed the concern that criminal proceedings not be unduly hampered, otherwise citizens' right to the protection of the law might be weakened. Continuing Committee of Officials on the Constitution, "A Briefing Paper on Discussions within the Continuing Committee of Officials" (Ottawa, 12 December 1968) at 41.

²⁸ Strayer, *supra*, note 17.

²⁹ Ontario, "Propositions of the Government of Ontario" (Brief submitted to the Continuing Committee of Officials on the Constitution, December 1968) at 22.

³⁰ A.A. Wishart, Attorney General of Ontario (Constitutional Conference, Second Meeting, Ottawa, 10-12 February 1969) at 261.

³¹ *Ibid.*

abandoned if the federal government was to gain provincial support for entrenched rights.³² The provinces categorically rejected the principle of entrenched rights with no explicit qualifications but only a reliance on the courts to fashion the appropriate limits. They also disapproved of the 1969 proposal in which the only explicit limitation was for emergency situations. Under the 1969 proposal, only federal legislation could override the provisions in the Charter. The provinces argued that they might also have emergencies warranting limitations on rights. Moreover, the provinces felt that rights should be subject to qualifications at all times and not merely tied to emergency situations.³³

By the summer of 1971, there was general agreement for the principle of entrenching fundamental rights and freedoms embodied in what became known as the Victoria Charter.³⁴ This accord, which soon collapsed,³⁵ was the first and last time there was

³² Strayer, *supra*, note 17.

³³ *Ibid.* The 1969 proposal was criticized from other circles as well. Rights activists were unhappy with the clause claiming that it would give carte blanche to Parliament in times of war.

³⁴ "Canadian Constitutional Charter 1971" (Constitutional Conference, Victoria, British Columbia, 14 June 1971) Appendix B [hereinafter Victoria Charter]. During the conference, there was little debate about the principle of entrenched rights; the issue had been thoroughly negotiated by provincial and federal officials before the actual conference.

³⁵ See *The Constitutional Review, supra*, note 15 at 41-42:

The agreement reached at Victoria provided that the proposed "Canadian Constitutional Charter, 1971" should be reported to all eleven governments for consideration and that if its acceptance as a whole was communicated to the Secretary of the Constitutional Conference by June 28 [eleven days after the Conference concluded], governments would then take the further step of recommending the Charter to their respective Legislative Assemblies or Parliament.... By June 28, all governments except Quebec and Saskatchewan had advised the Secretary that the Charter was acceptable. Quebec informed the Secretary on June 23 that it could not recommend the Charter to its National Assembly because the clauses dealing with income security (articles 44-45 in the Charter) allowed for a degree of uncertainty which was not in keeping with the objectives of constitutional review. Coupled with this rejection was the qualification that Quebec's answer could be different if the uncertainty mentioned was removed. In the case of Saskatchewan an election had been held on June 23rd resulting in a change of government; it was therefore agreed with the then Premier-designate, Mr. Blakeney, to extend the deadline for acceptance of the Charter by that province until a new Saskatchewan Cabinet had had time to discuss the document.

Saskatchewan never did report its position.

provincial agreement for entrenched rights until 1981. A key factor in reconciling the provinces to the Victoria Charter was the decision to include a general limiting clause³⁶ (contained in Article 3, following the preamble in article 1 and a statement, in article 2, that no law of Parliament or the provincial Legislatures shall abrogate or abridge the specified fundamental freedoms). This clause, which would serve as the prototype for subsequent Charter drafts, provided:

Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the Legislature of a Province, within the limits of their respective legislative powers, or by the construction or application of any law.³⁷

The Victoria Conference was significant for more than the fact that a tentative agreement was reached on the issue of entrenching fundamental freedoms. The inclusion of a general qualifying clause revealed the philosophical trade offs regarding rights and limitations that were then, and would increasingly become, necessary to secure provincial agreement for a constitutional Charter. A clear relationship had emerged between the provinces' willingness to support the principle of entrenched rights and the scope of limitations on those rights. The provinces, especially those most concerned about the implications of a Charter for legislative supremacy, wanted limitations that went far beyond either the qualifications Trudeau expected the courts to make in the absence of an explicit directive, or the emergency situations provided for in the 1969 policy paper.³⁸

The Victoria Charter reflected the provinces' view on the appropriate relationship between rights and limits. Article 3, which included the kinds of restrictions on rights permitted in the *European Convention on Human Rights*, allowed for limitations to be made by either level of government. Further, the situations

³⁶ Strayer, *supra*, note 17.

³⁷ Canadian Intergovernmental Conference Secretariat, *Proposals on the Constitution 1971-1978* (Ottawa: Information Canada, 1978) at 68.

³⁸ Strayer, *supra*, note 17.

justifying limits on entrenched rights were described in extremely general terms; this gave both provincial and federal legislatures significant latitude in enacting legislation which conflicted with the enumerated rights. Moreover, the clause had a phrase which was designed to encourage judicial deference to legislatures' policies in the event of a conflict with one of the entrenched rights. The provision in the clause that the Charter should not prevent such limitations which arise from "the construction or application of any law" was intended to amplify the impact of the limitation clause. This phrase was to serve as a directive to the courts that in construing the limits of a law, they should not reduce the effects of limitations.³⁹

For the next four years, federal-provincial conferences were dominated by economic concerns and the subject of entrenched rights was not debated. This changed in 1978 when the federal government introduced Bill C-60.⁴⁰ This bill included a section entitled "Rights and Freedoms within the Canadian Federation"; it contained a number of enumerated rights which would apply only to the federal Parliament. The Charter in Bill C-60 was a federal initiative, but the federal government was hoping that the provinces would voluntarily adhere to its provisions.⁴¹

In drafting limitations on the rights in Bill C-60, federal officials considered three approaches: (1) a general limiting clause similar to the one in the Victoria Charter; (2) internal qualifications tailored to the specific rights and included in the actual section specifying the right; and (3) including no explicit limitations, relying exclusively on the courts to determine the boundaries of rights.⁴² There were serious problems with the second and third approaches. With respect to the second approach, the provinces had previously

³⁹ *Ibid.*

⁴⁰ Bill C-60, *Constitutional Amendment Act, 1978*, 3d Sess., 33d Parl., 1977-78.

⁴¹ An incentive for doing so was the promise that the federal government would do away with disallowance and remedial legislation.

⁴² Information obtained from author's interview with F. Jordan (19 November 1987). Jordan, a Senior Justice Official, was one of the drafters of the 1981 Charter. Jordan was Director of the Constitutional and International Law section in the Department of Justice from 1972-80 and was Senior Counsel for the Constitutional Law section between 1980 and 1982.

expressed concern that if limits were placed on some of the rights and not others, courts might interpret those rights which are silent on limits as limitless. The provinces were also worried that the courts might not allow limitations on rights beyond the specific qualifications already included.⁴³ Yet, if more detailed limitations were attached to the rights in anticipation of the provinces' concerns, the Charter would be politically embarrassing: it would read like a negative bill of rights in which every time a right was granted, it was taken back.⁴⁴ The problem with the third approach was that the provinces did not share Trudeau's faith in the ability or willingness of courts to impose the appropriate limits on rights in the absence of an explicit directive. The provinces had already indicated that the American approach, which is silent on limits, was unacceptable. Moreover, some federal officials had expressed a reluctance to rely exclusively on courts to determine limits on rights, particularly in emergency situations.⁴⁵ Given the provinces' concerns with internal qualifications and their categorical rejection of a Charter which is silent on limits, it is not surprising that the federal government chose to include a general limitation clause which was similar to what had already been agreed to six years earlier at Victoria. The limitation clause in Bill C-60 provided:

25. Nothing in this Charter shall be held to prevent such limitations on the exercise or enjoyment of any of the individual rights and freedoms declared by this Charter as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.⁴⁶

The Charter in Bill C-60 was considerably broader than the Victoria Charter, including property, legal, and equality rights. A majority of the provinces, however, were reluctant to be drawn into a discussion about entrenched rights. Those provinces which had

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Strayer, *supra*, note 17.

⁴⁶ "The Constitutional Amendment Bill: Text and Explanatory Notes" (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 30 October-1 November 1978).

been skeptical about supporting even the limited Charter in Victoria were even more resolute in their efforts to thwart this greater assault on legislative supremacy.⁴⁷ Bill C-60 eventually died on the Commons order paper when Parliament was dissolved in May 1979.⁴⁸

Despite the demise of Bill C-60, its provisions were scrutinized by members of the Special Joint Committee of the Senate and of the House of Commons on the Constitution.⁴⁹ The Joint Committee's recommendations were greatly influenced by the testimony of a number of witnesses who either opposed the wording of the limitation clause, because they thought the scope of it was overly broad,⁵⁰ or wanted the clause removed entirely.⁵¹ The Joint

⁴⁷ Although some of the provincial regimes had changed in the past seven years, the three westernmost provinces, who had been among the most reluctant to support the limited entrenchment of rights in Victoria, had virtually the same leaders in 1978. Two of the three provincial Premiers, Blakeney and Lougheed, had been in office at the time of the Victoria Conference. In British Columbia, while the leadership of the Social Credit had changed since the Victoria Conference, the government of Premier Bill Bennett was no more supportive of entrenched rights in 1978 than the previous government had been. Moreover, provincial opposition to entrenched rights was strengthened by the 1977 Manitoba election of Sterling Lyon's Conservative government. Lyon became a leading critic of the Charter and defender of "legislative supremacy."

⁴⁸ The federal government's strategy had been to enact Bill C-60 in two stages. The deadline for phase one was 1 July 1979. Aside from the Charter, phase one included the entrenchment of the Supreme Court of Canada and Senate Reform. Bill C-60 was never realized and died on the Commons order paper. Not only did Parliament fail to meet the deadline, but provincial opposition pressured the federal government to refer the question of whether it could unilaterally amend the Senate to the Supreme Court of Canada where it lost. See D. Milne, *The New Canadian Constitution* (Toronto: Lorimer, 1982) at 44.

⁴⁹ A Special Joint Committee of the Senate and of the House of Commons was established in June 1978, under the co-chair of Maurice Lamontagne and Mark MacGuigan. The mandate of the Committee was to report on government proposals related to the Constitution. The principal matter before the Committee was Bill C-60 (see *supra*, note 40, and accompanying text).

⁵⁰ One of the strongest arguments against the limitation clause came from Professor Walter Tarnopolsky who suggested that a fundamental problem with the clause was that it acts as a substitute for section 6 of the *Canadian Bill of Rights*. This section ensures that rights can be limited by the invocation of the *War Measures Act*, R.S.C. 1985, c. W-2. The danger of this in Bill C-60, argued Tarnopolsky, is that while the *War Measures Act* requires a specific proclamation by government and is subject to the political restraints that accompany such a proclamation, the limitation clause in Bill C-60 is operational at all times. Tarnopolsky suggested that the Charter could be strengthened by narrowing the construction of the clause and specifying that limitations can only apply to the fundamental rights and freedoms and not to the individual legal rights. Special Joint Committee of the Senate and of the House of

Committee reported that the instruction to the courts on how to interpret the Charter was not necessary. It recommended that the clause be eliminated and replaced by a more explicit provision basing the justification for limiting rights upon the invocation of the *War Measures Act*⁵² or similar legislation.⁵³ The Joint Committee's recommendation resembled the limitation clause in the 1969 policy paper. Like the 1969 clause, the specified grounds for limitations would be emergency situations such as war, invasion, or insurrection. Further, rights could only be qualified by the federal Parliament, which alone is empowered to enact the *War Measures Act*. But the Joint Committee's proposed clause also included a recommendation which had not arisen in earlier discussions on how to limit rights. In contrast to earlier proposals, the determination of whether limits were justifiable was to be made not by the courts, but by Parliament:

Clause 25 should be replaced by a clause which exactly specifies permissible limitations on protected rights and freedoms by the *War Measures Act* or similar legislation, and the Government should be required to justify to Parliament the invocation of such legislation.⁵⁴

The Joint Committee's recommendation was not endorsed by the federal government. What the Joint Committee sought to do was to replace the limitation provision in Bill C-60 because it felt this clause was too excessive. Ironically, the Joint Committee's recommendation was rejected by federal officials who thought that

Commons on the Constitution, Hearings, 12 September 1978 (Ottawa: Queen's Printer, 1978) (Co-chairs: M. Lamontagne & M. MacGuigan) at 12:17-18, 12:26, 12:31, 12:43, and 12:50.

⁵¹ See the testimony of Professor Ed Ratushny who, in suggesting that the limitation clause be eliminated, argued that in its absence, rights would not be interpreted in unqualified terms. Special Joint Committee of the Senate and of the House of Commons on the Constitution, Hearings, 20 September 1978 (Ottawa: Queen's Printer, 1978) (Co-chairs: M. Lamontagne & M. MacGuigan) at 16:13.

⁵² *War Measures Act*, *supra*, note 50.

⁵³ Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Second Report to Parliament, 10 October 1978 (Ottawa: Queen's Printer, 1978) (Co-chairs: M. Lamontagne & M. MacGuigan) at 20:14.

⁵⁴ *Ibid.*

its implications would adversely affect rights.⁵⁵ Federal officials knew, from past experience, that the provinces would not support a Charter in which limitations were tied to emergencies. The provinces' attitudes towards limitations on entrenched rights had changed little in the past six years. They continued to express the concern that if the general limitation clause was replaced with an emergency clause, would this mean that rights are limitless in peace times? Yet, if provincial concerns were satisfied by extending the scope of the clause to situations other than war, the federal government would, in effect, be introducing a legislative override into the Charter. Further, the idea that limitations on rights be justified to Parliament was unacceptable to Trudeau.⁵⁶

The federal government, unable to secure an agreement for entrenched rights in 1978, was in a stronger bargaining position two years later. The majority victory for the Liberal government in 1980,⁵⁷ and the subsequent "success" in the May 1980 Quebec Referendum,⁵⁸ meant that the federal government had more influence over the constitutional agenda than it had enjoyed for some time. In successfully campaigning for a "No" vote on the referendum question, the Trudeau government argued that there was a new political resolve and goodwill to reform the constitution and satisfy the government's promise of renewed federalism.⁵⁹

⁵⁵ Jordan, *supra*, note 42.

⁵⁶ *Ibid.*

⁵⁷ The Liberal government of Pierre Trudeau was returned to power on 18 February 1980. The Liberals won 147 of 282 seats. P. Normandin, ed., *The Canadian Parliamentary Guide 1981* (Ottawa: Normandin, 1981).

⁵⁸ The Quebec government ordered a referendum, to be held on 20 May 1980, involving a quest for a mandate to negotiate "a new agreement with the rest of Canada, based on the equality of nations." There was a promise of a second referendum on the actual issue of sovereignty. In the referendum, 59.56 percent of voters voted no, rejecting the proposal for negotiation, while 40.44 percent registered yes. Quebec, Directeur général des élections du Québec, *Rapport des Résultats Officiels du Scrutin: Référendum du 20 Mai 1980* (Quebec: Directeur général des élections du Québec, 1980).

⁵⁹ See, for instance, R. Romanow, J. Whyte & H. Leeson, *Canada Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 60-63 and 101-103; R. Sheppard & M. Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982) at 23-33; and J. Jacobs, *The Question of Separatism: Quebec and the Struggle over Sovereignty*, 1st ed. (New York: Random House, 1980) at 88-89.

When it became clear that an agreement with the provinces might not be possible, the federal government committed itself to a public relations campaign: it was determined to "sell" the Charter.⁶⁰ The federal government intended to entrench rights in the Charter even if this required going directly to the people over the heads of Premiers. Its strategy was to design a Charter which would appease some of the provinces' concerns with entrenched rights. But if an agreement with the provinces could not be reached, the federal government was determined to proceed unilaterally, in which event it had to have a Charter that would attract public support.⁶¹ With this delicate balance in mind, the federal government introduced a significant change in the wording of the limitation clause at the September 1980 Constitutional Conference.⁶² In response to provincial concerns, the federal government amended the clause to read:

The *Canadian Charter of Rights and Freedoms* recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.⁶³

At the time the amendment was made, Ontario and New Brunswick were the only provinces supporting the federal government's constitutional package. It was thought that Nova Scotia might be persuaded to accept the Charter. Alberta, British Columbia, and Prince Edward Island were extremely reluctant to endorse the Charter; Manitoba and Saskatchewan opposed it

⁶⁰ Strayer, *supra*, note 17.

⁶¹ *Ibid.*

⁶² Only a few days earlier, a federal Charter draft had included the following limitation clause:

The *Canadian Charter of Rights and Freedoms* recognizes the following rights and freedoms subject only to such reasonable limits as are generally accepted in a free and democratic society.

"Federal Draft - *The Canadian Charter of Rights and Freedoms*" (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980).

⁶³ "Revised Discussion Draft of September 3, 1980 - *The Canadian Charter of Rights and Freedoms*" (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980).

outright; and Newfoundland had not declared itself either way. Quebec was in a difficult position: the public declaration that the majority of Quebec citizens wanted to stay in Canada meant that the Quebec delegates had to appear to participate in the process of constitutional reform, but for political reasons, it would have been difficult for the Lévesque government to support the federal initiative.⁶⁴

The inclusion of the phrase "parliamentary system of government," which was intended to expand the scope of permissible limitations, was a federal attempt to reconcile more of the provinces to the Charter. The federal government had considered two strategies for increasing provincial support: including a legislative override, or including the reference to a parliamentary system of government in the limitation clause.⁶⁵ Federal officials chose the latter approach because they were hopeful that this broader clause would militate against some of the provinces' demands for a legislative override in the Charter.⁶⁶ While there were concerns that the new wording might encourage judicial deference to legislatures and pave the way for the courts to turn the Charter into the 1960 *Canadian Bill of Rights*, the broader limitation clause was felt to be the "lesser of two evils." With a limitation clause, even one broadly constructed, there was a chance that the courts would still curb legislative supremacy. With an override, however, federal officials were concerned that the provinces would be willing to use it; this would have serious and possibly irrevocable implications for entrenched rights.⁶⁷

The intent of the federal government in including the reference to a parliamentary system of government was revealed during the 1980-81 hearings before the Special Joint Committee of

⁶⁴ Strayer, *supra*, note 17.

⁶⁵ Jordan, *supra*, note 42.

⁶⁶ Alberta Premier Peter Lougheed first proposed the inclusion of a legislative override in 1979.

⁶⁷ Jordan, *supra*, note 42.

the Senate and of the House of Commons on the Constitution.⁶⁸ A Senior Justice Official testified that the reference to a parliamentary system of government was a deliberate choice to reflect the concept of "parliamentary sovereignty":

The reference to a parliamentary system of government, I think, was deliberate, to refer to the concept of parliamentary sovereignty and the things that go with that. I might say that some of the provinces attach a good deal of importance to this in the discussions on the Charter, the reference to the parliamentary system of government, to indicate to the Court some distinction between our system and the American system.⁶⁹

Not only did federal officials change the wording of the limitation clause but, in an important symbolic gesture, they placed it in the lead position of the Charter.⁷⁰ The more prominent placement of the clause was intended to appease the opposing provinces which wanted to emphasize that rights are subject to limitations.⁷¹ The other purpose for stating that rights are subject to limits in section 1 was to meet the kinds of criticisms that had plagued the earlier drafts: that these Charters were more concerned with limiting and qualifying rights than in protecting them. Federal drafters thought it was preferable to be "up front" about limitations so they would not be accused of hiding their intent.⁷² Despite the changes to the clause, the federal government was not able to increase provincial support for the Charter.

The Charter, including the limitation clause containing the reference to a parliamentary system of government, was scrutinized

⁶⁸ The Special Joint Committee met for the first time on 6 November 1980 under the co-chair of Harry Hays and Serge Joyal. As was the case in 1978, see *supra*, note 49, the Committee was made up of members from both the Senate and the House of Commons. The mandate of the Committee was to consider and report on the federal government's proposal for reforming the Constitution and to propose whatever amendments the Committee considered necessary.

⁶⁹ Tessier, Special Joint Committee of the Senate and of the House of Commons on the Constitution, Hearings, 12 November 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 3:78.

⁷⁰ In earlier Charters, the clause had assumed a less prominent placement. The limitation clause was placed in Article 3 in the Victoria Charter and in Section 25 in Bill C-60.

⁷¹ Jordan, *supra*, note 42.

⁷² *Ibid.*

in 1980-81 by the Special Joint Committee of the Senate and of the House of Commons on the Constitution. The hearings were significant because the debate about the presence and wording of the limitation clause reflected the witnesses' conception of the nature of rights and limitations. Moreover, the hearings provided first hand explanations of the government's view of the function and purpose of section 1.

Testimony revealed that the federal government considered the principal purpose of the limitation clause to be twofold: (1) to ensure that rights are not interpreted by legislatures or courts as being absolute, and (2) to underscore that traditional limits on rights should be honoured by the courts. In giving evidence before the Joint Committee, Deputy Justice Minister Roger Tassé described the intention of the federal drafters as the following:

In effect, Mr. Chairman, that Section 1 is meant to bring forward the concept that these rights that are spelled out in the Charter ... are not absolute rights.

If you just take, for example, the freedom of expression, there are limits to the freedom of expression that already are spelled out in the Criminal Code and that will continue and should continue when a Charter of Rights like this is entrenched.

What the Section is meant to do is to bring that concept not only to the legislatures but also to the judges because in effect the judges when they are faced with cases where government action or parliamentary action, legislative action is being tested and being challenged, in effect they have to decide whether limits, restrictions, that may have been imposed, because against these rights are not absolute, are reasonable ones.⁷³

The overwhelming majority of the witnesses appearing before the Joint Committee were strongly opposed to the wording of the clause. The testimony came from a diverse group of individuals and organizations, including civil liberties groups, university professors, women's groups, ethnic associations, legal groups, policemen, and crown counsel. Many of the witnesses were willing to see a general limitation clause in the Charter, as long as it was more narrowly constructed. Some opposed the clause in its entirety. As in 1978, the witnesses' principal concern with the limitation clause was that the wording created too broad a standard for permissible limitations.

⁷³ R. Tassé, Deputy Minister of Justice, Special Joint Committee of the Senate and of the House of Commons, Hearings, 12 November 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 3:14-3:15.

Critics called section 1 the "bathtub section," because the clause makes it so easy for lawmakers "to pull the plug on human rights and freedoms,"⁷⁴ and argued that section 1, as worded, would permit so many encroachments upon entrenched rights that it would seriously impair the ability of the Charter to protect citizens' rights. Some critics went so far as to suggest that the clause must be deleted, otherwise its presence would open the door to "the very abuse to the supremacy of Parliament which the Charter is intended to check."⁷⁵

One of the most influential critics, in terms of prompting changes to the wording of the limitation clause, was Walter Tarnopolsky, then president of the Canadian Civil Liberties Association. Tarnopolsky was critical of the reference to a parliamentary system of government. He argued that judges, who are not anxious to change the traditional Canadian relationship between legislatures and the courts, might interpret the reference to mean the retention of parliamentary supremacy and be unwilling to overturn legislation which encroaches upon Charter rights.⁷⁶ Of even more concern to Tarnopolsky, however, was the phrase "generally accepted." Tarnopolsky argued that this phrase would not be an adequate safeguard of fundamental human values given that many of the government actions in our history, which are now considered to have involved the infringement of human rights, were generally accepted at the time. Tarnopolsky's concern was that the argument might be made that whatever Parliament enacts is "generally acceptable."⁷⁷

⁷⁴ P. Cooper, Vice-President, Coalition for the Protection of Human Life, Special Joint Committee of the Senate and of the House of Commons, Hearings, 9 December 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 22:32.

⁷⁵ N. Schultz, Associate General Counsel, Public Interest Advocacy Centre, Special Joint Committee of the Senate and of the House of Commons, Hearings, 18 December 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 29:20.

⁷⁶ W. Tarnopolsky, Special Joint Committee of the Senate and of the House of Commons, Hearings, 18 November 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 7:9.

⁷⁷ *Ibid.* Tarnopolsky argued that there have been a number of historical incidents in which minorities' rights were denied but which were accepted at the time, such as the treatment of Japanese Canadians in World War II, and the discrimination against Jehovah's Witnesses in Quebec in the 1940s and 1950s.

Another criticism, which prompted federal officials to rethink the role of the limitation clause, was that it did not clearly determine where the onus should lie for demonstrating the reasonableness or unreasonableness of a limitation. Tarnopolsky argued that the onus should lie with the party who favours the restriction.⁷⁸ Not only should the government bear the onus for demonstrating the reasonableness of a limitation, but the clause should require that limitations be prescribed by law:

... [T]he onus has to be upon the one who argues that there are restrictions, and that has to be put in terms of being either necessary or demonstrably justifiable or demonstrably necessary; but the onus has clearly to be upon the one who argues in favour of the restriction and, which is important, it has to be prescribed by law, because that - and this is as far as I will go into the question of the pluses and minuses of the Bill of Rights; because the most important aspect of the Canadian Bill of Rights is not so much in the invalidation of parliamentary legislation as it is in the control of administrative acts, police acts, and with respect to that the limitations that are provided in international instruments require that they be provided specifically by law.⁷⁹

IV. FINAL WORDING

There is little doubt that the overwhelming criticism that the clause made it too easy for legislatures to limit rights pressured the federal government to rewrite section 1. In explaining changes in the clause, Justice Minister Jean Chrétien stated that the purpose of the amendments was to narrow the limits which could be applied to the rights and freedoms. Chrétien suggested that the federal government itself preferred a narrower limitation clause but had gone along with the broader wording as a concession to the provinces.⁸⁰ Chrétien indicated, however, that while the government was agreeable to narrowing the application of the clause, it was not willing to eliminate section 1 entirely; it felt the clause was necessary to maintain an equilibrium between the rights of citizens, to be

⁷⁸ *Ibid.* at 7:10.

⁷⁹ *Ibid.*

⁸⁰ Jean Chrétien, Minister of Justice, Special Joint Committee of the Senate and of the House of Commons, Hearings, 15 January 1981 (Ottawa: Queen's Printer, 1981) (Co-chairs: H. Hays & S. Joyal) at 38:42.

protected by the courts, and the ability of elected representatives to legislate.⁸¹ The amended clause, which is the phrasing that now appears in the *Charter*, provided:

1. *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.

One of the most important changes in the wording was the replacement of the idea that rights are subject to such limits "as are generally accepted" by the more rigid requirement that rights be subject "only to such reasonable limits prescribed by law." Moreover, the reference to a parliamentary system of government, which many critics thought would result in judicial deference to Parliament and the provincial Legislatures, was removed, and the phrase "demonstrably justified in a free and democratic society" was included to squarely place the onus for limiting a right on the party seeking to limit it.

The change in the wording of the clause was significant not only because it made it more difficult for legislators to limit rights, but also because this was the first time the provinces' view was not represented in the drafting of the clause. The majority of the provinces' preference for legislative supremacy, and their concomitant demand that limitations on rights be generous and explicit, had largely informed the debate of the preceding decade. The provinces' preferred clause, such as the one in the Victoria Charter, included permissible limitations which were so generally stated that, when accompanied by the directive that the Charter should not prevent limitations arising from the "construction or application of any law," it effectively allowed legislatures to determine the scope of limitations.⁸² The assumption in the provinces' preferred clause was that limitations would almost always be justified by virtue of being enacted. The intended judicial deference to legislatures' policies, which had been at the heart of provincial demands and had been reflected in the Victoria Charter, Bill C-60, and the September 1980 Charter, was replaced by a

⁸¹ *Ibid.* at 38:44-45.

⁸² A similar effect was gained in the 1980 clause by including the reference to a parliamentary system of government.

stringent requirement that limitations be prescribed by law, demonstrably justified, and consistent with a free and democratic society.

It might seem strange that in 1981, the federal government was willing to ignore the provinces' demand for a broadly constructed clause. Given that the federal government had previously felt it necessary to accommodate the provinces' demand, why was it now willing to act without provincial consent? The answer to this lies in the dynamics of the constitutional process of 1980-81. The federal government had already committed itself to selling the Charter. It had promised renewed federalism and was determined to have a revised constitution. The Joint Committee's review of the proposed Charter advantageously served the federal cause. Once negotiations had broken down in the fall of 1980, the federal government's strategy became one of focussing attention on the Joint Committee.⁸³ As the hearings progressed, it soon became apparent that the vast number of submissions were in favour of strengthening the Charter and making it more difficult for legislatures to limit rights. The Joint Committee hearings served both to build up public momentum for the Charter and to give the federal government an effective bargaining chip by which to deny provincial demands for a "weaker" Charter and a broader limitation clause. By the end of the Joint Committee process, the federal government was able to go to the provinces and defend the new, more rigid, clause with claims that the public supported a stronger Charter and that the Joint Committee, with representation from all three political parties (the Liberal Party, the Progressive Conservative Party and the New Democratic Party), had fully debated and deliberated the issue of rights and their limits and had strongly endorsed a more narrow limitation clause.⁸⁴

The opposing provinces had the following reactions to the amended clause: they wanted (1) to remove entire chunks of the Charter, particularly legal rights; (2) to reinstate the reference to a parliamentary system of government in the limitation clause; or (3) to go back to the kinds of limitations that were provided for in the

⁸³ Strayer, *supra*, note 17.

⁸⁴ Jordan, *supra*, note 42.

Victoria Charter.⁸⁵ The federal government, however, refused to budge. At this point, the government considered its bargaining strength sufficient to enable it to adopt the position of "take it or leave it."⁸⁶ The revised wording of the clause did not change despite the provinces' efforts. The critical issues to be resolved no longer included the nature of the limitation clause. By November 1981, the only issue left for debate on the scope of rights was whether there would be a legislative override and to which provisions it would apply.⁸⁷

V. OVERVIEW OF SECTION 1

The debates about the method of limiting rights and the scope of limitations suggest differing views on what the nature of rights should be in Canada. One view is reflected in the testimony of the majority of witnesses who appeared before the 1978 and the 1980-81 Joint Committee Hearings on the Constitution. These witnesses, who either wanted significant changes in the wording of the 1980 clause or, in the absence of changes, its complete elimination from the Charter, shared a similar conception of what entrenched rights should look like. While they acknowledged that rights can never be absolute and must be subject to limitations, they argued that legislatures should not be allowed to infringe upon protected rights unless they can demonstrate that the policy at issue either facilitates the functioning of the democratic system (the values of which, the testimony seemed to presume, are both obvious and uncontested) or is necessary because of an emergency situation. This view implies that the Charter is exhaustive of the fundamental values in Canada. Charter rights, therefore, should have primacy over all other policy goals. For those who view rights in these terms, the purpose of the limitation clause is really nothing more than to provide the self-evident statement that rights are not absolute. A similar effect could be achieved without a limitation

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

provision. In the absence of an explicit directive, courts would fashion the appropriate limits on rights. As one commentator suggests, "[I]f a judge sees the threat to some basic aspect of democracy by giving a certain interpretation to a certain right, there is no question but that will be taken into account."⁸⁸

It was this conception of entrenched rights that informed the criticism, implicit in the 1980-81 Joint Committee Hearings, that the drafters of the limitation clause were fickle for their inability to decide whether Canada should have entrenched rights. The drafters were told repeatedly to make up their minds about what kind of political system they wanted for Canada: were we to have *legislative supremacy* or a *Charter regime*? Professor Cohen, for example, admonished the drafters to choose one system or the other.

To the extent that you want to have an equilibrium between a charter regime and parliamentary supremacy, you must accept the fact that, once you introduce a charter regime, parliamentary supremacy is modified for ever to that extent. That is a plain legal and political fact, and you cannot have the best of both worlds, except in an emergency....⁸⁹

The suggestion that Charter drafters were fickle would not have bothered the majority of provinces which remained skeptical about the virtues of entrenched rights throughout the debate. Far from being inconsistent, most of the provinces did not waver in their position that if rights are entrenched, they must be accompanied by explicit limitations to ensure legislatures' ability to enact policies which may conflict with Charter rights.

To fully understand the position of the majority of the provinces on the issue of limits on rights, it is helpful to consider the debate underlying the discussions about entrenched rights. At the time of the 1980-81 Joint Committee Hearings, the larger issue about whether or not to entrench rights was still far from being resolved. An important consideration in the debate continued to be whether legislatures or courts are best suited to make policy decisions about the appropriate limits on protected rights when they

⁸⁸ Ratushny, *supra*, note 51 at 16:13.

⁸⁹ M. Cohen, Special Joint Committee of the Senate and of the House of Commons, Hearings, 18 November 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 7:86.

conflict with governmental requirements in the name of collective interests. At times, this conflict over how Canadians' interests are best protected appeared irreconcilable. The Premiers had repeatedly refused to support a Charter in which limitations were left exclusively for courts to determine or were tied to emergency conditions. They continued to argue that a limitation clause must be sufficiently broad to permit governments significant latitude in determining their policy agendas, especially in the event that policies conflict with entrenched rights. Saskatchewan Premier Allan Blakeney was a leading critic of the suggestion that the limitation clause should be more narrowly constructed. His support of the 1980 limitation clause, in particular, the reference to a parliamentary system of government, was consistent with his belief that legislatures, rather than courts, are better equipped to determine the appropriate limits on rights. In arguing for the retention of the 1980 clause, Blakeney made no secret of the fact that he viewed this section as a good way of moderating the impact of entrenched rights:

I could certainly go along with entrenching and with a non obstante clause, because basically the courts are good places to decide individual cases of human rights issues, but bad places to decide broad social policies in the guise of deciding issues of human rights.

Therefore what we need is some basis whereby the legislatures can over-ride if, in the course of deciding an issue about a single citizen, they have made a decision which affects broad public policy.

I had thought that the resolution before this Committee was not too bad in that regard, because it has Section 1 which is a kind of non obstante clause in advance. You may think that is too comprehensive, but the suggestion of deleting Section 1 raise [sic] all my apprehensions, because we are then left with a very large number of judgments to be made by judges....⁹⁰

The Premiers' insistence that the limitation clause be broadly constructed was not only an attempt to temper the impact of the Charter; it also represented the rejection of the idea that a choice must be made between legislative supremacy and a Charter regime.

One might be tempted to suggest that the dynamics of the constitutional process of 1980-81 enabled the federal government to

⁹⁰ A. Blakeney, Premier of Saskatchewan, Special Joint Committee of the Senate and of the House of Commons, Hearings, 19 December 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 30:39.

choose a Charter regime. By "winning" the battle over the limitation clause, the federal government was able to deny provincial demands for a broadly constructed clause and ensure that the Charter reflected its own view, as well as that of those critics who thought the earlier clause nullified the significance of entrenchment, of the appropriate relationship between entrenched rights and limits. But there are reasons to question whether the adoption of a more narrowly constructed limitation clause ensured that the Charter reflected the critics' view concerning limits on entrenched rights and whether the federal government shared the critics' view of the relationship between rights and limits.

Despite Cohen's suggestion that Charter drafters must choose between two mutually exclusive political systems, it is difficult to conclude that the inclusion of a more rigid limitation clause has in fact resulted in the replacement of legislative supremacy by a Charter regime. While the provinces were unable to secure their preferred limitation clause, they were successful in negotiating a legislative override. Federal officials and Charter commentators will be quick to argue that by the fall of 1981, the discussions about the override were not related to the limitation clause: the wording of the limitation clause had crystallized and the issue for debate was whether there would be an override and to which provisions it would apply.⁹¹ Nonetheless, it is important to remember the federal government's strategy of the preceding year. In its attempt to secure provincial support and avoid the political difficulty of acting unilaterally, the federal government had considered the legislative override. Instead, it decided to broaden the scope of the limitation clause and include the reference to a parliamentary system of government, hoping this would militate against provincial demands for an override. The federal government assumed that the provinces would not demand a legislative override if entrenched rights were

⁹¹ On the eve of the accord, the provinces, minus Quebec, proposed a settlement which, among other things, included the entrenchment of a Charter with a legislative override. The federal government conceded the override to apply to legal and equality rights on the basis that the entrenchment of these rights might raise special problems for the provinces. The provinces, however, wanted the override to extend to fundamental freedoms as well. In what has been described as a "classic example of raw bargaining," Trudeau was persuaded to accept the extension of the override to fundamental freedoms, but in return, the override would be limited to a five year period. R. Romanow, J. Whyte & H. Leeson, *supra*, note 59 at 211.

subject to a broad limitation clause encouraging judicial deference to legislators' policy goals. It seems reasonable to suggest, however, that once the broad limitation clause was withdrawn and it was made clear that legislatures would bear the burden of demonstrating the justification for limits on entrenched rights, the override became more important to the provincial Premiers, who considered it an alternative means of buffering the impact of the Charter.

It should also be questioned whether the federal government shared the critics' view of the relationship between rights and limits. It is not clear that the Trudeau government's view on the nature of limitations, in the period following the two policy papers of the late 1960s, reflected a coherent or singular intent. The reason for making this claim is that until the 1980-81 Joint Committee Hearings, the federal government had not seriously considered the issue of where the onus should lie for proving the validity or invalidity of a limitation. A Senior Justice Official revealed that the drafters had not addressed the issue of onus until early 1981, when Tarnopolsky criticized the limitation clause for being unclear in this regard. Tarnopolsky's criticism forced the federal drafters to re-examine the impact of the limitation clause on protected rights and to consider the issue of onus of proof. Up until that time, federal drafters had assumed that when the courts determined limits, they would address the issue of onus.⁹² That the drafters had not addressed the issue of onus before the 1980-81 Hearings is also suggested in testimony before the Joint Committee by Barry Strayer, Assistant Deputy Justice Minister (Public Law):

... [I]t was the belief of the drafters that by going to these words demonstrably justified or can be demonstrably justified, it was making it clear that the onus would be on the government, or whoever is trying to justify the action that limited the rights set out in the charter, the onus would be on them to show that the limit which was being imposed not only was reasonable, which was in the first draft, but also that it was justifiable or justified, and in doing that they would have to show that in relation to the situation being dealt with, the limit was justifiable.

So whereas before there was no indication as to who had the onus of proving that the limit was reasonable or unreasonable, or whether it was generally accepted or not generally accepted. This seems to put the onus, appears to put the onus on the

⁹² Jordan, *supra*, note 42.

government that has to try to uphold some kind of limit to the rights set out in the charter.⁹³

Given the broad applicability of the limitation provisions that had preceded the revised 1981 clause, it seems remarkable that the federal government had not addressed the issue of onus. The most plausible explanation is that the federal position regarding limitations on rights, particularly in the period preceding 1981, was not as far from the provinces' view as one might expect from scrutinizing the rhetoric of the Charter debate. The proposed limitation provisions in the Victoria Charter, Bill C-60, and the 1980 clause, which referred to a parliamentary system of government, were so broadly constructed that, in the absence of a directive as to where the onus should lie for proving the reasonableness of a limitation, they would almost certainly have encouraged judicial deference to legislatures. These early clauses would have provided legislatures significant latitude to determine the scope of limitations. Without an explicit directive that legislatures demonstrably justify limits, courts would have leaned heavily in favour of upholding limits on rights; the individual litigant would likely have assumed the difficult burden of demonstrating that a limitation is unreasonable. Given that an intended consequence of the early limitation clauses was to encourage judicial deference to legislatures, it is unlikely that the federal government could have shared the critics' conception of rights – that decisions about limits on rights be removed from the political arena – and yet not be concerned with the issue of onus.

The federal government hardened its view on limitations in the final stages of the Charter debate. When faced with the overwhelming criticism during the Joint Committee Hearings that the limitation clause, as worded, undermined the purpose of the Charter, federal officials were forced to re-examine their view on the impact of limitations. The Trudeau government, after more than a decade of pursuing entrenched rights, was firmly committed to selling the Charter. The government would have been extremely sensitive to the criticism that Charter drafters were fickle for not being able to decide between legislative supremacy and a Charter

⁹³ B. Strayer, Assistant Deputy Minister, Department of Justice (Public Law), Special Joint Committee of the Senate and of the House of Commons, Hearings, 15 January 1981 (Ottawa: Queen's Printer, 1981) (Co-chairs: H. Hays & S. Joyal) at 38:45.

regime. Moreover, it would have been a great embarrassment for the federal government if it, as the leading proponent of entrenched rights, endorsed a limitation clause which was widely criticized for rendering Charter rights a "verbal illusion."⁹⁴ This charge was even more damning in light of the unbridled optimism of Liberal government members' promises that a Charter would forever "protect" Canadians' rights.⁹⁵

VI. CONCLUSIONS

Section 1 reflects a requirement that governments demonstrably justify limitations on rights, which is far more rigid than what was envisaged by either the provinces or the federal government in the years preceding the 1980-81 Joint Committee Hearings.⁹⁶ But this does not mean that the clause represents the choice of a Charter regime at the expense of legislative supremacy in the Cohen sense. Had federal officials followed up on Cohen's recommendation that the general limitation clause be dropped and replaced by a provision qualifying rights only in emergency situations,⁹⁷ perhaps the *Charter* could be interpreted as the embodiment of a completely new regime. But any such reading of the *Charter* would be predicated upon the assumption that the purpose of section 1 is only to explicitly provide what is both obvious and inevitable: that rights are not absolute.

This interpretation of section 1 is simply not consistent with what federal or provincial drafters had in mind for the clause. The evolution of the limitation clause reveals that both federal and

⁹⁴ A. Borovoy, General Counsel, Canadian Civil Liberties Association, Special Joint Committee of the Senate and of the House of Commons, Hearings, 18 November 1980 (Ottawa: Queen's Printer, 1980) (Co-chairs: H. Hays & S. Joyal) at 7:25-26.

⁹⁵ Canada, *House of Commons Debates* at 3704 (15 October 1980).

⁹⁶ The 1968 and 1969 Trudeau publications, which suggested that explicit limitations, other than an emergency clause, were not necessary, might seem to contradict this claim. But it is important to remember that these papers were highly abstract, and their purpose was not to represent firm government policy but to place the issue of entrenched rights on the political agenda.

⁹⁷ Cohen, *supra*, note 89 at 7:86.

provincial officials were in agreement that the purpose of the clause was twofold: to ensure that rights are not interpreted as being absolute, and to protect the legislatures' abilities to impose limits on protected rights. Federal and provincial officials may have differed in their opinions of how much latitude legislatures should have in enacting legislation that conflicts with entrenched rights. But the fact that the federal government agreed to construct a clause which encouraged judicial deference to legislators, and was not troubled by the lack of a directive as to where the onus should lie for proving the reasonableness of limits, strongly suggests that the federal government's view on the nature of limitations was not conceptually different from that of the provinces. Even when the federal government felt compelled to narrow the applicability of the limitation clause in 1981 in response to the overwhelming criticisms of witnesses who testified before the Joint Committee Hearings, it explicitly rejected proposals that section 1 be removed entirely. The reason given was that some form of a general limiting clause was necessary. The task was to construct the "proper balance between the protection of individual rights and the legitimate power of any legislative body."⁹⁸ Moreover, the federal government's concession, however grudgingly made, to subject the provisions in the *Charter* to a legislative override is further evidence that the purpose of the *Charter* is not to eliminate legislatures' abilities to enact policies which conflict with specified rights.

The evolution of the limitation clause reveals an ongoing and at times rigorous discourse about what latitude legislators should have in pursuing collective values which conflict with entrenched rights. The different conceptions of the nature of rights and limitations make it difficult to ascribe a singular intent to the clause. What is clear, however, is that the inclusion of the limitation clause was not merely to indicate the obvious fact that rights are not absolute. The evolution of the clause reveals that the Charter drafters, both federal and provincial, intended that legislators, in certain circumstances, be able to ensure the primacy of non-enumerated values over specified *Charter* rights. It may neither be possible nor desirable, however, to determine from the legislative history what that latitude should be.

⁹⁸ Chrétien, *supra*, note 80 at 38:44.