WHAT THE FRAMERS OF THE CHARTER INTENDED

Graham Fraser

What did the framers of the *Charter of Rights* intend as to the roles of Parliament and the courts at the time of its adoption in 1981-82? Graham Fraser, who covered that momentous debate, looks back and notes that some of the principal actors are still on the scene more than 20 years later, playing a leading role in the debate on same-sex marriage. Jean Chrétien, then justice minister in the Trudeau government, was asked at the time by NDP member Svend Robinson whether the Charter would exclude discrimination on the grounds of sexual orientation. "That will be for the court to decide," Chrétien replied at the time. "It will be open-ended." Roy McMurtry, then Ontario attorney-general and a key player in the Charter negotiations, later became chief justice of Ontario and was an author of the Ontario appeal court's 2003 ruling in favour of same-sex marriage. Fraser concludes the present outcomes are no surprise to the fathers of the Charter.

Quel rôle les créateurs de la *Charte des droits* et libertés souhaitaient-ils réserver au Parlement et aux tribunaux lors de son adoption en 1981-1982 ? Graham Fraser, qui avait couvert ce débat majeur, note que certains de ses protagonistes sont toujours au devant de la scène et jouent, 20 ans plus tard, un rôle clé dans l'actuel débat sur le mariage entre conjoints de même sexe. Alors ministre de la Justice du gouvernement Trudeau, Jean Chrétien s'était vu demander par Svend Robinson, du NPD, si la Charte exclurait la discrimination fondée sur l'orientation sexuelle. « Ce sera aux tribunaux d'en décider, avait-il répondu, la question reste ouverte. » Roy McMurtry, alors procureur général de l'Ontario et acteur clé des négociations entourant la Charte, fut par la suite nommé juge en chef de cette province et a rendu en 2003 un jugement de la Cour d'appel de l'Ontario favorable au mariage entre conjoints de même sexe. La situation actuelle, conclut Graham Fraser, ne risque guère d'étonner les Pères de la Charte.

Shortly after 5.30 on the afternoon of September 16, there were a remarkable and rare few moments of high tension in the most unlikely of places — the House of Commons.

After the ritual of a roll call vote, there was a lengthy pause as the clerks of the House of Commons huddled and consulted and pored over their list of MPs. Then, Bernard Patry, the Liberal member for Pierrefonds-Dollard, was told that he was listed as having voted both for and against the Canadian Alliance motion amending their motion reaffirming the traditional definition of marriage. Patry rose and made clear that he had only voted once: against the motion.

The amendment had countered Prime Minister Jean Chrétien's major argument with Liberal dissidents: that Parliament was being asked to use the notwithstanding clause to protect the definition of marriage as a union between a man and a woman.

But the delay continued. MPs looked at each other and shrugged as the minutes dragged on. Finally, Speaker Peter Milliken rose and announced that there had been a tie, 134 for and 134 against (the first tie vote in the House in 40 years), and that he would break the tie by voting against the motion. The second vote, on the harder resolution that would have asked Parliament to use the notwithstanding clause by taking "all necessary steps" to protect the sanctity of marriage, failed by 137 votes to 132 votes: a squeaker.

Ironically, the Liberal fear of the notwithstanding clause may have defeated the Alliance motion, but it has deprived Parliament of the dialogue with the courts that many MPs say they want. For the history of language legislation and Supreme Court decisions shows that, in fact, the notwithstanding clause works. By using the notwithstanding clause in 1989 to limit the use of English on signs in Quebec, the late Robert Bourassa may have lost several

Cabinet ministers and contributed to the defeat of the Meech Lake Accord. But the five years that he gained meant that when Quebec did introduce new legislation that met the requirements of the Charter, it was widely accepted.

September 16 was an emotional day and a tense debate. Canadian Alliance leader Stephen Harper set the tone two weeks earlier, when he told reporters that the Liberal government used the courts as a back channel to achieve what they didn't want to do in Parliament.

"They wanted to introduce this 'same-sex marriage' through back channels," Harper told reporters on September 4. "They didn't want to come to Parliament. They didn't want to go to the Canadian people and be honest that this is what they wanted. They had the courts do it for them, put in the judges they wanted, then they failed to appear, failed to fight the case in court."

It was an intriguing claim that played to the argument that Parliament had abandoned its role on social policy to the courts, and that the courts had deviated from the original intentions of the framers of the *Charter of Rights*.

Harper brushed away suggestions that one of the key judges involved in the cases he so disliked had been Progressive Conservative and named by a Progressive Conservative prime minister. But beyond that, a reading of the record shows that there has been a parliamentary agenda that anticipated the decisions of the courts, and that the courts have been doing precisely what the framers intended.

All day, as the House of Commons debated and voted on the Alliance motions, Svend Robinson had an interesting piece of paper on his desk.

It was a photocopy of an exchange that he had had with Jean Chrétien 22 years earlier, when Robinson was the 28-year-old NDP justice critic and Chrétien was Pierre Trudeau's minister of justice, responsible for shepherding the *Charter of Rights and Freedoms* through Parliament.

For on January 16, 1981, a Special Joint Committee on the Constitution was studying the *Charter of Rights and Freedoms*. Chrétien was before the committee and being questioned by Robinson.

Near the end of his questioning, Robinson said that he had a final question.

"Immediately following the passage of the Charter would it be your intention that the courts could interpret this Charter to exclude discrimination on the grounds of sexual orientation?" Robinson asked.

Justice Minister Chrétien made it clear that the debate over the original intent of the framers of the Constitution, which has so dominated judicial thinking in the United States, would have no place in Canada's Charter politics. The debate over rights would, in large part, take place in courtrooms; Chrétien had made it clear from the outset that the Charter was, as he put it, "open-ended."

"It might," Chrétien replied. "That will be for the court to decide, it is open-ended."

"But at the time of the passage of this Charter you would not preclude that as a possibility?" Robinson continued.

"We say other types of discrimination and we do not define them," Chrétien said. "It will be for the courts to decide."

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Over two decades later, when the House of Commons rejected the attempt by the Canadian Alliance to keep the traditional definition of marriage, Robinson was beaming with triumph and reminiscent of how the issue had evolved.

"I recall so well the debate in the Constitution Committee in 1981, when I proposed a motion to specifically include sexual orientation in Section 15," Robinson said. "Jake Epp, who was speaking on behalf of the Conservatives, said 'We can't include every barnacle and eavestrough in the Constitution of Canada.' Well tonight, we've moved a long long way from the days of barnacles and eavestroughs."

The process is not over. Same-sex marriage is legal in Ontario and British Columbia; civil unions for gay couples are legal in Quebec. The nature of the division of jurisdiction between the federal and provincial governments in Canada means that the federal government cannot introduce a civil union for same-sex couples, as that is in provincial jurisdiction. But the appeal of the British Columbia and Ontario court decisions has pressured the federal government to act. With only two choices — legalizing same-sex marriage or introducing the notwithstanding clause to prevent the Charter from applying to legislation defining marriage as only a union between a man and a woman — the federal government has chosen the former. It has referred its legislation to the Supreme Court for advice on how to reconcile the issue of same-sex marriage, and the reference is unlikely to be heard or written until months after Chrétien has retired from politics.

But already some elements of the debate are clear.

In the United States, there has been an ongoing debate for decades between those who feel the US Constitution and the *Bill of Rights* should be interpreted strictly as they were perceived by the framers and

Courtesy Hugh Segal

The Backroom Boys: Ontario Attorney-General Roy McMurtry, Justice Minister Jean Chrétien, and Saskatchewan Attorney-General Roy Romanow (right) were key backroom figures in cutting the 1981 constitutional deal. Hugh Segal, then principal secretary to Ontario Premier Bill Davis, looks on. More than 20 years later, Prime Minister Chrétien authored legislation allowing same-sex marriage pursuant to a ruling by the Ontario Court of Appeal and its chief justice — Roy McMurtry.

those who feel that the Constitution should evolve and grow. That debate intensified almost two decades ago, when Ronald Reagan's Attorney-General, Edwin Meese, called for "a jurisprudence of original intent," suggesting that the courts should be guided by the original intent of the founding fathers, the framers of the Constitution: an attack on judicial activism, and "reading in" rights to the Constitution. The debate continues in the United States Supreme Court today.

In Canada, as Chrétien made clear, the "original intent" was to let the courts decide, and that the process would be open-ended.

From the outset — Justice Willard Z. "Bud" Estey's 1984 decision in *Law Society of Upper Canada v. Shapinker*, the Supreme Court's first Charter decision — the Charter was defined, as the *British North America Act* had been, as a work in progress. Estey quoted Lord Sankey of the Judicial Committee of the Privy Council — which, until 1949, was the last word on constitutional issues: "The British North America Act planted in Canada a living tree capable of growth and expansion within its limits."

Estey went on to write that "The fine and constant adjustment process of…constitutional provisions is left by a tradition of necessity to the judicial branch."

Moreover, two of the key "framers" of the *Charter of Rights and Freedoms* have continued to play a critical role in its evolution and growth.

Chrétien, as justice minister, travelled across the country in the summer of 1980 seeking a consensus among his provincial counterparts on the constitution. René Lévesque's Parti Québécois had lost the referendum in May, and in that referendum campaign, Trudeau had promised "change" — left tantalizingly (and many have bitterly felt misleadingly) vague during the campaign. The decisive 60-40 "No" vote gave Trudeau the mandate he wanted for constitutional change: patriating the *British North America Act*, and amending it with a *Charter of Rights and Freedoms*.

Chrétien was central to those discussions. He was there at the table at the First Ministers Conference when the premiers strongly rejected the idea of a

Charter of Rights and Freedoms. He was deeply involved in the formulation of the Charter and Trudeau's attempt to introduce it unilaterally, which was blocked by the Supreme Court. Chrétien played a central role in the last-ditch effort to reach agreement with the premiers in November 1981 and the famous "kitchen negotiations" with then Saskatchewan Attorney-General Roy Romanow and then Ontario Attorney-General Roy McMurtry, which produced the compromise that resulted in nine provinces joining the federal government.

The other person who proved to be critical to the evolution of the Charter was McMurtry. After working as a lawyer for almost 20 years, he was elected to the Ontario legislature in 1975 and immediately named attorney-general by Progressive Conservative Premier William Davis. In 1985, Brian Mulroney named him as Canada's high commissioner to London and in 1991 to the Ontario Court of Justice. It was there that he wrote the judgment that accelerated the federal government's plans to propose same-sex marriage legislation.

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But, as Chrétien made clear to Svend Robinson, he always saw the Charter as "open-ended" rather than a final word; dynamic rather than static.

It did not take long for the dynamism of the Charter to become clear. The equality rights provisions did not come into force until three years after the Charter was signed in 1982, and in 1985, Prime Minister Brian Mulroney named Toronto MP Patrick Boyer to chair a committee to study the issue of the equality rights, and to make recommendations on how they should be applied.

That report, entitled "Equality for All," unanimously affirmed that the Charter should be interpreted to include sexual orientation — and that the *Canadian Human Rights Act* be amended to add sexual orientation as a prohibited ground of discrimination.

"What witnesses told us about the experiences of homosexuals in Canada indicates that they do not enjoy the same basic freedoms as others," the committee concluded. "Their sexual orientation is often a basis for unjustifiably different treatment under laws and policies, including those at the federal level, and in their dealings with private persons. We have therefore concluded that 'sexual prientation' should be read into the general open-ended language of section 15 of the Charter as a constitutionally prohibited ground of discrimination."

Two decades later, the Boyer Report represents an interesting response to the argument that Parliament has given up social policy to the courts.

For the committee laid out how Parliament should respond to section 15, which came into force on April 15, 1985. And, after weeks of consultations with 250 organizations and individuals, generating 2,500 pages of testimony, the report set an agenda for Parliament that proved to be remarkably prescient in its interpretation of the Charter.

Before the courts made it clear that the government would be required to pay pensions to gay couples (*Egan v. Canada*, 1995) and grant Charter rights to immigrants and refugee claimants (*Singh v Minister of Employment and Immigration*, 1985), Boyer and his fellow committee members suggested that this was what Parliament should do. When Parliament failed to respond to the Charter, the courts were forced to do so.

Last April, the Court of Appeal of Ontario issued its decision on same-sex marriage, written by McMurtry, James MacPherson, and E.E. Gillese; like Estey before them, they quoted Lord Sankey on the living tree, concluding that "to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's progressive constitutional interpretation." In other words, in Canada, original intent means change.

Far from failing to participate, as Harper claimed, the federal government argued that marriage, as an institution, does not produce a distinction between opposite-sex and same-sex couples.

"In our view, the (federal government's) argument must be rejected for several reasons," the judges wrote. Canadian governments gave legal recognition to marriage, Parliament and provincial legislatures build "a myriad of rights and obligations around the institution of marriage," and "same-sex couples are denied access to those licensing and registration regimes."

Much as Boyer had concluded with respect to pensions, the Ontario judges concluded that "the existing common law definition of marriage violates (same-sex couples') equality rights on the basis of sexual orientation…(and) the violation of (their) equality rights under s. 15(1) of the Charter cannot be justified in a free and democratic society under s.1 of the Charter."

A direct line can be drawn from Chrétien's remark in 1981 to the decision that McMurtry helped write in 2003. And the living tree is growing a few more leaves.

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