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**SACRED TEXT: Charter matters, but not much**

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I have been asked to reflect on the 25th anniversary of the constitutional reforms of 1982.
In 1981, a day or two after I finished law school, I began my legal career as a constitutional adviser to the Province of Saskatchewan. It was during the middle of the debate over Prime Minister Trudeau's "patriation" package.

Since then, I have been a participant and sometime-critic of three largely-failed efforts at further changing the 1982 Constitution -- Canada's "sacred text" -- and in a variety of court cases testing the meaning of the 1982 amendments.

So what do I really think?

* The 1982 changes to the letter of the written constitution -- to the 'Sacred Text" -- have made a moderate difference in Canadian life. They have not fundamentally reshaped it.

* The foundational law of Canada includes much more than the "sacred text." There is a second tier of important laws like the human rights code, privacy statutes, electoral statutes and the Canadian Health Act. These laws can be passed or amended by ordinary bills, rather than going through any special amending process.

* Our own Manitoba is liable to wallow in sullen mediocrity not roil with "spirited energy" and largely because of a dysfunctional political culture.

* Many needed reforms in this province and Canada generally can be achieved by changing ordinary laws and even attitudes rather than tampering with the "sacred text."

Let me begin, however, by looking at formal constitutional change of 1982. Its centrepiece was the Canadian Charter of Rights and Freedoms.

For Pierre Trudeau, the charter had many potential virtues.

One of them was to fulfill his promise that there would be "change" if Quebecois rejected separation in the 1980 referendum. Perhaps few Quebecois expected the "change" to include a centralized human rights system, as opposed to more powers for Quebec. Polls then and now, however, show that Quebec's population actually tends to approve of the charter.

Trudeau also wanted the charter to be a focal point of a new Canadian identity. The "two founding peoples" concept was already being challenged by changes to traditional immigration patterns and by

multiculturalism. The charter could be a modern organizing principle and point of pride. History has to some extent proven him correct.

Trudeau included minority language guarantees in the charter. He did not want Canada to become divided into an all-francophone Quebec and an all-anglophone elsewhere. So the charter contains rights for both official languages to have their own schools. This has probably helped some of these communities to survive.

Trudeau also believed that the protection of rights was a worthy end itself. Trudeau was in many ways a liberal individualist. (Not that he was always consistent, or that he extended this belief to economic matters). He believed in the importance and political equality of every person, regardless of their ethnic affiliation. He did not believe that rights should vary with whether you belonged to a "founding people." The courts, not politicians, were entrusted with the final say over how to interpret rights, and determine whether limits on them are "reasonable". In theory, some court rulings can be overriden by the "notwithstanding clause," but that has almost never been used.

The Supreme Court of Canada decided early that the charter would have a real life. It would be a moderately "activist court." It has not, however, been radical.

For example, the Court has pursued a middling and muddling approach to free expression. It does not like blanket restrictions on particular kinds of expression (such as advertising by professionals) but it will tend to uphold more balanced ones. It has also upheld laws that are seen as defending "human dignity," such as laws against pornography -- but its interpretation of those laws has in fact been highly liberal. It is in the area of "equality" that the Court has had the biggest impact. Common law relationships and gay partnerships have won recognition. Even here, the charter probably only secured a result that society was moving towards anyway. We would probably have same-sex civil unions by now anyway, with the same rights as traditional marriages, but without calling it "marriage".

Everyone who studies the matter probably has a list of charter decisions they dislike. The lists will vary sharply among observers. There are notably few cases, however, that have produced lasting public resentment.

Considering the number of cases decided, why is that?

First of all, most cases are decided after being looked at by a trial judge, a provincial court of appeal, and nine Supreme Court judges and a cadre of clerks. The collective nature of the overall process tends to place an outside limit on eccentricity. Also, if the Court does go too far in one direction, it can reinterpret or even openly overrule itself later on.

Often when the Court strikes down a law, it indicates that only a fine-tuning of the law is needed, not a complete overhaul. Conversely, if the Court upholds a law, often that is not the end of the matter. Opponents can still try to use political means to have it changed.

At the end of the day, most policy is still made by governments, not the courts. In the areas where the Court does have some say using the charter, on any particular matter, practical realities may predominate over the Court's pronouncements.

Much of the charter is concerned with the criminal justice system. In this respect, the courts have fine tuned the system, but not shifted the balance in any fundamental way. The Court has, among notable achievements, used the charter to expand the requirement of prosecutors to disclose evidence. This reform has improved the fairness and efficiency of the system, probably avoided some wrongful convictions, and has not impaired effective law enforcement.

If you think the criminal justice system is too lax, that has little or nothing to do with the charter. Blame Parliament for the content of the laws, inadequate resourcing by government, or softheartedness by police, prosecutors or judges.

If you think it is too harsh, the charter is not going to do much more to soften it. The courts are generally not going to stand in the way of mandatory minimum sentences or proceeds-of-crime laws, and have not recognized the way in which they can give excessive bargaining power to prosecutors when pleas are bargained.

Is the system too slow? The Court tried to mandate speedy trials, but backed down when this proved practically impossible. Today, an intolerable percentage of inmates in the system are awaiting trial, rather than being punished for actual convictions. Are there too few prosecutors or inadequate availability of legal aid lawyers? Not much the courts will or even can do about that.

The "individualist" part of the charter has not fundamentally reworked either Canadian society or the state itself. It can be a powerful reminder, however, that in a mass society governed by massive governments, the plight of even a minority of one matters.

I acted as counsel in one case for a family that could not usefully access the federal "parental leave" program. Their child was so ill at birth that she could not be brought home from hospital for almost a year -- by which time the benefit was essentially unavailable. We argued successfully that the rigid rules were discriminatory on the basis of disability. The rules were later changed, perhaps in part because of our case. In the meantime, an injustice to one family was corrected.

That was enough by itself for the charter to matter.

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