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Sleepers in Constitution

Collective rights create distinct charter issues

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WHILE Trudeau himself was a liberal individualist, his 1982 constitutional project made many provisions for rights of groups like Protestants or Catholics in Ontario or aboriginal peoples across Canada. They are not universally available. To access them, you have to be attached to a particular historic community. The content of the right depends largely on historical practice, not on any transcendent principle.

The 1867 constitution recognized the rights of 1867-era religious minorities to have their own education systems. The Charter of Rights and Freedoms contains a clause saying that it should not be read as taking away any of those rights. In the Adler case in 1996, the Supreme Court went even further. Some groups in Ontario were saying, in effect, "We are not asking you to take away any Roman Catholic school rights. Just give us the same rights. The charter says we are supposed to be equal." The court was not swayed. It again insisted that historic group rights and modern-day individual rights are separate and distinct pillars.

The "sacred text" was amended twice in 1982 to deal with denominational school rights. Quebec abolished them. Newfoundland and Labrador modified theirs. Ontario, however, has left in place the special status of Roman Catholic schools. It looks like it will indefinitely disregard a 1999 ruling by the United Nations Human Rights Committee that the inequality involved violates international guarantees. A highly emotional and contested issue has been the extent to which Quebec's provincial government should have the authority to limit individual rights, such as free expression, to protect the cultural and linguistic identity of that province. In the 1988 Ford case, the Supreme Court said that the "reasonable limits" clause gives Quebec some room to do so -- such as requiring pride of place for French on commercial signs. The court effectively acknowledged the distinctive character of Quebec could be taken into account in limiting charter rights such as free expression.

The Meech Lake Accord tried in 1987 to add to the "sacred text" a phrase that would encapsulate Quebec's character as "a distinct society." Where it failed was in not making any real attempt to define the phrase or place it in context. The subsequent Charlottetown Accord would have been much sounder. The distinct society clause there referred to Quebec's linguistic make-up and civil law tradition, rather than being entirely open-ended. The clause was also placed inside a "Canada clause" that set out a wide range of Canadian values, including respect for individual and minority rights.

The 1982 charter added a new kind of group right to the Canadian constitution. It said that if you live in a mostly English-speaking province, but your first language is French, you have the right to send your children to a French-language school. As an olive branch to Quebec nationalists, Trudeau agreed, however, that Quebec only had to recognize the rights of an anglophone parent who herself went to an English-language school in Canada.

Another limitation on human rights in the 1982 Constitution concerns "affirmative action programs." The "equality" guarantee in the charter contains two provisions. The first generally calls for equal treatment for every individual, regardless of ethnicity or gender and other forms of group affiliation. The second clause says the first provision cannot be read as to "preclude" programs to remedy the conditions of disadvantaged groups. The framers of the Constitution were wary of decisions by the United States Supreme Court that put limits on such programs.

Some liberal individualists regret that Canada took this path. These programs assign rights and burdens on the basis of group affiliation, rather than only individual merit, sometimes using stereotypes that are crude or passé. Affirmative action programs may be justified in some narrow circumstances. As the U.S. courts have ended up saying, however, they should be narrowly crafted, mostly temporary in nature, and reflect actual and current disadvantage. A downtrodden group from yesterday may become a local or even national majority today. It may well have the resources and internal organization to not only survive, but thrive, in the routine political competition for government benefits.

Trudeau's package contained a "sleeper." A single clause -- which was almost removed from his package -- "recognized and affirmed the aboriginal and treaty rights" of aboriginal people. Trudeau himself would say a few years later that his original thinking on aboriginal rights had been "too liberal." Once a believer in bringing to an end the special status of aboriginal peoples, he was now prepared to see them become a full-fledged part of the constitutional system.

The "aboriginal rights" clause contained no definition of those rights. It also did not contain a "reasonable limits" provision. It was not subject to the "notwithstanding clause."

As with charter rights, the Supreme Court developed a middle-of-the-road approach. "Aboriginal rights," it said, were based on long-standing historical practices of various aboriginal communities. "Aboriginal title" to land, for example, could be established by use and occupation of land going back to before European contact. At the same time, the court limited its recognition of rights in various ways. It has tended to read history as conferring rights of aboriginal peoples to make "personal use" or resources, but not to exploit them on a "commercial scale."

The court has also decided that aboriginal and treaty rights are, in effect, subject to "reasonable limits." A province retains the right, for example, to expropriate land held under aboriginal title for hydro development. The province might first, however, have to show that it has a real need for the intrusion, that it was as limited as possible, that it has attempted patiently and in good faith to negotiate an agreement on fair terms with the group involved, and that it is going to pay reasonable compensation. The court has also encouraged Canada and the provinces to negotiate agreements with aboriginal peoples, rather than having disputes settled in the court. It has tended to issue judgments that give broad guidelines -- a certain amount of "bargaining chips" -- to each side, and leave the details to be determined by political agreement.

Across Canada, modern day agreements between aboriginal peoples and governments are reshaping the relationship. Some groups have entered into modern land claims agreement. Due to a 1983 amendment to the "sacred text," these count the same as historic treaties. Other groups have been negotiating self-government agreements.

Controversy continues on the extent to which federal or provincial governments should be insisting that, in governing themselves, aboriginal communities should be required to respect mainstream notions of democracy and individual rights. Some argue that aboriginal groups should be free to determine the appropriate balance in their communities for themselves. Others insist that core Canadian principles -- or at least international principles -- of human rights must apply everywhere. The actual practice in land claims agreements and self-government deals have been for both sides to agree that the charter will indeed apply to aboriginal self-government.

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