



HANSARD – HOUSE OF COMMONS DEBATE – APRIL 20, 2004

SPEECH BY JOHN CUMMINS IN REPORT STAGE

AMENDMENT DEBATE

Mr. John Cummins: Mr. Speaker, the issue here is the application of the Charter of Rights and Freedoms or the failure of the Charter of Rights and Freedoms to apply here, and it is to that issue that I would like to address my comments.

The Charter of Rights and Freedoms is designed to shield individuals from the arbitrary actions of their government. The charter provides individuals with a tool to challenge their government. All Canadians are covered by the charter.

Yet, while all Canadians are covered by the charter, all Canadians are not equally protected by the charter. Some government actions are shielded from the application of the charter.

Section 25 of the charter acts to shield government actions involving aboriginal rights from challenges under the charter; that is, if an individual challenges a government action involving the exercise of aboriginal rights, the government can shield itself from the challenge by claiming that the arbitrary government action involves aboriginal rights.

Charter challenges involving aboriginal rights trigger the section 25 shield.

What has section 25 got to do with the right of Westbank residents to use the charter to challenge arbitrary rights of the Westbank government?

Section 25 has everything to do with the right of Westbank residents to use the charter to challenge the Westbank government. Section 25 will only be available to the Westbank government to shield itself from a challenge under the charter if it can claim that its actions involve the exercise of an aboriginal right. The Westbank agreement makes invoking the section 25 shield very easy.

The Westbank agreement states throughout that the purpose of the agreement is to “recognize” and “implement” an aboriginal right of self-government.

In establishing the Westbank government as an aboriginal right, the agreement triggers section 25 of the charter. This gives the Westbank government the power to shield itself from the challenges of its own residents. All the Westbank government needs to do when challenged is to point out that it is exercising an aboriginal right. End of story.

That is the problem in a nutshell.

For those who think this is a pipe dream, they should give their heads a shake. In Nova Scotia an appeal was made under the Canadian Human Rights Act that a band government was discriminating against a non-native husband. On appeal to the Federal Court of Appeal, the band argued that it had an inherent right to govern and as such it could invoke section 25 of the charter to shield itself from the prohibition against discrimination found in the Canadian Human Rights Act.

The court said:

...[the band] acted pursuant to its inherent powers of self government...this inherent power...is one of the 'rights or freedoms that pertains to the aboriginal peoples of Canada' shielded from erosion by the Charter through s. 25

That was the band's opinion.

The Federal Court of Appeal rejected the band's argument holding that the band government had not been charged under the section 15 equality rights

provision of the charter and therefore it could not invoke section 25 as a shield against the equality provisions of the Canadian Human Rights Act.

The court said:

...the answer to the [the band's] contention is three-fold. First, section 25 of the Charter has been held to be a shield which protects [aboriginal] rights...

Second, the named respondents have complained that the appellant's refusal to pay social assistance to them is a contravention of section 5 of the CHRA. Since they did not allege that the appellant had violated section 15 of the Charter, section 25 of the Charter has no application here. Third, the appellant has not established by evidence the unique right which they are asserting and which they say is included in section 25

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Third, [the band] has not established by evidence the unique right which they are asserting and which they say is included in section 25

The Westbank government has a step up on the Nova Scotia band. It will never have to make the argument that it has an aboriginal right of self-government and as such that its actions are shielded from charter challenge. The Westbank agreement does all that. It states clearly and unequivocally that the Westbank government is a representation of the aboriginal right of self-government. Any time it faces a charter challenge it need only point to the agreement with the crown that will have been ratified by Parliament. Its actions will automatically be shielded from charter challenges.

   (1015)

In a recent decision, the British Columbia Supreme Court has ruled that section 25 offers a complete defence, or what it called a “complete answer”, to challenges under the charter involving section 7, legal rights of life, liberty and security of person; section 15, equality rights; and section 3, democratic rights of citizenship. It stated:

...Section 25 of the Charter is a complete answer to this argument.

In any case, s. 25 of the Charter itself is as much an answer to a submission concerning sections 7 and 15(1) as it is an answer to the s. 3 submission.

The challenges based upon the Canadian Charter of Rights and Freedoms are answered by s. 25 of the Charter.

Based upon the dangerous wording of the Westbank agreement, it will always be open to the Westbank government to affirm that its arbitrary actions against its own residents are merely an exercise of its aboriginal right to govern and therefore is shielded from a resident's challenge under the charter.

Do members of Parliament really want to create the Westbank government as a charter-free zone where residents will have lost their rights to challenge their own government?

Do members of Parliament really intend to give the Westbank government a shield to protect itself from any and every challenge, no matter how arbitrary its actions have been and how legitimate the challenge might be?

Do members of Parliament really want to create a Westbank government that will have free rein to mistreat its residents and to have that government's actions shielded from any and all challenges under the charter?

The Minister of Indian Affairs acknowledged in the Senate Committee on Human Rights on March 22 that the real and growing conflict between the protection of what he called the “individual rights” identified in the charter, equality rights, political rights and the legal rights to life, liberty and security of person, and what he called the “collective rights” protected by section 25. It acknowledged:

...there is the necessity to reconcile the principles contained in...the Charter of Rights and Freedoms with those contained in section 25, which protects Aboriginal rights....

The Minister of Indian Affairs' acknowledgment of the conflict between the charter rights and section 25, aboriginal rights, differs considerably from his statement on March 10 before the House of Commons committee studying the Westbank bill and agreement. There he said that:

The agreement...recognizes that all first nation members, like all Canadians everywhere, are subject to...the charter.

His statement is patently untrue when an aboriginal right is involved and he acknowledged as much in the Senate Committee on Human Rights on March 22.

All problems in aboriginal governance will not be cured by merely ensuring that everyone has, without question, the right to challenge their government if they believe their fundamental rights enumerated in the charter have been impaired but all problems will be demonstratively worse at Westbank if Westbank government becomes a charter-free zone simply because Parliament has ratified an agreement that expressly identifies the Westbank government as an aboriginal right.

By expressly identifying Westbank government as an aboriginal right, members of Parliament will have, whether intentionally or inadvertently, shielded Westbank government from challenge under the charter and left Westbank residents stripped of their basic constitutional rights, rights that have developed in Anglo-Canadian law beginning with the Magna Carta.

Section 91(24) of the Constitution makes what happens on Indian lands the responsibility of Parliament. Washing their hands, like Pilate, of what happens on Indian lands and at the same time blocking access to the charter by making Westbank government an aboriginal right, will not make members of Parliament less guilty but it will make them impotent to act when problems occur.

Senator Beaudoin, a recognized expert on the Constitution and human rights, said as much to the Minister of Indian Affairs when he chastized the minister on March 22 in the Senate human rights committee stating:

You say that it is up to the Aboriginals to do this. I do not agree. It is our duty here to do that. There are two orders of government in this country—the federal and the provincial. The Aboriginal people have collective rights, but the power to improve the situation is within the Parliament of Canada and I do not think that we should wait for the existence of a third order of government because the power is with the Senate and the House of Commons

Our esteemed colleague in the other place got it right as he so often does. Let us not get it wrong by establishing the Westbank government as an aboriginal right and therefore outside of and shielded from charter challenge. It would be wrong to strip Westbank residents of their charter rights. Let us not do it.

   (1020)

The agreement never claims that the charter of rights fully applies to the Westbank government. Section 32 of the agreement makes it very clear that the charter has limited application to the Westbank government. It states:

The government of Westbank First Nation and Council in respect of all matters under its authority are bound by the provisions of the Canadian Charter of Rights and Freedoms with due regard for section 25 of the Charter--

More accurately, the government of Westbank and its council are effectively bound by the charter when they choose to be bound. When the Westbank government wants to opt out of the charter, it can use the aboriginal rights defence. It need only assert that its actions are merely an exercise of an aboriginal right to govern, as set out in the agreement and put in force by Parliament.

Mr. Speaker, I am aware that my time has expired, but if there was unanimous consent, I would like to continue. It should not take me too much longer.

 

The Deputy Speaker: The member might want to indicate to the House in his request for unanimous consent to extend his intervention, by how many minutes?

 

Mr. John Cummins: Probably less than five, Mr. Speaker.

 

The Deputy Speaker: Does the House give its consent to the member for Delta—South Richmond to extend his intervention by less than five minutes?

Some hon. members: Agreed.



Mr. John Cummins: Mr. Speaker, simply put, the agreement gives the Westbank government an umbrella to shield itself any time a resident seeks to reign on its arbitrary actions with a challenge under the charter.

The lawyer for the Westbank, Micha Menczer, when challenged in the House of Commons committee studying the Westbank bill and agreement, claimed that critics must not believe in the charter, that their complaint was really with section 25 of the charter rather than with the agreement. He stated:

I think that's a misreading. More importantly, section 25 is part of the Charter of Rights and Freedoms. Westbank and the Government of Canada have no power to change that, either by an agreement or even by legislation. That is a matter of constitutional change.

A convenient lawyer's trick, but no, the problem is with the agreement's action to make the Westbank government an aboriginal right triggering section 25 and knocking out the protection of the charter for Westbank residents. The problem is not section 25 of the charter.

The problem is the sections in the agreement that state that the agreement is both a recognition and an implementation of the aboriginal right of self-government. It is those sections of the agreement that trigger section 25. It is the aboriginal right of self-government provisions of the agreement that effectively allow the Westbank government to shield itself from the application of the charter any time it wishes to do so.

In a paper entitled “Westbank self-government agreement will strip away fundamental Canadian rights”, Tanis Fiss, Director for the Centre for Aboriginal Policy Change of the Canadian Taxpayers' Federation, observed:

This is a disastrous piece of legislation. If Members of Parliament pass this agreement, Canada's elected officials will deny certain Canadians the

right to vote in community elections and in so doing will strip the fundamental rights of Canadian citizens.

The proposed Westbank Self-Government Agreement, Bill C-11, will shield the Westbank government from application of the Charter of Rights and Freedoms. By doing so, Westbank laws would be immune from a Charter challenge. In other words, Westbank laws could discriminate between residents of Westbank based on their race, religion or gender and the victim of discrimination could not use the Charter to strike down the offence.

Once entrenched in the Constitution based on the premise of an “inherent right” to self-government, this means Section 25 of the Constitution will also apply to the Agreement. The equality rights of the Charter do not apply to Aboriginal communities under Section 25 of the Constitution. This will be the case no matter what is written in the Agreement because the Constitution is the supreme law of Canada.

The federal government plans to use the Westbank self-government agreement as a template for further negotiations. This piece of legislation will set a precedent which other Indian Bands will follow. Clearly, this Agreement will have national repercussions for generations of Canadians.

Incredibly, all parties in the federal parliament plan to support the measure and have supported it through the first two readings. Given the many flaws of this Agreement, Canadians can only hope their elected Members of Parliament come to their senses and vote against the Agreement.

Mark Milke, in an article in the *Calgary Herald* entitled “Native agreement flawed”, stated:

One significant problem with the Westbank agreement is that it will deny natives and non-natives some of their charter rights. Defenders already claim that because one section in the Westbank document references it as bound by the Charter of Rights and Freedoms that such freedoms are thus secure. No, they are not. The same section of the agreement the defenders will point to also has this caveat about such charter freedoms: “with due regard for Section 25...”

That's a tip-off. Section 25 grants aboriginal and treaty rights immunity from legal challenges launched from other charter sections.

Christopher Harvey, a lawyer who analyzed the agreement, argues that the new Westbank deal infringes on charter rights and does so through a clever (and improper) juxtaposition of aboriginal claims to self-

government combined with the Section 25 rights noted above: “It amounts to an abdication of the sovereign law-making and executive authority of the Crown in Parliament. Its effect on the people residing and working in Westbank is to remove many of the fundamental political and legal safeguards that support their freedoms and security. It is surprising to see basic legal rights which have been acquired gradually over many years of political struggles being so abruptly discarded”.

If Parliament intends residents to have the right to use the charter to challenge the Westbank government, it must ensure that those sections of the agreement that refer to the aboriginal right of self-government are not brought into law. If Parliament intends to give the Westbank government an umbrella to shield itself from challenges under the charter, then it should pass Bill C-11, the Westbank law act, into law without amendment.

   (1025)

However, a healthier choice of action dictates that Parliament consider the serious implications of shielding the Westbank government from the charter. Westbank residents, like Canadians everywhere, deserve the protection of the charter. It is the right of Canadian citizenship, yet they will not have charter protection if this bill is approved in its present form.

 