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POLICY REPORT for Parliamentarians

Courtesy of the Association for Reformed Political Action (ARPA) Canada

Thomas D'Arcy McGee, one of Canada's founding fathers, once said of Canada, "We have had liberty... liberty to our hearts' content. There is not on the face of the earth a freer people than the inhabitants of these colonies."¹ The question before us today is, have we still such liberty?² Do we have freedom from the stifling hand of State? Do we have creative, religious and economic freedom? The importance of the question and the benefits of the concept for the individual, for society and for government are immeasurable. An improper understanding of human rights will result in the flouting of the rule of law, delays of justice, regulatory paralysis, economic stagnation and the infantilization of citizens.

Canada is founded upon principles that recognize the supremacy of God and the rule of law.³ Our government is constitutionally prevented from limiting the rights and freedoms of its citizens unless it can demonstrably justify those limits in a free and democratic society.⁴ Even though these well-known phrases from our *Charter of Rights and Freedoms* were only explicitly made a part of our Constitution in 1982, our country and citizens have historically enjoyed freedom and liberty from governments. However, in the last five decades, we have seen huge increases in the size of the government at both the federal and provincial levels. As the size of the government increases, so does the level of taxation and regulation coupled with a consequent decrease in the ability of the individual citizen to conduct his or her affairs as he or she sees fit.

Leaders must lead. We trust this policy report will provide our Members of Parliament with a broader understanding of policy alternatives in order to promote greater liberty in Canada. We hope it will give insight into the diversity of positions within society on this issue. The approach taken herein is grounded in Canadian history and law, the nature of the human condition, the evolving nature of Canadian society, and a desire for achievable solutions.

This policy report is not meant to be like that of the United Nations which critiques Canada on human rights, the availability of food and its environmental record, while seemingly turning a blind eye to nations with atrocious human rights records, starving populaces, and unmitigated pollution. Canada still remains, on many fronts, one of the beacons of freedom in this world.

However, we cannot rest on our laurels. There is room for improvement in Canada, and increasingly so. Freedom and liberty have an impact far beyond that of personal preference.

*The price of freedom
is eternal vigilance⁵*

How free are we?

The Crown in England once ruled by "divine right": the monarch was placed over the people by God and was God's representative on earth. A text from the Christian Bible typically used in coronation ceremonies was Psalm 72, a psalm that implies that God puts the king over the people.⁶

Interestingly, the Psalm talks extensively about the role of the Crown: he is to "judge [the] people with righteousness" (v. 2); "defend the cause of the poor... and crush the oppressor" (v. 4); "pity the weak and the needy and save the lives of the needy. From oppression and violence he redeems [them]" (vv. 13,14).⁷ It's obvious that the original intention for the role of the Crown is to *serve* the people, not to be served by the people.

Freedom & Liberty

SEPTEMBER 2012

But, as proven by history, monarchs can and do go bad. As the famous truism goes, “Power tends to corrupt and absolute power corrupts absolutely.”⁸ The free people in England pushed back and in 1215 forced the Crown to recognize several rights of his subjects. The *Magna Carta*, penned that year, required King John to proclaim certain liberties and to accept that his arbitrary will was no longer supreme law. For example, no freeman could be punished except by the law of the land.

This was the beginning of our rule of law and due process, enshrined today in our legal rights as outlined in sections 7 - 14 of the *Charter*. Lord Denning once described the *Magna Carta* as “the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot.”⁹ One might wonder if the despot (an unfettered monarch) has now been replaced by the despotic “arbitrary authority” of an amorphous bureaucracy or by the tyranny of the majority in disposing of the rights of the minority (or vice versa).

The role of the State has ballooned from “protecting the innocent and punishing the wrongdoer” to societal ubiquity. Though it rightly has authority over core issues like immigration, criminal law and national defence, it is also continually asserting itself in

“It is seldom that liberty of any kind is lost all at once”
- David Hume

smaller and more invasive ways: the government intervenes in relationships between parents and their born children, regulates education of the youth, monopolizes and distributes our health care, limits our speech, interferes in our economic relationships, asserts an environmental Puritanism and provides ever-more redistributive social benefits. The government protects and defends us, feeds us, makes us better when we are sick, settles our disputes when our marriages break

down, educates and raises our children (starting at younger and younger ages), rewards our charitable giving, punishes our criminal behavior, and even ensures our burial is conducted properly. In short, the government is a part of the Canadian’s life from the cradle to the grave in one form or another, either overtly or covertly.

True concept of the rights of citizens

With a government so involved in our lives, is it possible to be truly free? Or does freedom come about only when the State alleviates us from the ills of life? When speaking of liberty and freedom, we should ask: What is it from which we must be freed? Yes, we need freedom from foreign and domestic enemies, but citizens also need freedom from state interference. A government that interferes too much in the personal affairs of its citizens risks becoming (if it has not already become) tyrannical. Tyranny is not a progressive force, neither morally nor economically. It infantilizes its subjects, reduces initiative, and impoverishes the spirit. Liberty then is the right of citizens to conduct their personal affairs and pursue personal ambitions within the confines of moral law without state interference. Liberty does not mean freedom from poverty, envy, hurt feelings or child-rearing – nor does it mean living a comfortable life on the public dime. Liberty is the freedom to grow, and to help others grow. It is voluntary, not coercive.

Edmund Burke, reflecting on the French Revolution, gave a proper explanation of the rights of citizens:

[Citizens] have a right to do justice, as between their fellows, whether their fellows are in public function or in ordinary occupation. They have a right to the fruits of their industry and to the means of making their industry fruitful. They have a right to the acquisitions of their parents, to the nourishment and improvement of their offspring, to instruction in life, and to consolation in death. Whatever each man can separately do, without trespassing upon others, he has a right to do for himself; and he has a right to a fair portion of all which society, with all its combinations of skill and force, can do in his favour. In this partnership all men have equal rights, but not to equal things.¹⁰

Why freedom?

We believe that our freedoms are essential. Section 2 of the *Charter* outlines four fundamental freedoms: religion (including conscience), expression (including the press), assembly, and association. These freedoms are fundamental to a properly functioning democracy, and ought never to be violated by government unless absolutely necessary for our free and democratic society to function as such.

“...but freedom of speech, religion and the inviolability of the person are original freedoms which are at once the necessary attributes and modes of self expression of human beings...”
- Mr. Justice Rand, Supreme Court of Canada¹¹

Although the Supreme Court of Canada has stated numerous times that there is no hierarchy of rights, the very plain reading of section 2 requires an understanding that fundamental freedoms are the foundation on which other rights and freedoms can be built. So, although these four freedoms don't have a hierarchy between them, they certainly are fundamentally more important than other rights as outlined in, for example, human rights codes. Thus, a government should never override its citizens' fundamental freedoms in an attempt to protect recently contrived rights.

Freedom and liberty come from...

Where do our rights and freedoms come from? If we can't determine precisely where they *do* come from, can we, at the very least, eliminate where they *do not* come from?

RIGHTS NOT CREATED BY A CONSTITUTION

The adoption of a constitution or of a charter of rights does not, in itself, give us rights. We are wrong to think that because our rights are written down they will necessarily be protected. Examples of meaningless documents purportedly enshrining freedom and liberty have been asserted in Russia and China, among other nations.

Has our *Charter of Rights and Freedoms* brought about more freedom or less? With the inclusion of a "reasonable limits" clause (section 1 of the *Charter*), the power of the *Charter* to shield Canadian citizens is compromised and susceptible to legislative and judicial abuse. As long as an arguably "reasonable" rationale has sufficient public support at the time, governments may feel free to interfere with individual liberty. Think of the internment camps for Canadians of Japanese and German heritage that were established during World War II. Furthermore, a propensity to ideological bias in an unelected Supreme Court (the final arbiter of whether government infringement is reasonable) may make it easier to dismiss such infringements of freedom as "reasonable" in a free and democratic society.

We argue that constitutions and charters do not create rights and freedoms. Rather, these codes simply *recognize* pre-existing rights and freedoms. Our *Charter* recognizes the rights of Canadian citizens. These rights have always existed, but in 1982 (and in 1960 with the *Bill of Rights*) our lawmakers made a conscientious choice to codify recognition of those rights in order to remind future governments to refrain from infringing upon them.

RIGHTS NOT CREATED BY MAN OR THE STATE

Having established that rights do not come from the Constitution, do they come from fellow human beings, a sort of "rights by convention" as argued by Rousseau? If rights come from man, then how is the apartheid era of South Africa any more morally condemnable than any other era? That is to say, men give rights and recognize rights, so how could we argue that their failure to recognize the rights of blacks for a time was wrong? What is the benchmark? The majority's feelings on the issue? The consensus of academic elites? Or can we now say that South Africa has emerged from an era of injustice?

If rights do not come from fellow humans, do they come from the State? If we say that rights come from the State, we face the same conundrum as the earlier proposition. In fact, followed to its logical conclusion we would have to admit that Auschwitz was right and that Nuremburg was wrong. After all, everything that the Nazis did to the Jews (and many other groups including homosexuals, the disabled and Gypsies) was, strictly speaking, *legal*. If human rights are created by the State, they can be defined by the State, limited by the State and ultimately removed by the State.

TRUE ORIGIN OF RIGHTS AND FREEDOMS

So, if rights and freedoms do not come from the Constitution (but are recognized by the Constitution) and are not created by man or by the State, where do they come from? We all recognize that there are certain freedoms that exist and need to be protected. We recognize unfairness and injustice. What option is left? Looking to the United States, another option is that rights are given to humanity by its Maker. The *American Declaration of Independence* begins: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."¹²

"...the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions ...men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law..."
- Preamble, Canadian Bill of Rights, 1960

Human rights are not created by man or by the State or by constitutions. We can possess a genuine right only if it comes from Someone who has the authority to grant it. John Warwick Montgomery, who amassed 11 earned degrees in philosophy, theology, and law, understood this well: “Human rights logically require an identification of human value and pose the question of ‘someone’

The State does not bestow rights. It protects the rights bestowed by God.

– Someone! – who has ‘the right, authority or power’ to give them. And the quest to define rights cannot be separated from the need to justify them.”¹³ As such, constitutions and states must recognize and respect the human rights of people for the very fact that they are human, created *Imago Dei* –in the image of God. A secular society may well squirm at such a suggestion. Yet after hundreds of years of trying to do so, secularism remains incapable of explaining why rights are inherent and inalienable apart from God. We can’t

throw God out of the public square and still hold onto the same notion of rights that has grounded Western law and policy for centuries. If rights do not have a moral foundation it won’t be long before another despot, or society of despots, decides that rights for others are meaningless and can be disposed of when convenient.

Role of the State: Liberty and the Rule of Law

In light of the discussion above, what is the role of the Crown (or government) today in a representative democracy?¹⁴ Looking to our Constitution, there is no explicit mention of the role of the Crown.¹⁵ However, a genuine objective for the Crown in Canada is for the maintenance of peace, order and good government.¹⁶ This is a satisfactory summary of its role: the Crown is to be focused on stability and security and concerned for the equal protection of all of its citizens.

Our government is to be guided by the will of the people. In this way the objective of stability in a representative democracy is met: truly “government of the people, by the people, for the people” (to borrow from Lincoln’s Gettysburg Address). To govern based on “the will of the people” does not mean that individuals give their own meaning to laws, since this would transform community to anarchy. Instead, people protect the scope of their individual freedoms by collectively granting a measure of their liberties to government. Citizens surrender some of their freedom to ensure that each person will be afforded fair and equal protection by the State.¹⁷ The philosopher John Locke argued that the primary role of the State is to protect the life, liberty and property of its citizens and to do so without discrimination between them.¹⁸ Each citizen should be protected equally, but in such a way that infringements on their liberties are minimized.

The role of maintaining stability and security is intrinsically linked to the other role of the Crown, that is, to promote and defend the rule of law. Our *Charter of Rights and Freedoms* has legitimacy only because our country “is founded upon principles that recognize... the rule of law.”¹⁹ The Supreme Court of Canada explains: “The ‘rule of law’ is a highly textured expression [...] conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”²⁰ To maintain good government requires that the rule of law be maintained and that justice not only be done but also be seen to be done.

We see that there is a need for government to recognize that it ought not to interfere in the individual lives of its citizens; we require freedom *from* government. However, citizens also require freedom from oppressive neighbours. The role of the State is to protect the good and punish the bad.²¹ The State is thus mandated to interfere in the individual lives of its citizens in order to enforce and uphold the rule of law. Therefore, the maintenance of a justice system that treats each citizen equally is paramount. The rule of law means that “*everyone* is subject to the law; that no one, no matter how important or powerful, is above the law.”²² One law, one justice system, all treated equally by the law. This is necessary to maintain the trust and democratic engagement foundational to the legitimization of the democratic process.

And so, D’Arcy McGee did not end his speech on February 9, 1865 after noting that we have much freedom. He continued by stating that citizens also have great responsibility: “The two great things that all men aim at in any free government are liberty and permanency.” Freedom to conduct one’s personal affairs also requires the stability of a society in which to do that. Therefore, “it is necessary that there should be respect for the law... the virtue of civil obedience.”²³

The modern conception of positive rights

The modern conception of rights (typically positive rights purportedly bestowed by the State) and the push for their more explicit tabulation came at the cost of our traditional and fundamental freedoms (negative rights, where the State must refrain from interfering with the citizen, or must protect the citizen from those who would so interfere). The table to the right shows the losses we have suffered.

We must recognize that personal responsibility and individual liberty go hand in hand – if we want to have a free society, we also need to take more personal responsibility. If someone’s opinions offend us, we should use our own freedom of

expression to explain why and to counter the argument. If we can’t get a job with a certain organization, we apply somewhere else. Politicians should not be afraid to tell constituents to help themselves as much as possible – to seek local solutions – instead of turning to big government to help them.

State-Enforced Modern Rights at the Cost of Fundamental Freedoms	
Right to freedom from offence	Cost: other’s freedom of expression
Right to employment	Cost: violates other’s security of the person
Right to housing or economic equality	Cost: violates other’s right to private property
Right to be free from discrimination	Cost: violates other’s freedom of association
Right to be free from proselytizing	Cost: violates other’s freedom of speech and religion
Group right to affirmative action	Cost: Rule of Law and right to be treated equally under the law
Group right to be exempt from laws based on culture or religious beliefs	Cost: Rule of law and right to be treated equally under the law

Recommendations

The topic of liberty and freedom is broad and diffuse. How can a Member of Parliament put such a discussion to practical use? Allow us to make a few practical recommendations:

1. Before introducing a bill or voting on a law, first ask whether the law falls within the responsibility of civil government. If there is another sector of society better able to handle the matter (consider the marketplace, the charitable sector, the individual, the academy, the church or the family), allow that sphere of society to handle it.²⁴ Also ask whether the proposed law infringes on the freedoms of citizens in any way. If there is infringement, ensure that it is absolutely necessary and unavoidable with broad public support. Absent such – vote against it.
2. Consider introducing legislation to remove laws, or sections of laws, that unnecessarily infringe on freedoms. The recent Bill C-304 is a good example of this recommendation at work.
3. Don’t be afraid to say no to constituents and media who are hungry for government intervention and blame. Instead of having the government supply all things for all people, citizens need to be able to take initiative, garner investment, apply hard work and drive their own projects.
4. Bureaucratic red tape is the biggest attack on free enterprise in a free country. The famous economist Friedrich Hayek wrote about this and the totalitarianism of centralized planning in his treatise *The Road to Serfdom*. As Alexis De Tocqueville prophesied,

“A government big enough to give you everything you want is a government big enough to take from you everything you have.”
- Gerald Ford

[The government] covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate to rise above the crowd. The will of man is not shattered but softened, bent and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrial animals, of which government is the shepherd.²⁵

As a Member of Parliament, do what you can to decrease the red tape for businesses and enterprise and to reduce the role of the government in the marketplace to the prosecution of criminal activity and the enforcement of civil contracts.

5. The government must be consistent in the application of the law, not only across jurisdictions, but also across identifiable groups. Affirmative action programs violate the rule of law and should be stopped. Demonstrating excessive leniency in prosecuting criminal activity because individuals are members of certain groups also violates the rule of law and brings it into disrepute.²⁶
6. All actions of the State must be consistent with the Constitution. If administrative tribunals and commissions are known to violate the *Charter* and interfere in the private affairs of the people, Members of Parliament ought to speak out and work to have these government bodies controlled, reined in, or dissolved. For example, the work of limiting the Canadian Human Rights Commission and Tribunal through Bill C-304 needs to continue.

"...but there exists also in the human heart a depraved taste for equality, which impels the weak to lower the powerful to their own level, and reduces men to prefer equality in slavery to inequality with freedom."

- Alexis de Tocqueville²⁷

Our hope is that Canada can be strengthened as a bastion of freedom against a world of increased regulation, rules and governmental controls. A Canada in which citizens are able to take more individual responsibility, demonstrate more innovation and exercise more personal and corporate charity is a healthier society and a stronger and freer nation.

¹ Thomas D'Arcy McGee in *Canada's Founding Debates*, eds. Janet Ajzenstat, Paul Romney, Ian Gentles and Bill Gairdner, (Toronto: University of Toronto Press, 2003), p. 16

² Professor F.H. Buckley recently argued in the negative, "Canadians no longer have more... liberty... than Americans. In both countries, benign neglect has been replaced by the bureaucrat's officious nudges, giving us ugly light bulbs, toilets that don't flush and idiotic playground rules." in "Canada was a free country" in *National Post*, August 15, 2012 online: <www.fullcomment.nationalpost.com/2012/08/15/f-h-buckley-canada-was-a-free-country/>.

³ Preamble, *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].
⁴ *Charter*, *supra* note 2 at section 1.

⁵ This quote is often attributed to Thomas Jefferson, although no original source for this has been found in his writings. The earliest established source for similar remarks are those of John Philpot Curran in a speech upon the Right of Election, published in *Speeches on the late very interesting State trials* (1808): "It is the common fate of the indolent to see their rights become a prey to the active. **The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt.**"

⁶ Incidentally, this Psalm is also intrinsically connected to Canada: two of its verses are inscribed on the Peace Tower, one of which is the motto of the country (Psalm 72:8 - *A Mari Usque Ad Mare* - From sea to sea) and the name *Dominion*, used to describe Canada, also comes from this Psalm.

⁷ All verses from Psalm 72 in *The Holy Bible, English Standard Version* (Lake Mary, FL: Ligonier Ministries, 2005), 798-799.

⁸ Lord Acton, "Letter to Mandell Creighton (5 April 1887)" in John Neville Figgis & Reginald Vere Laurence, eds., *Historical Essays and Studies by John Emerich Edward Dalberg-Acton* (London: Macmillan, 1907), 504.

⁹ Danny Danziger & John Gillingham, *1215: The Year of Magna Carta* (New York: Touchstone, 2004), 278.

¹⁰ Edmund Burke, *Reflections on the Revolution in France*, (Indianapolis: The Liberal Arts Press, Inc., 1955), p. 67.

¹¹ *Saumur v. City of Québec* (1953) 2 S.C.R. 299 (S.C.C.) at 329.

¹² *Declaration of Independence* (US 1776).

¹³ John Warwick Montgomery, *Human Rights and Human Dignity* (Edmonton: Canadian Institute for Law, Theology, and Public Policy, 1995) 79-80.

¹⁴ Canada is also described as a *Constitutional Monarchy*. An entire paper can be written on the differences between these two concepts. I will work on the assumption that, in effect, Canada is a representative democracy.

¹⁵ The *Constitution Act, 1867* is a long list of things the government may do, not necessarily what the government *ought* to do.

¹⁶ See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5. Section 91 is titled "Powers of the Parliament".

¹⁷ See generally, John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1990).

¹⁸ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1990), p. 291.

¹⁹ *Charters supra* note 2, Preamble.

²⁰ *Reference Re Proposed Resolution Respecting the Constitution of Canada*, [1981] 1 S.C.R. 753 at 805. See also *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [Roncarelli].

²¹ This principle is a summary of the role of the State as outlined in Romans 13:1-7.

²² The Hon. Eugene A. Forsey, *How Canadians Govern Themselves*, (online book) <http://www.parl.gc.ca/about/parliament/senatoreugeneforseys/book/chapter_5-e.html>.

²³ See in connection with the opening quote of this paper - Thomas D'Arcy McGee, *supra* note 1.

²⁴ This principle, informed by Reformed thought, is known as *Sphere Sovereignty* and was elucidated by the Dutch Prime Minister (1901-1905) Abraham Kuyper in the third of his six Stone Lectures delivered at Princeton University in 1898. The lecture was titled, *Calvinism and Politics*. When applied, this principle has the potential to dramatically increase the personal responsibility, contribution and ownership of citizens toward and in their nation and communities. A similar principle is found among Catholic thinkers called *Subsidiarity*: a matter ought to be handled by the smallest, lowest, or least centralized authority capable of addressing that matter effectively.

²⁵ Alexis de Tocqueville, *Democracy In America*, Volume II, Book 4, Chapter 6 (1835) Electronic Text Center, University of Virginia Library, online: <http://xroads.virginia.edu/~HYPER/DETOC/ch4_06.htm>.

²⁶ See, for example, the police indifference to the illegal criminal activity of Tamil Tigers in Toronto reported online <<http://www.cbc.ca/news/canada/toronto/story/2009/05/10/toronto-tamilprotest.html>>.

²⁷ Alexis de Tocqueville, *Democracy in America*, Vol. I, ch. 3 (1835) Electronic Text Center, University of Virginia Library, online: <http://xroads.virginia.edu/~HYPER/DETOC/1_ch03.htm>.