The Political Impact of
The Canadian Charter of Rights and Freedoms
On the Supreme Court of Canada

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Abstract

This study explores the political impact of the Canadian Charter of Rights and Freedoms on the Supreme Court of Canada. This influence is contrasted with the judiciary's historic reluctance to recognize civil liberties, commencing with the position taken by the Judicial Committee of the Privy Council and the cautious reaction of the Supreme Court to the Diefenbaker Bill of Rights.

The treatment of civil liberties under the Charter is considered through a survey of some of the Charter cases addressed by the Supreme Court of Canada. The political consequences of the Court's decisions are examined. Alternative possibilities for the Court's role in Canadian society are considered, including the prospects for entrenchment under the Meech Lake Accord and other recently proposed reforms.

The criticism that too much power is being vested in the "least democratic branch" is addressed and the suggestion that the Charter should be located in the "communitarian tradition of Canadian politics" is appraised. This study reflects upon the theoretical assumptions which underlie the existence of the Charter, as it evaluates the political theory behind differing conceptions of judicial interpretation. This thesis concludes by determining that the Supreme Court has made a positive political contribution to Canadian society.
**Resumé**

Cette étude a pour but de mesurer l'impact de la Charte Canadienne des droits et libertés sur la Cour suprême du Canada. Cette influence s'oppose à la traditionnelle hésitation de la magistrature face à la reconnaissance des libertés civiles. Ainsi, en témoigne la position adoptée par le "Judicial Committee of the Privy Council" (Comité judiciaire de Conseil privé) et la reaction mitigée de la Cour suprême face à la Déclaration des droits du P.M. Diefenbaker.

L'explication des libertés civiles dans la Charte est élaborée selon un aperçu des différents cas examinés par la Cour suprême. Les conséquences politiques des différentes décisions prises par la Cour sont analysés. De nouvelles possibilités envisageant le rôle de la Cour dans la société canadienne sont considérées ainsi que la perspective d'une solide insertion dans l'Accord du lac Meech et dans diverses réformes.

La critique affirmant que trop de pouvoir a été confié à cette "institution moins que démocratique" est adressée; et la suggestion que la Charte devrait être placée dans la "tradition communautaire de la politique canadienne" est examinée. Cette étude pose d'une part une réflexion sur les suppositions théoriques qui sont à la base de l'existence de la Charte, et d'autre part, une evaluation de la théorie politique sous-jacente au différentes conceptions de l'interpretation judiciaire. La conclusion de cette thèse attribue à la Cour suprême une contribution politique bénéfique à la société canadienne.
Acknowledgements

My interest in the political impact of the Canadian Charter of Rights and Freedoms on the Supreme Court of Canada began when I read Peter Russell's "The First Three Years in Charterland". At the time, I was a first year undergraduate reading for a conference in Professor J.R. Mallory's "Government of Canada" course. The conference was headed by James Crossland, who was working on an M.A. thesis on the evolution of Canadian constitutionalism. Mr. Crossland encouraged my interest in the Charter and has been a generous and insightful source ever since.

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Note on Abbreviations

A.C. - Appeals Cases.
A.-G. - Attorney General.
C.A. - Court of Appeals.
C.B.A. - Canadian Bar Association.
C. of R. Newsl. - Canadian Charter of Rights Newsletter.
C.J. - Chief Justice.
C.J.C. - Chief Justice of Canada.
C.J.P.S. - Canadian Journal of Political Science.
C.P.A. - Canadian Public Administration.
D.L.R. - Dominion Law Reports.
J. - Justice.
JJ. - Justices.
J.C. or J.C.P.C. - Judicial Committee of the Privy Council.
L. - Lord (U.K.).
M.R. - Master of the Rolls (U.K.).
O.L.R. - Ontario Law Reports.
Queen's L.J. - Queen's Law Journal.
s. - Section.
Sask. L. Rev. - Saskatchewan Law Review.
S.C.R. - Supreme Court Reports.
Sup. Ct. L. Rev. - Supreme Court Law Review.
U.T. Fac. L. Rev. - University of Toronto Faculty of Law Review.
U. of T. Press - University of Toronto Press.
U.B.C.L. Rev. - University of British Columbia Law Review.
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Chapter One

Unscheduled Night Drop

"Sed quis custodiet ipsos Custodes?"
Juvenal

On the field of Runnymede, King John signed the first great charter in 1215. The Magna Carta was the initial step toward English constitutional government. Through that historic document, the Crown formally acknowledged an unprecedented, albeit modest, limit on its power. Civil liberties were conceived, but they would remain in embryonic form for many years.

As a response to the use of arbitrary methods by the Stuart kings, the British Parliament issued the Petition of Right in 1628. Accepted but later disregarded by Charles I, the petition provided the roots for the terms and conditions later set out in the famous Bill of Rights which allowed William and Mary to accede to the throne after the glorious revolution in 1689. Civil liberties would be born.

It has now been three hundred years since the first bill of rights was enacted. The 1689 legislation abolished the royal power to suspend laws, established free election, and defined citizen rights. Issued one hundred years before France’s Declaration of the Rights of Man and serving as a model for the American Bill of Rights, the 1689 Bill was to have a remarkable impact on the history of democracy and civil liberties.

King John’s successor traveled to Ottawa in 1982, to sign Canada’s own charter. On April 15, Queen Elizabeth II signed the Constitution Act, 1982 "patriating" Canada’s principal legal document and "entrenching" rights and freedoms. The parchment accepted at Runnymede had slightly limited the monarchy; the Canadian Charter of Rights and Freedoms\(^2\) provided a check on the authority of government, acknowledged

\(^1\)Satires VI, 1. 347.

positive rights, and empowered courts to grant remedies. The recognition and preservation of civil liberties in Canada was moved to a new domain.

"As liberty increases," observed Alexis de Tocqueville a sesquicentury ago, "the prerogatives of the courts are continually enlarged." Since the adoption of The Constitution Act, 1982, the role of the judiciary in Canada has been enlarged significantly. The act has substantially altered the function and mandate of the Supreme Court of Canada and concomitantly led to the considerable enhancement of that institution's political significance.

II

TO BE INVESTIGATED

This study will explore the political impact of the Charter on the Supreme Court of Canada. Since the Charter has come into force, politicians have increasingly deferred to the decision-making power of the Court, especially in politically sensitive areas. The project's purpose will be to determine the Court's proper position in response to this development.

This chapter will examine the theoretical assumptions which underlie the existence of the Charter and the political theory behind

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4 See, for instance, the abortion cases (R. v. Morgentaler [1988] 1 S.C.R. 30, Borowski v. A.-G. Can., as well as the recent appeal by Chantal Daigle against a decision by the Quebec Court of Appeals granting her former boyfriend Guy Tremblay an injunction preventing her from having an abortion), and the Quebec sign language cases (Devine v. Quebec [1988] 2 S.C.R. 790, Ford v. Quebec [1988] 2 S.C.R. 712). Although in the latter instance the notwithstanding clause was invoked, the political hot potato was thrown to the Court before being retrieved.

differing conceptions of judicial interpretation. The works of both Canadian and American scholars will be consulted.

Traditionally the judiciary has been unwilling to question the wisdom of the legislature and has deferred authority to the people's elected representatives. The second chapter will scrutinize the courts' historic reluctance to recognize civil liberties through the decisions of the Judicial Committee of the Privy Council and the Supreme Court of Canada. This section will begin to determine whether our history of legislative supremacy has adequately protected civil liberties.

Chapter three will present a brief examination of the Supreme Court's experience under the Bill of Rights and recall the commentary on the inclusion of civil liberties into the Constitution. By considering the protection of rights and freedoms in Canada before the Charter, the recent conclusions of Michael Mandel will be examined.\(^5\)

A survey of the Charter cases addressed by the Supreme Court of Canada will be presented in the fourth chapter. The treatment of civil liberties under the Charter will be considered, as will the political consequences of the Court's decisions. By reflecting upon some of the judgments rendered during the past seven years and by assessing the public and political responses that the decisions have evoked, this study intends to illustrate that the Court has become one of the most important political institutions in Canada.

The fifth chapter will assess alternative possibilities for the Supreme Court's role in Canadian society and will conclude by focusing on the prospects for entrenchment under the Meech Lake Accord and other recently proposed reforms.

A consideration of how changes in the Supreme Court's mandate might affect the theoretical underpinning of Canadian political society will be undertaken in the final chapter. The criticism that too much power is being vested in the "least democratic branch" will be addressed and the suggestion that the Charter should be located in the "communitarian tradition of Canadian politics" will be appraised.

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\(^5\)Infra, note 18.
III

POLITICAL DYNAMIC

Due to its increased authority under the Charter, the Supreme Court is rendering decisions that would have been impossible just eight years ago. As a result, the Court has come under strict scrutiny from scholars of various disciplines and has been the subject of numerous articles in the popular press.6

To examine the activity of lawyers, judges, and courts under the Charter is to examine politics and the dynamic of power. In his most recent book, Peter Russell affirms that political power is exercised by the judiciary and that courts are part of the machinery of government.7 Elsewhere, Prof. Russell reminds us that judges are public office holders who are authorized by the "coercive powers of the state."8 It is this connection to the "coercive element" which gives judicial decision-making its political character.

It is best kept in mind that rights and freedoms are political concepts in themselves. As Stephen Cohen of the University of New South Wales has recently affirmed, civil liberties are far from being natural rights. "It is a decision or a commitment not a discovery,"

6The recent analysis varies in depth and approach. An historical account has been provided by James Snell and Frederick Vaughan, in The Supreme Court of Canada: History of the Institution (Toronto: U. of T. Press, 1985), [hereinafter History of the Institution]. Peter Russell has extensively reviewed the Court from a political perspective in various works including The Judiciary in Canada (Toronto: U. of T. Press, 1987), as has Patrick Monahan in Politics and the Constitution: The Charter, Federalism and the Supreme Court (Toronto: Carswell, 1987), [hereinafter Politics and the Constitution]. Many other scholars are examining the Court's activities (see bibliography), while newspapers throughout the country have been frequently reporting on the Justices, their judgments, and the governmental and public reactions to them.

7The Judiciary in Canada, supra, note 6, p. 3.

asserts Prof. Cohen, "which is responsible for something being regarded as a civil liberty." 9

It has been conceded that the Charter presents the possibility of a new paradigm in which the judiciary will assume a central role and equal responsibility with Parliament and provincial legislatures in the formulation of public policy. 10 For his part, Peter Russell has concluded that the Supreme Court's function in the governance of Canada "should now be viewed as of the same importance to Canadian political science as the performance of the United States Supreme Court is to students of American Politics." 11 Elsewhere, Professors Rainer Knopff and F.L. Morton have suggested that the Court has become a nationalizing institution by interpreting and giving life to a constitutional document which encourages Canadians to perceive themselves as "bearers of rights that have no local boundaries." 12 This was apparently the intention of the Trudeau government which fought vigorously for the "patriation" of the Canadian Constitution in the face of a separatist threat from Quebec in the latter part of the 1970's.

The Charter has been described as a new, third pillar of constitutional government in Canada. 13 Others have emphasised the document's capacity to strengthen democracy. David Beatty, for

13 Alan Cairns and Cynthia Williams, "An Outline," Constitutionalism, Citizenship and Society in Canada, supra note 12, p. 34.
instance, has written that "the Charter could turn out to be the most important event in the democratization of the country since Confederation." Yet, more cautious observers and sober octogenarians may ask themselves if this is merely academic rhetoric lacking in substance. There are those who doubt if such a profound change could have occurred in Canadian society on a day when "no one cheered."15

"The history of scholarship is a record of disagreements," explained former American Chief Justice, Charles Evans Hughes, "when we deal with questions relating to principles of law and their applications, we do not suddenly rise into a stratosphere of icy certainty."16 This is no less true in Canada, where certain scholars have gone far out of their way to condemn the Charter. Harry Glasbeek and Michael Mandel, for instance, have explained the document is an attempt to avoid the enhancement of "real democracy" by offering a formal substitute.17 Recently, Prof. Mandel has argued that the existence of the Charter and what he terms as the subsequent "legalization" of politics have brought Canada back to the time when democracy was a dirty word. "Pleading," claims Michael Mandel, "is not a democratic form of discourse."18 Prof. Mandel would have the Charter

14David Beatty, "Charter could be the key to greater democracy," The Globe and Mail (April 7, 1987).
15See the introduction to Keith Banting and Richard Simeon, And No One Cheered (Toronto: Methuen, 1983), pp. 2-26.
16Speech to the American Law Institute, May 7, 1936.
dates form a time when democracy was a dirty word. Expanding that form of discourse to more and more corners of life as the Charter does, is in effect seeking to return to that time. I do not like the idea of going backward in history. At pp. ix-x [hereinafter Legalization of Politics].
"wither away" into disuse or, to use his own impudent expression, be made to "seem absurd and irrelevant like the Monarchy or the Senate."19 Nevertheless, it has been recognized that the vague provisions of the Charter invite judicial policy-making.20 The Supreme Court's new remedial power and explicit invalidation authority have substantially changed its role. As a result, Andrew Petter and Patrick Monahan have urged the Court to abandon its "facade of neutrality and objectivity."21 Prof. Monahan has ultimately warned that:

The enactment of the Charter is like an unscheduled 'night drop', in which Canada's judges and lawyers have been parachuted unaware into the battlefields of political theory, without weapons, and with no knowledge of the deployment of the contending armies.22 This chapter intends to visit these "battlefields" and gauge the strength of the cross-fire.

IV COMPETING THEORIES OF JUDICIAL REVIEW

The open-ended provisions of the Charter raise many questions about the proper scope of judicial review. In the poetic legal style of old, Lord Sankey articulated his now famous metaphor: "The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits."23 Yet, this dictum has been questioned recently by Richard Devlin, who has submitted that the "living tree"
metaphor is "suggestive rather than informative." According to Mr. Devlin, we are still left with the question of whether the Constitution is "to be interpreted as a rigid and hard red oak, or as a flexible willow." According to Peter Hogg, however, the problem of legitimizing judicial review is a much less serious problem in Canada than it is in the United States. For Prof. Hogg ss. 1 and 33 provide significant constraints on the Canadian judiciary. Nonetheless, in Patrick Monahan's "battlefield", Mr. Devlin's army of skeptical scholars is on the rampage.

Peter Russell, a pioneer in the political analysis of the Canadian judiciary, has always urged us to reject the view that the judicial function is technical or non-political. "A particular judicial decision," J.R. Mallory once observed, "does not take place in a vacuum in which the result is a simple arithmetical conclusion from purely abstract ideas." Likewise, Prof. Russell understands that the judiciary "puts flesh on the bare skeleton of the law and in so doing, shapes the substance of the law."

However, many political pundits have begun to take aim at established notions of judicial interpretation. For instance, Richard Devlin has accused Prof. Hogg of engaging in unfounded positivism by making the "fundamental error of severing the subject from the object,


26Ibid., p. 88-89. A discussion of ss. 1 and 33 can be found in Chapter 4 of this thesis.

27Numerous scholars, including Noel Lyon, have expressed a similar belief. According to Prof. Lyon, since the Constitution "now clearly derives its authority from the people ... it is no longer acceptable to assert that meaning can be found in the language alone." See N. Lyon, "An Essay on Constitutional Interpretation," O.H.L.J. XXVI:1 (1988) 95, at p. 123.


29Peter Russell, supra, note 8, p. 428.
the interpreter from the text." Drawing on the thought of Mark Tushnet, Mr. Devlin has rejected the distinction between adjudication and legislation by arguing that there is no difference between choices made by the judiciary and those made by the legislature. Ronald Dworkin would be ill at ease with Richard Devlin's characterization of adjudication. According to Prof. Dworkin, it is proper for courts to review principle but not policy. The professor of Jurisprudence at Oxford explains that while policy goals are to be considered by legislatures, the Courts must ensure that principles of justice are respected.

An approach that is much more constraining than Ronald Dworkin's is advocated by Alexander Bickel. According to Prof. Bickel, judicial review should only affirm principles that will gain general assent in the foreseeable future. He terms this concept "the obligation to succeed." In Prof. Bickel's view, the Court should provide a "continuing colloquy" by engaging the public and the legislative branch in conversation.

In the Canadian context, Anne Bayefsky has adapted Alexander Bickel's model by urging the judiciary to adopt "passive virtues" in postponing judgments until public approval is reached. In Prof. Bayefsky's application, judicial wisdom must be "informed by popular

30Richard Devlin, supra, note 24, p. 10.
understanding," court decisions must be put off until public opinion finally adopts morally correct answers.\textsuperscript{36}

Yet, other scholars may be found on the other end of the theoretical battlefield. For instance, Michael Perry insists that judicial review exists to allow judges the opportunity to provide moral guidance when people's elected representatives do not.\textsuperscript{37} In Canada, Michael Hartney has argued that Charter has the moral purpose to protect certain fundamental moral rights and to treat it otherwise is to nullify its effect.\textsuperscript{38} Therefore, Mr. Hartney argues that the document requires judges to engage in moral philosophy to determine the limits of the rights it embodies. He prescribes two alternatives: "either Charter interpretation is to be considered as moral philosophy and to be done by people who are trained in this area, or there should be no Charter at all."\textsuperscript{39}

Some have ignored the battle lines to claim that the "contending armies" are fighting a war over the legitimacy of judicial review which no one can win. For example, B.L. Strayer has reaffirmed Laurence Tribe's declaration that attempts to legitimize constitutional choices with a single theory or framework are "futile."\textsuperscript{40} In a similar vein, Joel Bakan has rejected attempts to establish formal grounds for the legitimacy of judicial review in Canada. Prof. Bakan proclaims,

Notwithstanding the pretensions of intellectual rigour and analytical depth, constitutional arguments are really just appeals for faith in the institution of judicial review and,

\textsuperscript{36}Ibid., p. 162.


\textsuperscript{38}Michael Hartney, "Commentary," in Legal Theory Meets Legal Practice, supra, note 35.

\textsuperscript{39}Ibid., p. 206.

\textsuperscript{40}B.L. Strayer, "Constitutional Interpretation Based on Consent: Whose Consent and Measured When?" in Bayefsky, ed., Legal Theory Meets Legal Practice supra, note 35, p. 187. See also Laurence Tribe Constitutional Choices (Cambridge, MA: Harvard University Press, 1985), pp. 3-8. Prof. Tribe advocates the abandonment of such pretense and endorses "the process of replacing arrogant certitudes about our often unshared pasts with a more open search for a shared future." at p. 267.
correspondingly, obedience to the outcomes of that institution.41

V

CONCEIVING A CONSTITUTIONAL IMAGE

One of the most original Canadian theories of judicial interpretation has recently been advanced by William Conklin.42 By uniting concepts of literary theory, political philosophy and law, Prof. Conklin has situated himself far beyond the "battlefield" described by Monahan. According to William Conklin, a constitution is not composed strictly of a text, nor a set of doctrines, nor values, nor customs. He avows that the Constitution is, instead, an image. To understand the law of a constitution, Conklin asserts that "we must identify and consider the presupposed image of a constitution which judges, scholars, lawyers or political officials share in their discourse."43 This image "rebounds off a text" and "joins a lawyer to his/her past and projects him/her into the future."44 The images in question are not values, nor metaphysical constructs, nor models, nor theories. Instead, Prof. Conklin explains that an image of the constitution originates from within the conscious and subconscious of the individual judges and is formed through the legal profession's formal and informal education, personal experience, and childhood rearing.45 Ultimately, these images "serve as a prism through which the lawyer/judge understands the world."46

Prof. Conklin advocates a teleological rather than rationalist interpretation of the Constitution. Borrowing from the language of

43Ibid., p. 4.
44Ibid., p. 4-5.
46Ibid., p. 67.
Aristotle, he enunciates the belief that the Charter raises "deep issues of Goodness", in addition to those of social and cultural practice, that are best understood using the constitutional image first developed by Ivan Rand during the 1950's. He expands on Justice Rand's conception of "citizenship" established in Roncarelli v. Duplessis. For Prof. Conklin, Ivan Rand's teleological image of a constitution is superior because it entertains issues of "ideal-directed" theory and social practice by making theory and practice socially legitimate and epistemologically valid issues. Furthermore, Prof. Conklin insists that the Charter "embodies a forward-looking image of a constitution" which makes the backward-looking or contemporary focus of the historicist and rationalist approaches inadequate. In his understanding, the Charter triggers "deep meta-issues of theory and a piercing scrutiny of social/cultural practices."

While many other savants in Patrick Monahan's "battlefield" are relying on the philosophy of John Rawls and the properties of liberalism to hurl their ammunition, William Conklin peers over the horizon from the plateau of Aristotelian thought. Prof. Monahan himself appears to want none of this. Nor does he seem impressed with Canadian scholars who are attempting to articulate theories of judicial review which borrow from the ideas of American scholars such as Laurence Tribe, Alexander Bickel, Michael Perry, or Ronald Dworkin.

47Ivan Rand was one of the most respected jurists to ever sit on the Supreme Court. Although reputed to be an extremely companionate man, during oral arguments Mr. Justice Rand was described as the judge "most feared by counsel." One observer was prompted to note that Rand J. "used the word 'why' like a machine gun." See History of the Institution, supra, note 6, p. 197.


49Images of a Constitution, supra, note 42, p. 217.

50Ibid., p. 129.

51Ibid., p. 217.

VI

DEMOCRACY REINFORCING REVIEW

Many Canadian intellectuals have acknowledged the benefit of examining American constitutional jurisprudence to help illuminate some of the unlit terrain that lies ahead under the Charter. However, Prof. Monahan has warned that:

General Motors may be able to ignore the Canadian-American border, but Ronald Dworkin cannot; approaches to judicial review in Canada must necessarily differ from those in the United States.53

This intellectual tariff barrier is an interesting idea, especially considering that Patrick Monahan's own theory depends heavily upon American, John Hart Ely's concept of "representation reinforcing review."54 According to Dean Ely, judicial review should be limited to "questions of participation, and not with the substantive merits of the political choice under attack."55

For very similar reasons, Prof. Monahan has criticised the Court's interpretation of the Charter. The Osgoode professor of Law has attempted to establish the grounds for divorce between Canadian and American constitutional theory. This is by no means a novel idea. Indeed, throughout the years of debate on whether the Charter should be "entrenched", many commentators expressed the fear that the Canadian Constitution might become merely "what the judges say it is."56 Some deplored the idea of a constitutional bill of rights and saw it as a subtle means to introduce American individualism into Canadian society.57 Others disapproved of the absence of originality within the proposals. Commenting on attempts to incorporate some of the

53 Politics and the Constitution, supra, note 6, p. 95.
55 Ibid., p. 181.
56 Expression of Associate Justice, Charles Evans Hughes, of The United States Supreme Court. Speech at Elmira, New York (May 3, 1907).
principles of the American Bill of Rights into the Canadian Constitution in the 1960's, Donald Creighton complained that "imitation and plagiarism had become deep-seated Canadian instincts."^58

Now, in the late 1980's, Patrick Monahan appears to have come to the defence of the Charter against some nationalist academics who still want no part of it.^59 Prof. Monahan has emphasised the differences between the Charter and American Bill of Rights by locating the former within "the communitarian traditions of Canadian politics."^60 Citing Alasdair MacIntyre's conception of a "living tradition,"^61 Prof. Monahan has determined that rights-based models and other American individualistic theories are inadequate for judicial review under the Canadian Charter. According to Patrick Monahan, the individualist, the communitarian, and collectivist aspects of the Canadian cultural tradition must be accommodated in constitutional adjudication. To achieve this, he advocates a theory of judicial interpretation which defers to democracy. "Judicial review in Canada," declares Prof. Monahan, "must be more than another branch-plant operation of an American head office."^62

A closer look at Patrick Monahan thesis, however, may well reveal that he has constructed an affiliate operation himself. Prof. Monahan reasons that the academic critique of Dean Ely's theory in the debate among American scholars leaves open the possibility that it will "be relevant and persuasive in another context."^63 Prof. Monahan provides

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^59The most vociferous exponent of this group is Michael Mandel, see Legalization of Politics, supra, note 18. See also Glasbeek and Mandel, supra, note 17.

^60Politics and the Constitution, supra, note 6, p. iv.


^62Politics and the Constitution, supra, note 6, p. 96.

^63Politics and the Constitution, supra, note 6, p. 99.
two general principles to legitimize his framework of Canadian judicial review. The first is "a right of equal access to and participation in the political process;" the second principle is the maximization of "openness and the possibility of revision in social life" in order "to ensure that all social arrangements are subject to meaningful debate and transformation through the political process." This process-oriented formula of judicial review enucleated by Prof. Monahan, based on communitarian rather than counter-majoritarian principle, is a reformulation of John Hart Ely's thesis in Canadian society. Dean Ely appears to be the chief executive of Patrick Monahan's branch plant.

VII

MAJORITARIANISM IS NOT ENOUGH

At this point it is necessary to ask an essential question. What does it mean to fall back on the so-called "communitarian" tradition of Canadian politics as Prof. Monahan suggests? The argument for a retreat into our collectivist past has frequently been made under the blinding seduction of nationalism, yet, in the next two chapters the alleged benefits of the "communitarian" tradition will be critically evaluated. First, however, the nature of Prof. Monahan's process-oriented scheme is worth further examination.

The democratic approach to judicial review has been already rejected by Peter Russell because it "rests on a philosophy of moral relativism that is difficult to square with the essential adjudicative function." However, as Laurence Tribe has done with the work of Dean Ely, it is not difficult to illustrate in Prof. Monahan's case that a "communitarian" theory of judicial review claiming to champion democratic participation, and procedure rather than substance, is

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64 Ibid., p. 124-125.

65 Prof. Russell explains that questions "of federalism, of procedural due process rights, of minority language rights and aboriginal rights cannot adequately be dealt with - cannot be reduced - to questions of access to democratic politics." See P. Russell, supra, note 8, p. 432.
advancing a substantive value judgement in itself. \(^6\)

In fact, a practical response to the theories of J.H. Ely and Prof. Monahan is provided by William Conklin:

> to suggest that efficacy or majoritarianism can outweigh constitutionalized human rights is to lower the latter to the plane of saying that "anything may count" as an allowable exception to the rights. The text would then become redundant as would the interpretive process triggered by the text. \(^6\)

For Prof. Conklin, as undoubtedly for Michael Hartney, the text of the constitution suggests "essentially contestable concepts" that are "rationally indeterminate." \(^6\) According to Prof. Conklin's persuasive explanation, this indetermination may only be superseded by adopting a teleological image. Such an image cannot develop under a theory of "democracy reinforcing review." William Conklin's interpretive understanding appears richer than Patrick Monahan's.

Furthermore, democracy does not necessarily equate solely to majority rule. For instance, B.L. Strayer has pointed out that federalism itself is at times anti-majoritarian. \(^6\) Judicial review of ultra vires legislation can invalidate the will of the majority supporting an impugned enactment. Judge Strayer has noted that true democracy does not leave every decision to majorities but attempts to maximize the scope of decision-making for the individual. \(^7\) The danger of using the courts merely to reinforce political representation should be self evident. The point has been underscored by John Whyte:

> freedom-loving and equality-loving governments can lose sight of the consequences, for some people, of legislative schemes.

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\(^7\) *Images of a Constitution, supra,* note 42, p. 249.


The role courts play in these situations is not superfluous. 71 Moreover, Bernard Siegan has properly noted that "the relationship between the will of the majority and the passage of laws is often highly tenuous." 72 Peter Hogg has joined in the rejection of Prof. Monahan's assertion that the Charter's purpose is to increase democratic participation. Prof. Hogg reasons that each section of the Charter must be interpreted as serving its own specific purpose. 73 In the United States, Mark Tushnet has convincingly argued that Dean Ely's theory is "flawed by its inability to specify what really facilitates pluralist politics, and by its acceptance of the existing system as a reasonably well functioning one." 74 The same observation can be made with respect to Patrick Monahan's idealized view of the opportunities for popular participation in the Canadian political process. 75 Chapter Two will examine a few instances where citizens have been discriminately excluded from being afforded these opportunities.

VIII

REPEALING THE CHARTER

In 1978, the Committee on the Constitution of the Canadian Bar Association recommended the entrenchment of a bill of rights, explaining that:

It would inculcate in all citizens, young and old, a consciousness of the importance of civil liberties and

73Peter Hogg, supra, note 25, p. 113.
75Prof. Monahan's entire enterprise is based on the premise that Canadian "democratic" institutions are, indeed, democratic. This implication is by no means uncontestable. For additional difficulties with Monahan's thesis on this score see Joel Bakan, supra, note 41, pp. 184-185.
provide an authoritative expression of the particular rights and liberties our society considers fundamental. However, shortly after the Charter came into force, Donald Smiley contested the document's existence by arguing that Canadians were essentially Hobbesian and not prepared to accept the thesis that government exists to protect pre-existing rights. "Nobody," said Professor Smiley, "has ever become a convert to Christianity through reading the Apostle's Creed. To impose a Charter that one would expect will get embedded into the consciousness of the people, who operate under certain contrary predispositions, will not 'wash.'"

Indeed, to a certain extent, D.V. Smiley has been correct in his prediction. With some, the Charter has clearly not 'washed.' Michael Mandel, for instance, has attempted to expose the document as a means to avoid enhancing democracy by "giving merely a sense of enhancement."78 Prof. Mandel's self-admitted 'conspiracy theory' contends that,

Specifically, it is possible to understand the legalization of politics in the context of three inter-connected contemporaneous phenomena: the expansion of the suffrage, the deep involvement of the state in the economy, and the increasing tendency to malfunction of Western industrial economies. Legalized politics can be seen as a defence mechanism developed to preserve the status quo of social power from the threats posed to it by these phenomena.79


As Canadians have become less diligent about reading the scriptures around the family hearth or saying the rosary before retiring, the secular nationalists attempt to move in with a new set of devotional exercises. There is little evidence that such verbalizations of general principles have any profound effect on human conduct.

See D.V. Smiley, supra, note 57, p. 290.

78Legalization of Politics, supra, note 18, p. 73.

79Ibid., p. 71. In response to a student's question during his "Politics and Law" course given at Osgoode Hall School during the summer of 1989 (POLS 3320J.06), Prof. Mandel admitted that he was
Prof. Mandel refers to the Charter as the "epitome of unguided judicial power." Similarly, David Fraser has opined that the document allows legalism to "spread like a plague." "Despite all the heavy exaltation," claims Prof. Mandel, "the Charter has merely handed over the custody of our politics to the legal profession."

F.R. Scott and the others who fought for the constitutional protection of rights and freedoms would be shocked at the result of Michael Mandel's analysis. Although numerous progressive intellectuals and even the first two leaders of the New Democratic Party, Tommy Douglas and David Lewis, were early advocates of an entrenched bill of rights, segments of the Canadian left seem to be distancing themselves from the Charter. Yet, in contrast to Prof. Mandel's prescription of fatalistic resignation, another socialist, Charles Campbell, has argued that "the judicialization of politics requires the politicization of the judicial process." In addition, Joel Bakan has maintained that while courts might be unlikely to render progressive decisions under the Charter, they do not "act illegitimately when, and if, they do." Socialist scholars appear to float far from the stratosphere of certainty earlier described by Charles Evans Hughes.

IX

SAVING THE CHARTER

To different degrees, both Patrick Monahan and Michael Mandel have turned their backs on substantive jurisprudence in favour of a romance with politics. Once we have stepped in from the sun of judicial

indeed advancing a conspiracy thesis.

80 *Legalization of Politics*, supra, note 18, p. 85.
82 *Legalization of Politics*, supra, note 18, p. 308.
83 C. Campbell, "The Canadian Left and the Charter of Rights," *Socialist Studies* II (1984), p. 41. He suggests that "leftists in the legal arena should firmly seize the opportunity and face the necessity of politicising the legal process," at p. 42.
84 Joel Bakan, *supra*, note 41, p. 183.
adjudication and entered the forum of contemporary political resolution, we would be well advised to remove the dark sunglasses that Professors Mandel and Monahan have urged we don. To remove the blinkers of democratic formalism, is to ensure that idealism is tempered with common sense.

Solutions which resort to "more politics not less" seem all well and good until we stop and consider the fate of those members that will be effectively excluded from the political debate. "The diversity of Canada," said Prof. J.R. Mallory, "has made it a polity with many minorities which are everywhere vulnerable to the passing whims of majorities." We need only recall the deplorable treatment of Japanese Canadians, among others, to realize that exclusion is not only possible in this country, it is a part of our so-called "communitarian" history. As Gordon Kadota, of the National Association of Japanese Canadians told the Special Joint Committee on the Constitution,

Our history in Canada is a legacy of racism made legitimate by our political institutions.

If Courts vacillate or adopt the postponing posture advocated by Alexander Bickel and Anne Bayefsky, certain Canadians will be left to wait until popular sentiment comes to their aid. No one, however, can guarantee that popular recognition of injustice will be forthcoming, speedy or steady.

David Beatty properly reminds us that the "judiciary provides a forum which is less vulnerable to the wealth and influence that

85Politics and the Constitution, supra, note 6, p. 119.
86J.R. Mallory, "The Charter of Rights and Freedoms and Canadian Democracy," Timlin Lecture given at the University of Saskatchewan, in Saskatoon, Saskatchewan, 8 March 1984.
88Appearing as a witness on November 26, 1980, quoted by Berger, ibid, p. 93.
89The Least Dangerous Branch, supra, note 33 and A. Bayefsky, supra, note 35.
powerful majorities can exert in the political arena." Rather than
the elitist or anti-democratic institution depicted by some, the
Supreme Court can engage the polity in a consideration of society's
tolerance, or lack thereof. "It is only by refining the judicial
processes," says Prof. Beatty, "that we can commit ourselves
collectively, as well as individually, to right the wrongs we sometimes
inflict in the name of majority rule."

It is indeed necessary to refine some of the historic tendencies
of the Canadian judicial process. Adopting the advice of Lord Denning
M.R., Judge Fred Kaufman of the Quebec Court of Appeals has stated that
"bold spirits" rather than "timorous souls" are required to interpret
the Charter. On this point, William Conklin, Michael Hartney, and
David Beatty would be in agreement. We have not had an absence of
timorous souls on the bench. The interpretive views of Prof. Conklin,
Mr. Hartney, and Prof. Beatty must prevail over those of Anne Bayefsky,
Patrick Monahan, and Michael Mandel. Chapter Two will begin to
consider how the Supreme Court would benefit by adopting this advice.

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90 David Beatty, supra, note 14.
91 Ibid.
92 Fred Kaufman, "The Canadian Charter: A Time for Bold Spirits not
Chapter Two

Historic Reluctance

The legislature within its jurisdiction can do everything that is not naturally impossible, and it is restrained by no rule human or divine ... The prohibition 'thou shalt not steal' has no force upon the sovereign body.

Mr. Justice Riddell

To properly appreciate the Charter's impact on the Supreme Court, one must consider the experience of the Court and the Judicial Committee of the Privy Council under the Constitution Act, 1867. Unlike the Australian Constitution of 1900 which created the High Court of Australia, the Constitution Act, 1867 did not grant ultimate appellate jurisdiction to a Canadian court. The British North America Act, as it was then known, did not even establish a federal court of appeal. It was not until 1875 that Parliament passed the Supreme and Exchequer Courts Act giving birth to the Supreme Court of Canada. For the next three quarters of a century, however, the highest court of appeal for Canadians remained overseas. The Judicial Committee of the Privy Council had, among other jurisdiction, the power to hear per saltum appeals coming directly from the highest courts of the provinces.

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2Formerly the British North America Act.

3The High Court of Australia was the final court of appeal on inter se questions (jurisdiction on the Commonwealth and the States) but could grant leave. Appeal did lie on other questions until this right was abolished. See Peter Hogg, Constitutional Law of Canada (Toronto: Carswell, 1985), n. 23, p. 168.

4The B.N.A. Act did indirectly authorize the creation of such an institution in the future. Section 101 of the Act allows the Parliament of Canada to "provide for the constitution, maintenance, and organization of a general court of appeal for Canada."

5The Exchequer Court of Canada, also created by the act, has since been replaced by the Federal Court of Canada. The statute currently governing the Supreme Court is The Supreme Court Act, R.S.C. 1970, c.S-19.
Supreme Court's decisions could be circumvented and overturned; "supreme" they were not.

As British subjects and later as Canadians remaining under the British tradition of parliamentary supremacy, the rights and freedoms of the people of Canada were historically defined by Parliament and the legislatures. The role of the courts was strictly passive. Judicial restraint was facilitated by the original Constitution Act which made no specific reference to equality, human rights or fundamental liberties. Section 92(13), of that Act, granted the provincial legislatures the authority to make laws concerning "property and civil rights," but did not define civil liberties for groups or individuals. The only exception to this absence of definition was the provision protecting French and English in the Parliament of Canada and the legislature of Quebec (s. 133), and the articles protecting denominational schools (s. 93). Under the "exhaustion principle", all governmental power was believed to be divided between the federal and provincial levels. In this division of authority between state and state and the resulting push and pull over definition in the judicial system, individuals and minorities were often lost in the fray.

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6 See Union Colliery Co. of British Columbia v. Bryden [1899] A.C. 580. In the Judicial Committee's view, ...the discretion committed to the parliaments, whether of the Dominion or the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. At p. 585.

II
WHO GUARDED RIGHTS AND FREEDOMS?

In 1867, Walter Bagehot acknowledged that "the benefits of a good monarch are almost invaluable, but the evils of a bad monarch are almost irreparable." The same can be said of Parliament. Under parliamentary supremacy, one elected assembly may respect the rights of certain groups or individuals while another may simply choose to ignore them for reasons of its choice. "The legislature can confer new rights on the citizen," warns J.R. Mallory, "but it is equally free to take away or alter rights that have existed for centuries."

Constitutional protection of civil liberties is no guarantee against the infringement of rights. Yet, without such protection those who are discriminated against have no recourse to seek legal remedy; those whose voices are drowned out by the political process have little opportunity to seek any remedy whatsoever. Since the courts were rarely disposed to recognize fundamental rights and freedoms, such helplessness is precisely what occurred at various times during the first eighty years of Canadian history. For F.R. Scott, and many progressive persons of his day, such absolute constitutional authority was unacceptable.

Nevertheless, during the debate over a charter of rights for Canada, many traditionalists held that the inclusion of such a document would be inconsistent with the rest of the constitution. Entrenched civil liberties were said to reverse the preference for collective rights over individual rights. It was often argued that Canada had a much better record with civil liberties under the supremacy of

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Parliament than many nations which had constitutionally protected freedoms.

In the United States, the first ten amendments of the American Constitution were inspired by the British Bill of Rights. These amendments were written into the U.S. Constitution prior to its adoption in 1787 and enumerated certain integral liberties such as the freedom of speech, the press, and peaceful assembly.\textsuperscript{11} The articles which came to be known as the American Bill of Rights, however, were not always interpreted generously. In fact, many of those who objected to the codification of liberties for Canada would often point to the United States to illustrate the failure of the Bill of Rights in comparison to "effective" parliamentary democracy.\textsuperscript{12} Even after the addition of the Canadian Charter of Rights and Freedoms to the Constitution, one commentator would lament that former Prime Minister, Pierre Trudeau, had presided over the "Americanization of Canada."\textsuperscript{13}

During the 1950's, John Farthing wrote a book that was typical of that generation of thinkers who romanticised about Canada's past. In Freedom Wears a Crown, Mr. Farthing urged Canadians to abandon the notion of constitutional rights and return to the roots of their "great political tradition."\textsuperscript{14} Yet, a closer look at Canadian history will

\textsuperscript{11}See Amendments I through X in the Constitution of the United States of America, 1787. Many of these right were later extended to the state level of government with the adoption of Amendment XIV.

\textsuperscript{12}Had these commentators compared the United States record with civil liberties to that of the British Government regarding Northern Ireland, they may have had much more difficulty reaching a conclusion preferring parliamentary over constitutional protection of rights.


reveal that, for some, the tradition was not as glorious or as 'great' as John Farthing remembered it.15

III
THE JUDICIAL COMMITTEE: IGNORING THE ISSUE

Until 1949, final appeals for Canada continued to be resolved in London. The Judicial Committee was created by a statute of the British Parliament in 1833. The body included the Lord Chancellor, the Lord Chief Justice, and various judges.16 The Act which conceived the Judicial Committee gave it jurisdiction over Admiralty appeals from the colonies and all other appeals which were previously reviewed by the king or the king in council.17 With respect to Canada, however, this broad mandate did not tempt the Judicial Committee to move beyond questions of federalism to consider civil liberties. Later, Walter Tarnopolsky remarked that the law lords "decided early in our constitutional history that discrimination on racial grounds was not a basis for invalidating provincial legislation."18

From 1867 until the mid 1890's the Judicial Committee resolved most federal-provincial disputes in favour of the legislative power of the Dominion. During this period, s. 91 of the Constitution was interpreted broadly and the federal government's prerogative to legislate for the "peace, order, and good government" was given wide

15 With very few exceptions, the "great political tradition" did not include the recognition of civil liberties for various minorities in Canada. In fact, Canadian concern for human rights as reflected in literature, and federal and provincial legislation is largely a post-World War II phenomenon. On this point, see R. St. J. Macdonald and John P. Humphrey, The Practice of Freedom (Toronto: Butterworths, 1979), p. xv.


17 The Judicial Committee Act of 1844 specifically referred to appeals from any British Colony or Possession. According to B.L. Strayer, this 'formalized' the royal prerogative of justice. Ibid., p. 23.

definition. After 1896, the Privy Council was less generous in its interpretation of the Dominion’s residual power. Under Lord Watson, and later Lord Haldane, a greater emphasis was placed on s. 92 of the Constitution. Before the end of the century, the court reversed its previous position and decided that the federal government could not legislate under the general power of s. 91 if the effect of such legislation was to "trench" upon provincial powers. A debate was eventually begun on whether to end appeals to London.

During the 1930’s, while Canada was experiencing the worst social crisis of its history, the Privy Council invalidated much of R.B. Bennett’s New Deal legislation. Their Lordships ruled that the federal and provincial governments possessed jurisdiction in "water-tight compartments" that could not be tampered with, even in times of crisis. Commenting on the spirit of the Judicial Committee’s later judgments, Bora Laskin observed that the body’s de-centralizing decisions frequently involved "manipulations which can only with difficulty be represented as ordinary judicial techniques." Yet, no

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10 Section 91 outlines the powers of the Federal Parliament while s. 92 enumerates the exclusive powers of the provincial legislatures.


such manipulations were used to recognize civil liberties in the Constitution.

In 1899, the Judicial Committee did invalidate a British Columbia statute which forbade Chinese immigrants from working in underground mines. However, the legislation was struck down for the sole reason that it was ultra vires or outside the authority of the legislature by trenching "upon the exclusive authority of the Parliament of Canada."

The Court implied that, if enacted by the competent level of government, it would not invalidate racially-motivated legislation.

It proved this implication in 1903 by rendering Cunningham v. Tomey Homma. Section eight of the British Columbia Election Act, 1897 had provided that people of Chinese, Japanese, or Indian origin, whether "naturalized" or not, were not entitled to vote. According to the British Columbia Supreme Court, the act was an invasion of the federal power over "naturalization and aliens." However, the Judicial Committee decided that the law was not ultra vires and declared that Mr Tomey Homma, a naturalized British subject of Japanese origin, had been properly prohibited from voting in the election of 1900. The Judicial Committee ordered his name struck from the register of voters in a Vancouver electoral district. The Lord Chancellor claimed that in determining disputes between ss. 91 and 92 of the Constitution, "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider." Therefore, while the Judicial Committee was later to employ "manipulative techniques" in its decentralizing decisions, their Lordships explicitly decided that such judicial devices were not to be used to prevent injustice for individuals.

26 Ibid., p. 587.
28 Ibid., at p. 152.
29 Ibid., at pp. 155-156.
IV

WOULD IT HAVE BEEN BETTER TO DEFER TO THE MAJORITY?

Some might be tempted to think that everyone would have been better off had the people decided who was to be allowed onto the British Columbia electoral rolls. Would the "communitarian tradition" not be preferable to a Judicial Committee decision? Consider this editorial which appeared in the Victoria Colonist shortly after the Privy Council's decision in the Tomey Homma case. The paper commented approvingly,

We are relieved from the possibility of having polling booths swamped by a horde of Orientals who are totally unfitted either by custom or education to exercise the ballot, and whose voting would completely demoralize politics ... They have not the remotest idea of what a democratic and representative government is, and are quite incapable of taking part in it.\(^\text{30}\)

There is no evidence which indicates that this view was not shared by the majority of British Columbians. The community does not seem to have been intent on preserving fundamental freedoms. However, had the Supreme Court of British Columbia's ruling been allowed to stand, racial discrimination could have been prevented and the civil liberty of many individuals could have been respected.

Yet, the B.C. Court's ruling was not left to stand. It was overridden not only by the Judicial Committee, but by the Federal Parliament itself. Ottawa passed a law which prevented everyone who had been disenfranchised, for racial reasons by the provinces, from voting in the federal election.\(^\text{31}\) There were also laws on the provincial statute-books which were racially discriminatory with respect to the right to gain a livelihood. Laws were passed to keep "undesirable" immigrants from being employed in the hope of forcing such people to return to their country of origin. In 1923, one such


\(^{31}\)Ibid., p. 97. Only war veterans were excepted from this restriction which was enacted in 1920.
act prohibiting the employment of Asians was upheld by the Judicial Committee.\textsuperscript{32} Lord Chancellor Viscount Cave wrote:

Now, whatever may be said as to the stipulation against employing Japanese labour, there is nothing (apart from the British North America Act) to show that a stipulation against the employment of Chinese labour is invalid.\textsuperscript{33}

The passive nature of the Privy Council's judgments during this period must certainly have kept the xenophobes content by contributing to ethnocentricity. Unfortunately, decisions of this caliber did not end in the 1920's.

V

COMMUNITARIAN TRADITION OR REGRETTABLE MISTAKE?

It is always easier to find tolerant societies during times of peace and prosperity. Constitutional rights may be said to exist to be tested in times of crisis. One of the most tragic illustrations of the absence of popular consideration of individual rights occurred during World War II. In 1947, the Judicial Committee went to the extreme in demonstrating its passivity with respect to civil liberties under the Constitution Act, 1867; the Privy Council expanded a Supreme Court decision validating orders-in-council for the Deportation of Japanese.\textsuperscript{34}

After the attack on Pearl Harbour of 7 December 1941, immigrants who had retained Japanese citizenship were forced to register with the Registrar of Enemy Aliens as Germans and Italians in Canada had already been required to do. However, on December 16, an order-in-council commanded all persons of Japanese descent to register, whether British Subjects or not. Although Canada had been at war with Italy and Germany since September of 1939, Canadians of German and Italian origin

\textsuperscript{33}Ibid., at p. 458.
were not forced to undergo similar humiliation.\textsuperscript{35} In some instances, registration was demanded for citizens who had resided in Canada for over two generations!\textsuperscript{36}

Mackenzie King's deportation order included Canadian nationals of Japanese origin, many of whom had never seen Japan, and the wives and children under sixteen of such persons. Although Japan had unconditionally surrendered in August, 1945, the order-in-council was issued four months later and defended as a legitimate exercise of emergency power. The Supreme Court of Canada, by a split decision, remarkably determined that the orders-in-council were valid, except for the provisions authorizing the deportation of wives and children under 16.\textsuperscript{37} The Judicial Committee incredibly upheld the orders in their entirety.

Speaking for the Judicial Committee, Lord Wright explained that Parliament has the right to define an emergency, but:

...it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation.\textsuperscript{38}

Wright L. also explained that the act "...must apply to all persons who are at the time subject to the laws of Canada." On the subject of citizen's liberties, the Judicial Committee stated that "an order relating to the deportation would not be unauthorized by reason that it related to Canadian nationals or British subjects."\textsuperscript{39} For the Judicial

\textsuperscript{35}Fragile Freedoms, supra, note 30, p. 107. A clue as to why this distinction may have been made, might be found in the diary of the Prime Minister who commanded the incarceration of thousands of Japanese Canadians. Shortly after the horror of Nagasaki, Mackenzie King observed in his personal journal that it was rather "fortunate that the use of the [atomic] bomb should have been upon the Japanese rather than upon the white races of Europe."


\textsuperscript{38}Supra, note 34, at p. 102.

\textsuperscript{39}Ibid., at p. 105.
Committee the definition of civil liberties was outside of its scope and was to be left strictly to the legislative branches.

Yet, the democratic process was no more inclined to protecting the Japanese. There appears to have been little communitarian impulse toward tolerance. An editorial in The Vancouver Sun proclaimed,

What British Columbians want to know is whether the Japs can be sent out of the country and kept out.\(^4^0\)

In fact, some laws actually forbade resettlement in B.C. For those Japanese Canadians who were allowed to return, the political process ensured that many were kept away from various types of employment. "You will look in vain in B.C.," lamented one professor in 1941, "for Japanese lawyers, pharmacists, accountants, teachers, policemen or civil servants."\(^4^1\)

VI

A POWERLESS SUPREME COURT OF CANADA

With respect to civil liberties, the history of the Supreme Court of Canada under the Constitution Act, 1867 is little better than that of the Judicial Committee of the Privy Council. In a 1914 case bearing the misleadingly melodious title of Quong Wing v. The King, the Supreme Court upheld a Saskatchewan act which prohibited white women from residing or taking up employment in any establishment owned by a Chinese person.\(^4^2\) When the Chinese owner of a restaurant was charged with employing two white women as waitresses, the Court refused his appeal by deciding that it could not be concerned with the "justice of the Act in question, but solely as to the power of the provincial legislature to pass it."\(^4^3\)

Justice Lyman Duff, as he then was, addressed the issue from a purely economic point of view. Duff's J. stated that it would require further evidence,

\(^4^0\)Cited in Fragile Freedoms, supra, note 30, p. 114.
\(^4^1\)Ibid., p. 98.
\(^4^2\)[1914] 49 S.C.R. 440. The offence carried with it a steep, for 1914, $100 fine.
\(^4^3\)Ibid., p. 445. Emphasis added.
...to convince me that the right and opportunity to employ white women is, in any business sense, a necessary condition for the effective carrying on by Orientals of restaurants and laundries and like establishments in the Western provinces of Canada.\textsuperscript{44}

In the eyes of the Chief Justice Charles Fitzpatrick, the legislation was valid because it purported "merely to regulate places of business and resorts owned and managed by Chinese, independent of nationality, in the interest of the morals of women and girls in Saskatchewan." Invoking a strange principle of morality, Fitzpatrick C.J. added that: "This legislation may affect the civil rights of Chinamen, but it is primarily directed to the protection of children and girls."\textsuperscript{45}

Commenting on this decision, Walter Tarnopolsky has contended that the underlying presumption of the people's elected representatives and the judiciary must have been that, due to the surplus of Chinese male labourers as a result of legislative restrictions on their employment, a Chinese restaurant or laundry owner "...obviously did not need to hire white females! If he did hire them, he must have other purposes in mind!"\textsuperscript{46} Nevertheless, with respect to the Quong Wing decision, the Supreme Court's historians, Frederick Vaughan and James Snell remarkably suggest that in a "racist Canadian environment it would have been unrealistic to have expected the Canadian Supreme Court to do other than confirm the legislation."\textsuperscript{47} Yet, if Lyman Duff had continued to cede to the reactionary environment, the Alberta Press Case\textsuperscript{48} would never have been rendered, the same may be said of Chief Justice Earl Warren's Brown v. Board of Education\textsuperscript{49} decision in the United States or Ivan Rand's judgement in Roncarelli v. Duplessis\textsuperscript{50}.

\textsuperscript{44}Ibid., p. 465
\textsuperscript{45}Ibid., p. 444.
\textsuperscript{46}W.S Tarnopolsky, Discrimination and the Law (Toronto: Richard De Boo Ltd., 1982), p. 15.
\textsuperscript{50}[1959] S.C.R. 121.
More could have been expected from Supreme Court Justices. Less, not more, was forthcoming.

In 1928, the Supreme Court of Canada went as far as to tell five women that they could not be appointed to the Senate because the constitutional meaning of the word "persons" did not extend to females.\(^5^1\) Not one of the judges ventured to infer that women could be considered "qualified persons" under the Constitution.

VII

**RACIAL DISCRIMINATION**

Often Canadians rightfully criticize the American legal system for its acceptance of the discrimination against Blacks and minorities for numerous years.\(^5^2\) Yet, Canada's legal history is not unblemished in this regard. Lower courts were often reluctant, and the Supreme Court later unwilling, to recognize that racial equality was a higher principle than freedom of commerce.

In the 1921 *Loew's Theatre v. Reynolds* case,\(^5^3\) a majority of the Quebec Court of Appeals upheld a Montreal theatre's right to discriminate against Blacks. The majority ruled that:

> While it may be unlawful to exclude persons of colour from the equal enjoyment of all rights and privileges in all places of public amusement, the management has the right to assign particular seats to different races and classes of men and women as it sees fit.\(^5^4\)

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\(^{5^2}\)The infamous decision of U.S. Chief Justice, Roger B. Taney, is often singled out. Taney C.J. ruled that Blacks were not to be regarded as United States citizens nor granted Constitutional privileges. See also the establishment of the equally ignominious separate-but-equal doctrine in *Plessy v. Ferguson* (1896) 163 U.S. 537.

\(^{5^3}\)Ibid., at p. 465. Chief Justice Lamothè declared:

> ...chaque propriétaire est maître chez lui; à son gré, établir toutes règles non contraires aux bonnes moeurs et à l'ordre public. Ainsi, un gérant de théâtre pourrait ne recevoir que les personnes revêtues d'un habit de soirée. La règle pourrait paraître arbitraire, mais elle ne serait ni illégale ni prohibée.
The Loew's Theatre decision was a painful step backward. The courts had taken a sterner stand against racial prejudice twenty years earlier in a judgement regarding discrimination on racial grounds. As a result of the 1899 Johnson v. Sparrow decision, damages, including compensation for injury to feeling, were granted to a Black Montrealer who had not been permitted, due to his skin colour, to occupy seats in the orchestra section of a theatre with the woman he had accompanied. In granting damages and legal costs, Mr. Justice Archibald ruled that the theatre's action was "undoubtedly a survival of prejudices created by the system of negro slavery." In a judgement clearly delivered ahead of its time Archibald J. went on to explain that:

> Our Constitution is and always has been essentially democratic, and it does not admit of distinctions of races or classes. All men are equal before the law and each has equal rights as a member of the community.

It is regrettable that other judges did not adopt a similar view of the Constitution. If they had, they would have concurred with the notion that tacit bigotry is not only unconstitutional but "entirely incompatible with our free democratic institutions." Yet, the 1899 Johnson ruling was followed by judgments upholding violations of civil liberties on racial grounds.

During the first half of this century, many minorities did not have access to the political system. The "great political tradition" was of little use to them against discrimination. Yet, the courts were unwilling, or unable, to come to their aid under the Constitution Act, 1867.

In a 1924 Ontario case, a Black man was refused service in a restaurant. The trial judge claimed that while he "could not but be touched by the pathetic eloquence of (the man's) appeal for recognition as a human being, of common origin with ourselves," he could not grant the man's claim since there was no explicit law requiring restaurants...
to receive.\textsuperscript{58} Just prior to World War II the Supreme Court of Canada rendered a similar decision in Christie v. the York Corporation, affirming that restaurant owners were not required to serve Blacks and could engage in racial discrimination under the principle of "freedom of commerce."\textsuperscript{59}

The details of the case are worth recalling. In 1939, Fred Christie, a British subject of Jamaican origin, worked as a private chauffeur in Montreal. Mr. Christie was a season box subscriber to the Canadiens home games at the old Montreal Forum and had on occasion bought beer from a tavern in the building. One evening Fred Christie requested three steins of beer for himself and two friends. The waiter refused to serve the Verdun resident because he was Black and the waiter had been instructed not to serve "coloured people."\textsuperscript{60} Upon being refused service Mr. Christie called the manager who confirmed that the only reason for denial was that he was a "coloured person." Mr. Christie then telephoned the police and had the manager repeat his previous refusal so that the authorities could witness the denial of service.

A majority of the Supreme Court of Canada upheld the act of discrimination and refused to reinstate the damages and legal costs that Mr. Christie had been awarded by the trial court. The Court's opinion, written by Rinfret J. and endorsed by Duff C.J. and Crocket and Kerwin JJ., reaffirmed "complete freedom of commerce" in Quebec law. According to the Court "any merchant is free to deal as he may choose with any individual member of the public."\textsuperscript{61} The only restriction to such freedom was the existence of a specific law to the contrary. Of course, "the existence of a specific law to the contrary" was unlikely in the illiberal Quebec of the 1940's. Exhibiting absolutely no inclination to read any higher principles into the

\textsuperscript{58}Franklin v. Evans [1924] 55 O.L.R. 349.
\textsuperscript{59}(1940) S.C.R. 139.
\textsuperscript{60}Ibid., at p. 146.
\textsuperscript{61}Ibid., at p. 142.
Constitution, nor demonstrating any sympathy for Fred Christie, the court delivered a sad comment.

Mr. Justice Rinfret even attempted to justify the denial of service to Mr. Christie on the grounds that it was made "quietly and without causing any scene or commotion whatever." He then remarkably concluded that "if any notice was attracted to the appellant on the occasion in question, it arose out of the fact that the appellant persisted in demanding beer after he had been so refused and went to the length of calling the police, which was entirely unwarranted by the circumstances." For Rinfret J. it was apparently unwarranted by the circumstances to seek justice.

Mr. Justice Davis was the only member of the Supreme Court willing to recognize Mr. Christie's right against discrimination. In his dissenting opinion Davis J. ruled that the conduct of the tavern was contrary to good morals and the public order. The majority obviously could have, but refused, to do the same. Yet, this was not to be last time the Canadian courts would fail to rule against racial inequality. The Supreme Court's decision in Christie was used as the basis for the dismissal of a similar action in British Columbia. Six months after the Christie judgement, the B.C. Court of Appeal applied the ruling of the Supreme Court in finding that the operator of a beer parlour had the right to refuse service to Blacks.

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62 Ibid., at p. 141. Emphasis added.
63 Ibid., at p. 147.
64 Rogers v. Clarence Hotel Co. [1940] 3 D.L.R. 583. In dissent O'Hallaran J.A. wrote, at p. 588, that "all British subjects have the same rights and privileges under the common law - it make no difference whether white or coloured; or of what class, race or religion." In addition the Judge cited, Rothfield v. North British R. Co. [1920] S.C. 805, where a railway company sought to exclude a man it described as "a German Jew and a money-lender" from its Edinburgh hotel during World War I. O'Hallaran quoted Lord Anderson approvingly, where the later wrote of the Edinburgh exclusion:

It is obvious that the defenders are not entitled to exclude the pursuer from their hotel because he is a Jew; and it would have made no difference, in my opinion, had it been proved that he is a Jew of German origin. An individual is not responsible, and ought not to be made responsible, for his
None of this was inevitable from a legal point of view. Commenting on the preference of freedom of commerce over racial equality in Christie, F.R. Scott noted that the majority "exercised a discretion that could as well have gone the other way ..." 65 Apparently, for the majority of the Supreme Court, the role of defending the principle of "laissez faire" was of greater importance than that of ensuring social justice.

VIII

WHAT DID THE MAJORITY DO TO PROTECT THESE MINORITIES?

Where were the people's elected representatives throughout all of this? The more democratic branches of government did not appear to have been much more tolerant. For instance, in 1941 Prof. Mallory observed,

The pages of Hansard are a depressing reaffirmation of the meagerness of our political thought. Where is this babel of narrow and confused ideas leading our political society? Every country has in the political psychology of its people an Achilles heel of prejudice with which the advocates of dishonest causes can arouse popular feeling. 66

The federal government could have exerted its political pressure to encourage reform or used its direct power of disallowance to invalidate discriminatory provincial legislation. However, in such an atmosphere it is not surprising that it chose to do nothing. 67

ancestry.


67 Although the Governor-General has not been asked to disallow a piece of legislation since 1943, at the time it was an effective advantage that Ottawa held over the provinces. See Christopher Gilbert, Australian and Canadian Federalism 1867 - 1984 (Carlton, Victoria: Melbourne University Press, 1986); Eugene Forsey, Freedom and Order (Toronto: McClelland & Stewart, 1974), pp. 177-191; G.V. La Forest, Disallowance and Reservation of Provincial Legislation (Ottawa: Queen's Printer, 1965).
While Canada's treatment of minorities may have been better than the United States, a properly empowered judiciary may have curbed some of the injustice of our past. Many of the incidents described above would surely have been prevented if the Charter, which Michael Mandel now rejects, had existed at the time. Yet, many of these incidents might have been repeated if the Courts had deferred to the legislative branches as Prof. Monahan now urges.68

Today, Prof. Mandel points to the Korematsu69 decision in the United States, to claim that it is 'clear' that "no Charter would have saved Japanese Canadians from the parallel abuses of the Canadian government."70 Yet, such an assumption is far from 'clear'. The American government did not issue a deportation order for the Japanese and it is doubtful whether such an measure would have passed muster under the U.S. Bill of Rights. Furthermore, in Canada the War Measures Act has recently been revised to conform to the Charter, as have other important pieces of legislation. To assume that such a situation as the Japanese internment could be replicated today, is to stretch the imagination to acrobatic proportions.

As for Patrick Monahan's suggestion that "we need more politics not less,"71 consider the Martin v. Law Society of B.C. case.72 A

68See the discussion of the views of Patrick Monahan and Michael Mandel in the previous and final chapters of this study.


70Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989), p. 50. It is worth noting, though Mandel does not, that in Korematsu there was an important dissent. Describing the majority decision in Korematsu as the "legalization of racism," Mr. Justice Murphy of the U. S. Supreme Court issued a strong repudiation of the ruling of his brethren stating that it was "difficult to believe that reason, logic or experience could be marshalled i.: support of [the] assumption ... [that] all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage." Ibid., at pp. 235, 242. It should also be noted that, without an entrenched bill of rights, the majority of the Supreme Court of Canada could not find grounds to invalidate the much more serious government measure of deportation.

graduate of the University of British Columbia Law School was denied admission to the Bar of B.C. because he was a member of the Labour Progressive Party and had campaigned for elected office as an LPP candidate. Although, the LPP was a legal party, the Benchers refused to allow Mr. Martin to be called to the bar because he was a communist. Canada was not experiencing the kind of witch-hunts which would soon dominate the United States during the tragic McCarthy era. Yet, neither the politicians nor the citizens comprising the "great communitarian tradition" showed any great inclination to step in and allow communists, or those with unpopular political views, the opportunity to practice law in British Columbia. Contrary to Prof. Monahan's general prescription, the problem here appears to have been too much politics not to little.

Arguing against the entrenchment of rights in the Canadian Constitution, D.A. Schmeiser warned Canadians "not to relinquish part of their sovereignty to the potential despotism of the judiciary." According to Prof. Schmeiser, judges could "thwart the public will." On the other hand, he held that,

If the people appreciate that they are the primary guardians of freedom, they will be conscious of, and watchful for violations of freedom.

Canadians have always, and hopefully will always, have the opportunity to be conscious of the preservation of liberty. During the era of parliamentary sovereignty, the people of Canada, through their democratic representatives, were the final arbiters of freedom as they lived under a judiciary which claimed to be powerless in the protection of civil liberties. From the turn of the century to the 1920's, certain Canadian towns greeted visitors with the warning: "No Catholics, Blacks or Irish."

For many years, Canada's immigration policy continued to rank the ethnicity of individuals as "desirable" or "undesirable", without

74Ibid., p. 30.
75Ibid., p. 31.
popular objection. Moreover, Asians were disenfranchised and prevented from taking up employment; the Japanese were deported; Blacks were refused service; and Communists were kept out of the Bar - while the majority looked on in silence.

Lest the wrong impression be given, it should be noted that there were some outstanding judicial decisions where "bold spirits" recognized fundamental rights where "timorous souls" could find none. For example, as early as 1916, Mr. Justice Stuart observed in a sedition case that,

There have been more prosecutions for seditious words in Alberta in the past two years than in all the history of England for over 100 years, and England has had numerous and critical wars in that time.76

Despite, such a history of judicial pusillanimity, Chief Justice Duff and Davis J. were not deterred from finding a constitutional "right of free public discussion of public affairs" in the Alberta Press Case.77 Our forbearers can be thankful that the Province of Alberta's 1937 Accurate News and Information Bill was met with valiance in the Court.78 The proponents of minority political views in Quebec were similarly fortunate that the Supreme Court cracked Premier Duplessis' "padlock law" in 1959.79 Such displays of valour on the part of the judiciary, however, were rare under the British North America Act.

76Cited by F.R. Scott, supra, note 65, p. 36.

77Supra, note 48. Duff C.J. ruled that free speech is "the breath of life of parliamentary institutions."

78The sword used to preserve liberty was the principle of an "implied bill of rights" within the constitution.

79Switzman v. Elbling [1957] S.C.R. 285. The "Padlock Act" had made it illegal to use a house "to propagate communism or bolshevism by any means whatever." The Court had earlier struck down a bylaw that prevented the distribution of pamphlets without the prior permission of the Chief of Police, in Saumur v. City of Quebec [1953] 2 S.C.R. 299.

Chapter Three

Constitutional Half-Way House

To define and protect the rights of individuals is a prime purpose of the constitution in a democratic state. F.R. Scott.¹

The same year that the Judicial Committee upheld the Supreme Court's decision to deport Japanese Canadians, the Saskatchewan Legislature enacted Canada's first Bill of Rights. As a regular act of the Legislature it could have been repealed at any time by that body. Nevertheless, the Saskatchewan legislation was a monumental first step in increasing the respect for civil liberties in Canada.

The international community soon followed suit. The General Assembly of the United Nations passed the Universal Declaration of Human Rights in 1948. Although the Universal Declaration does not contain effective measures of enforcement it affirms political, legal, egalitarian and economic liberties. Many nations signed the Declaration and bound themselves to its declaratory provisions; Canada was one of them.

To conform to the spirit of the Declaration, Parliament of Canada subsequently established a joint committee to explore the possibilities for a national bill of rights. A Special Senate Committee on Human Rights and Fundamental Freedoms followed shortly thereafter and many recommendations were heard to insert a bill of rights into the British North America Act.

Rising in the House of Commons in May 1947, John Diefenbaker urged the adoption of such a bill by stating that it would protect individuals and minorities, and "assure that each of us would have a legal right to be heard in the courts of this country."² Later, in


March 1952, the future prime minister provided further reasons for supporting a bill of rights:

A Bill of Rights would do something more; it would make Parliament freedom-conscious. It would make Parliament realize that rights are to be preserved. It would make Parliament more cautious in passing laws that would have the effect of interfering with freedom. It would act as a landmark by means of which Canadians, through Parliament, would have redeclared those things which have made Canada great. It would preserve those spiritual wells in legislative form without which freedom cannot survive. It would give to Canadians the realization that wherever a Canadian may live, whatever his race, his religion or his colour, the Parliaments of Canada would be jealous of his rights and would not infringe upon those rights which are dear to us all ...  

Upon coming to power, a few years later, the Diefenbaker Government considered submitting a draft Bill of Rights to the Supreme Court for an advisory opinion. This option was never carried through as it was soon decided that the proper step would be to table the Bill in Parliament.

In 1960, after debating the issue for many months, Parliament passed An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms. However, the Supreme Court's interpretation of civil liberties under the Canadian Bill of Rights was to be nearly as narrow and technical as it had been before the legislation. The courts showed great reluctance to give the statute teeth.

The shortcomings of the Diefenbaker Bill of Rights were apparent from the outset. In 1959, Bora Laskin, then Professor of Law at the

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3 Ibid.
4 Ibid., p. 256.
5 It is, nevertheless, interesting to speculate how the Supreme Court would have reacted to such an unusual request, especially in light of their later ineffective interpretation of the Bill.
6 R.S.C. 1970, App. III. [hereinafter, Canadian Bill of Rights, Bill of Rights or 'the Bill'].
University of Toronto, wrote an article in which he classified "civil liberty" matters. Professor Laskin, who later became Chief Justice of the Supreme Court of Canada, observed that the proposed draft of the Bill of Rights was "replete with omissions and obscurities." While noting the Bill's limitations, he expressed disappointment that it would apply only to the federal level of government. Mr. Diefenbaker, in fact, did not even seek provincial agreement for the entrenchment of the Bill into the British North America Act; at the time, such approval seemed unattainable.

Prof. Laskin was not the only authority criticising the Bill's defects. F.R. Scott had urged that a bill of rights be included in the B.N.A. Act and was quick to observe that the principal omission of Diefenbaker's Bill was the absence of any new legal remedies for individuals. As it turned out, it took the Supreme Court a decade to decide that it would render legislation inconsistent with the Bill of Rights inoperative. Yet, even after the Drybones decision the Court


9Ibid., p. 125.

10Ibid., p. 78. Laskin used the word 'unfortunate' to describe this condition.


12Writing in his autobiography during the 1970's, Diefenbaker remarked:

My experience with the provincial governments indicates that they were too jealous of their jurisdiction over property and civil rights to support any amendment applicable to themselves. I have little hope that their attitude will be altered in the years ahead.

One Canada, supra, note 2.


continued its reluctance to review legislation which came into apparent conflict with the human rights outlined in the legislation.

The first section of the Bill stated that, "it is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination ... the following human rights and fundamental freedoms ..." The judiciary proceeded to interpret the first article in a literal manner. This produced the "frozen rights" doctrine which prevented the courts from recognizing rights that had not existed when the Bill was adopted in 1960.16

The 1950's had left hope that the Supreme Court might find tacit civil rights within the B.N.A. Act to make it consistent with the new Bill of Rights.17 This expectation was quickly dispelled with the Oil, Chemical and Atomic Workers ruling in which the majority of the Court disagreed with Justice Abbott's concept of an "implied bill of rights."18 The Supreme Court determined that it was within British Columbia's jurisdiction to prohibit union contributions to political parties under the province's authority to regulate labour relations. Similarly, Walter v. Attorney General of Alberta affirmed the right of the Government of Alberta to pass the Communal Property Act with the intention of limiting the expansion of Hutterites and other minority sects.19 The Supreme Court, in a unanimous decision, held that Alberta had exclusive jurisdiction over property, regardless of the civil liberties affected.


It is to be noted at the outset that the Canadian Bill of Rights is not concerned with 'human rights and fundamental freedoms' in any abstract sense, but rather with such 'rights and freedoms' as they existed in Canada immediately before the statute was enacted.


One of the most disappointing cases under the Bill of Rights was the Lavell and Bédard judgement.\(^{20}\) The Indian Act allowed Indian men to marry non-Indian women without relinquishing their Indian status, yet, Indian women who married non-indians were denied registrations as members of Indian bands. The discriminatory provision of the Act was held invalid by lower courts and the Federal Court of Appeal. However, Justice Ritchie led a majority of the Supreme Court to proclaim that equality before the law did not pertain to equal treatment, but equal enforcement and administration of the law.

In response to the Lavell and Bédard decision, Emmett Hall remarked that the Bill of Rights, "went from a high point of great expectancy down a short steep slope to near oblivion."\(^{21}\) Writing to a colleague on the bench, a retired Justice Hall stated that the majority decision on the meaning of equality before the law amounted to "plain damn nonsense."\(^{22}\) In reference to the author of the ruling, Emmett Hall said,

I cannot help but think of my erstwhile colleague Ritchie as coming within that qualification of those mammals who destroy and devour their young.\(^{23}\)

Indeed, the opinions of Mr. Justice Ritchie and his supporters rendered many provisions of the Bill largely nugatory, destroying the hopes of a generation. According to Neil Finkelstein, the Supreme Court's later judgments under the Bill of Rights 'eviscerated' the Drybones decision and 'emasculated' the Bill's equality provisions.\(^{24}\)

William Conklin's explanation for the demise of the Canadian Bill of Rights is linked to the rationalistic image of a constitution which


\(^{22}\) I bid., p. 167.

\(^{23}\) In the letter written to former Judge Thomas Berger. Quoted ibid.

\(^{24}\) N. Finkelstein, supra, note 8, p. 231, n. 14.
Justice Ritchie and his brethren presupposed in their judgments.\textsuperscript{25} Prof. Conklin contends that an apolitical and passive institutional self-image permeated the judiciary's application of posited statutory rules; the problem was with the judges conception of the constitution. "Their image of a constitution could not absorb or incorporate the bill," writes Prof. Conklin, "much like an old body with a newly transplanted heart, their image rejected the Bill as a foreign, unassimilable object."\textsuperscript{26}

II

**BLATANT INEFFECTIVENESS**

The Bill of Rights was not to protect Canadians against the Trudeau Government's invocation of the War Measures Act to deal with an "apprehended insurrection." The details of the 1970 October Crisis are well documented elsewhere, yet it is worth noting that the event saw the suspension of habeas corpus, the right to bail, and access to counsel, all with widespread public approval. A complacent majority did not pursue these indiscretions by demanding a Royal Commission of Inquiry to investigate the questionable circumstances surrounding the Government's draconian measures. For J.R. Mallory, the incident "illustrated the fragility of generally accepted civil rights and indeed of the whole constitutional order."\textsuperscript{27}

Despite the various international crises that have faced the United States this century, nothing even coming close to the Canadian War Measures Act has been inflicted on the domestic American population. Perhaps, this best be kept in mind before getting carried away with Michael Mandel's admonition that the Charter encourages too many lawyers to interfere with politics. To use William Conklin's phraseology, Prof. Mandel's problem appears to be that his negative 'image' of judges and the Constitution leads him to reject the Charter


\textsuperscript{26}Ibid., p. 98.

as a foreign conspiratorial object. Were Prof. Mandel to develop a Constitutional image as sophisticated as that of F.R. Scott, his relentless criticism of the Charter might be redirected.

There may be interpretations of the Charter well worth improving and some of these will be considered in the next chapter. However, unchecked majorities have been known to sentence philosophers to death and to scream for crucifixions. Despite, the protestations of a few concerned voices, the Government’s actions in October 1970 would easily have been confirmed if put to a referendum. "It is true that civil liberties have been better protected in Britain than in the United States," state Corry and Hodgetts. "It is also true," they add, "that without bills of rights in the federal and state constitutions, civil liberties in the United States would have suffered still greater infringement."29

With respect to the protection of civil liberties in Canada, the 1960's and 70's illustrated that the Canadian Bill of Rights was not enough. In the Hogan judgement the absence of judicial remedies in the Bill became painfully evident when the majority made it clear that it would not interpret a remedy for the abrogation of Mr. Hogan's "right to counsel."30 As the Court came to interpret the Bill, its limitations became more obvious, leading Chief Justice Laskin to perceive the document as "a half-way house between a purely common law regime and a constitutional one."31 Soon Canadians would recognize that, in the protection of civil liberties, a half-way house does not make a home. After seemingly endless rounds of constitutional negotiations, the Charter was finally adopted.

28See F.R. Scott, supra, note 1.
30Hogan v. The Queen [1975] 2 S.C.R. 574
31Ibid., 579.
Chapter Four

Increased Authority

It is something astonishing what authority is accorded to the intervention of a court of justice by the general opinion of mankind.

Alexis de Tocqueville

The Charter’s political impact on the Supreme Court can best be considered by noting the structural changes brought about by the patriation of Canada’s Constitution. The Court’s new responsibilities have been explicitly mandated by ss. 24 and 52(1) of the Constitution Act, 1982. Although the supremacy clause, s. 52(1), is not part of the thirty-four articles which are collectively known as the Canadian Charter of Rights and Freedoms, it nevertheless gives the Charter and the rest of the Canadian Constitution its overriding capacity to the extent that any law inconsistent with the document is "of no force or effect."

As a result of the categorical wording of s. 52(1), since 1982, the greatest change in the institutional history of Canadian politics has occurred. Parliamentary supremacy in Canada has been replaced by constitutional supremacy. Furthermore, the Supreme Court now has the power to define how rights will be enforced. Section 24 of the Charter grants the Court the power to exclude evidence which, if allowed, "would bring the administration of justice into disrepute." In addition, s. 24(1) enables the court to devise "creative remedies" to guarantee rights and freedoms.

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2The legislation found inconsistent with the section is rendered inoperative.

3The inclusion of the non obstante clause (s. 33) and limitation clause (s. 1) in the Constitution Act, 1982 have prevented the creation of judicial supremacy.
II

THE NEW CONSTITUTIONAL MANDATE

With the new provisions of explicit and expanded invalidation power, remedial authority, and the potential to exclude evidence, the court has been granted an unprecedented ability to guard against the infringement of rights. By establishing a set of new relationships between the individual and the state, the Charter has allowed the court to enter a new domain of constitutional interpretation. The judiciary is therefore now required to define and, if necessary, to limit state power over individuals. This new reality has increased the Supreme Court's political character.

In addition to its post-1949 'watchdog role' in Canadian federalism, the Court has been handed the responsibility of interpreting the fundamental rights and freedoms of individuals and groups in Canadian society. Therefore, the constitutional emphasis of the court has shifted from merely determining the scope of federal and provincial legislative and governmental powers, to interpreting the rights of individuals in their dealings with those two levels of government and related agencies. The passive option to decide cases solely on the principles of federalism is no longer open to the Court.

While Michael Mandel may choose to lament the "legalization" of politics, it has more importantly been agreed that the Charter will allow individuals and interest groups to present national issues "unencumbered by the snares of federalism." Where constitutional questions once revolved solely around disputes of state versus state, now private individuals and groups of citizens may constitutionally challenge questionable government action.

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III

EXPLICIT REMEDIES: CONTRASTING THE BILL AND THE CHARTER

Over the past three decades there has been a considerable shift in attitudes toward the state's role in the protection of liberties. For example, when the Bill of Rights was introduced in 1960, legal aid was extremely scarce. Today, the vast majority of criminal cases are pleaded by lawyers whose services are paid for by the state. A dramatic re-orientation has taken place in the public's concept of individual liberties and rights.

In his memorable article on the Bill of Rights, Bora Laskin outlined four classes of liberty: political, legal, egalitarian, economic. The first three of these classes have been greatly affected by the Charter. The provisions of the Constitution Act, 1982 which grant remedies and invalidate legislation, were notably absent from the Bill of Rights. Unlike its statutory predecessor, the Charter provides grounds for the judicial enforcement of rights and freedoms, and does so at both the provincial and federal levels. This has significantly influenced the depth and significance of Supreme Court judgments.

According to Peter Hogg, judicial review under the Charter is a "formidable task, involving a much higher component of policy than any other line of judicial work."

The Court has met the Charter with a different spirit than it did in the Canadian Bill of Rights. Mr. Justice Le Dain has written of a "new constitutional mandate for judicial review," which, in the words of Madam Justice Bertha Wilson, means that "those convenient escape hatches (to defer to the legislature) are not open under the Charter.

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8Part II, s. 3 of the Canadian Bill of Rights explains that: "The provisions of Part 1 shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada."


which uses broad and vigorous language and whose paramountcy is clear and unqualified by virtue of s. 52." Chief Justice Brian Dickson has affirmed that "a constitutional document is fundamentally different from the statutory Canadian Bill of Rights, which was interpreted as simply recognizing and declaring existing rights." Elsewhere, the Chief Justice has declared that "the task of expounding a constitution is crucially different from that of construing a statute."

IV
LEARNING FROM THE PAST

It is clear that the Charter was built on two decades of experience under the Bill of Rights. However, since many of the contentious issues that have arisen and will arise under the Charter have already been litigated by the United States Supreme Court, America civil liberties jurisprudence has been cautiously considered in Canadian cases.

There are many differences between the Canadian and American constitutional experiences with respect to the courts. In the United States, the sixth article of the American Constitution establishes that document as the "supreme law of the land." However, with the third article of the U.S. Constitution, there is a particular "case or

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14Mr. Justice Estey observed in Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161 (S.C.C.), at p. 168: The courts in the United States have had almost two hundred year's experience at the task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States.
15Constitution of the United States of America (1787).
controversy" requirement in order to obtain standing. In contrast, the Canadian judiciary has been much more willing to hear cases under the liberal provisions of s. 52(1) of the Constitution Act, 1982. This provision allows individuals or groups to initiate legal proceedings if they can demonstrate direct consequence in the validity of the legislation or a genuine interest as citizens where there is no other reasonable and effective manner in which the issue may be brought before the Court.

To a large extent Canada has had the opportunity to learn from many of the inequities which have arisen south of the border. In the United States the federal Bill of Rights has been incorporated by the states on a selective basis. For instance, although most Bill of Rights criminal process guarantees have been made applicable to both levels of government, the grand jury indictment provision of the Fifth Amendment and the "excessive bail" provision of the Eighth Amendment do not apply to the states. Canada has avoided the inconsistency brought about by the selective incorporation battles of the U.S. Bill of Rights, by applying the Charter to the federal and provincial governments. Due to the integrated nature of the Canadian court system and Canada's single criminal code with uniform national application, many of the American irregularities with respect to criminal justice have been avoided. Despite these structural differences, the Supreme

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16Under the U.S. Constitution the right to standing is granted on a far more limited basis as claimants must prove "injury in fact". See Laurence Tribe, Constitutional Choices (Cambridge MA: Harvard University Press, 1985), p. 99.


18Following the precedent established by Mr. Justice Benjamin Cardozo in Palko v. Connecticut 302 US 319.


20The revelations of the Marshall Inquiry in Nova Scotia and the recent Inquiry into Aboriginal Justice conducted in the Pas, Manitoba, notwithstanding.
Court of Canada has learned from the experience of its American counterpart.

While the U.S. Constitution remains a document of the eighteenth century political tradition, the Canadian Constitution has become a product of more modern social and legal thought. "Although framed in the rhetoric of liberal individualism," writes Patrick Monahan, "the Charter simultaneously emphasizes communitarian and republican values." Robert Sharpe, of the University of Toronto Faculty of Law, has noted that language is one of the major differences between the Canadian and American constitutions. In comparison to the negative restrictions in the American Constitution, the Canadian Constitution makes affirmative promises. Prof. Sharpe has emphasised that instead of stating "congress shall make no law," Canada's document affirms that "everyone has the following fundamental freedoms." The fundamental justice, equality, and affirmative remedy sections of the Canadian Constitution serve to underscore the point. Stating rights and freedoms in a positive manner inevitably leads to great power being invested in the Supreme Court to fulfill the Constitution's promises.

V

RIGHTS AND FREEDOMS IN THE CHARTER

The Supreme Court's new-found authority has been made possible by the various provisions added to the Canadian Constitution in 1982. The Court's greatest influence has been, and will be, exerted in interpreting the extensive set of human rights and fundamental freedoms outlined by the Charter. These provisions can be essentially divided into six broad categories: fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, and minority language education rights.

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23 The First Amendment of the Constitution of the United States of America.
24 The Charter, s. 2.
The delineated fundamental freedoms include freedom of religion, thought, conscience, belief, expression, peaceful assembly and association. Democratic rights are specified in ss. 3-5. Among democratic guarantees are: the right to vote and hold office; the provision that Parliament and each provincial legislature hold at least one sitting every twelve months; and the assurance that neither the House of Commons nor any provincial legislature may continue longer than five years, except in "time of real or apprehended war, invasion or insurrection" in which case such a continuation must not be opposed by the vote of one-third of the members of the House or legislature in question.25 Canada's mobility rights are expressed in s. 6 which ensures that every citizen has "the right to enter, remain in and leave Canada," and guarantees that citizens and permanent residents have the freedom to "move to and take up residence in any province," and "pursue the gaining of a livelihood in any province."

The new relationship between individuals and the state, created by the Charter, is subject to judicial interpretation of the legal rights set out in ss. 7-14. Rights which apply to arrests, detentions, and proceedings in criminal matters are defined in these articles. In addition, s. 7 includes the affirmation that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." This legal right is of particular importance, since, in one of its most activist decisions to date, the Supreme Court ruled that s. 7 has both procedural and substantive significance, ensuring that the actual content of government legislation is also consistent with these values.26

25The Charter, s. 4(2).

26Re. Section 94(2) British Columbia Motor Vehicle Act [1985] 2 S.C.R. 486, at 492, [hereinafter Re. B.C. Motor Vehicle]. While considering the broader range of values expressed under the Charter Lamer J. explained that the "Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues." See also Morgentaler, infra, note 182, per Wilson J., at p. 492.
Equality rights are expressed in s. 15 of the Charter. This section establishes a general prohibition against discrimination. Although the Bill of Rights protects the right of the individual 'before' the law and guarantees "the protection of the law", s. 15 of the Charter goes further to recognize that everyone has the right to "equal protection before and under the law," in addition to "equal benefit of the law." As a result, several forms of discrimination are proscribed, including "race, national, or ethnic origin, colour, religion, sex, age, or mental or physical disability." It is understood that the list of examples is not meant to be exhaustive, but the court has not yet had to establish the relative importance attached to forms of discrimination expressed in s. 15 and those which are implicit, such as sexual preference or discrimination based on height.

Many of the rights and freedoms guaranteed by the Charter are not limited to Canadian citizens. Only democratic rights, mobility rights, and minority language education rights are restricted to "citizens of Canada." Other rights or freedoms belong to "everyone" or "any person." Since these terms are not defined it has been left to the Court to clarify their potential application to groups or corporations.

Minority language education rights are guaranteed under s. 23(b) of the Charter. Due to a political compromise during the constitutional drafting process, Canadian citizens "who have received their primary instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority," are granted the right to have their children "receive primary and secondary school instruction in that language in that province."

VI

THE LIMITATIONS CLAUSE

All human rights and fundamental freedoms expressed in the Charter are not absolute. They are subject to potential restriction. Section 1 permits governments to limit rights, provided that such limitations are "reasonable," "prescribed by law," and "justified in a free and democratic society." Although, the first section of the Charter
acknowledges the inherent tension between 'individual' and 'collective' rights, it places the burden of proof on the state to justify any such limitation on individual freedom.27

The theory behind the general limitation clause holds that rights and freedoms, in any society, cannot be unlimited. Despite the absence of a restriction clause in the U.S. Constitution, the American Supreme Court has read limitations into the Bill of Rights.28 The Charter was drafted with the consideration that, although it is highly desirable to protect individuals and minorities against possible excesses at the hands of the majority, it is also necessary to ensure that only reasonable rights are confirmed. Therefore, s. 1 strikes a balance between collective and individual rights.

VII

JUDICIAL DECISIONS UNDER SECTION ONE

As a substantive provision, the Supreme Court appeared at first reluctant to consider s. 1. In the Quebec Protestant School Boards case,29 the Quebec government argued that its restrictions on access to English education were reasonable under the first section of the Charter. However, the Supreme Court refused to consider Quebec's s. 1 claim since the provision of Bill 101 in question (s. 73), directly

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violated s. 23 of the Charter and, therefore, were not a limitation but the outright denial of a constitutional right.30

In The Queen v. Big M. Drug Mart the Court struck down the Sunday closing provision of the federal Lord’s Day Act because it conflicted with the Charter’s guarantee of freedom of religion.31 The decision was significant in many ways. The act in question had already been unsuccessfully challenged under the Bill of Rights in Robertson and Rosetanni v. The Queen.32 The judgement clearly illustrated the superior force of Charter rights. In Big M. Drug Mart corporations were recognized as ‘individuals’ under the Constitution for the first time. Furthermore, the Court used the ‘purposive’ approach to determine the philosophical and historical roots of rights and freedoms. Due to the obvious religious bias of the legislation, the court rejected the application of s. 1 and defined the limitations clause for the first time.

Under the explanation provided in the Big M. Drug Mart case, in order to justify a Charter infringement, a government is first required to prove the disputed law has a valid purpose or involves an issue of "pressing and substantial" societal concern. Once this is established, the onus is still on the crown to demonstrate that the measures used by the law are not unfair, arbitrary or bring about incommensurate effects.33

In R. v. Oakes, the Supreme Court went further in defining the limitations clause of the Charter.34 The case arose after David Edwin Oakes was charged with the unlawful possession of narcotics for the purpose of trafficking, an offence under s. 4(2) of the Narcotic

30Id., at 88.
33In fact, when a more secular Sunday closing act was challenged in Edwards Books and Art Ltd. v. The Queen [1987] 2 S.C.R. 713. The Court found that while the legislation still interfered with the guarantee of freedom of religion under s. 2(b) of the Charter, it was a reasonable and demonstrably justified limit under s. 1.
Control Act. The Crown sought to establish the offence by using the reverse onus provision (s. 8) of the Act. However the accused was acquitted and the decision was upheld by a unanimous Ontario Court of Appeal where Mr. Justice Martin concluded that the reverse onus provision of the Narcotic Control Act was unconstitutional "because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic)."35

The Crown eventually appealed to the Supreme Court, arguing that the provision in the Act was a reasonable limitation. As a result, s. 1 of the Charter was finally clarified. Writing for the Court, Chief Justice Brian Dickson recognized that the purpose of s. 1 is to place limits on rights when "their exercise would be inimical to the realization of collective goals of fundamental importance."36 His Lordship outlined two essential criteria which must be satisfied before a legal limit on a right could be justified. The first criterion holds that any limitation overriding constitutionally protected rights and freedoms must "relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important."37 In other words, it is first necessary to prove that the objective for which the limitation is designed is of sufficient importance. If this is achieved, the state must prove that the means chosen to reach the objective are "reasonable" and "demonstrably justified." The determination of this second criterion involves a "proportionality" test for which there are three components. First, the law must be "rationally connected" to the objective of the limitation. Second, even if rationally connected, the means chosen must impair the limited right or freedom "as little as possible." Third, even if the first two standards are met, the state must then demonstrate a proportionality between the "effects" of the mean, or the

36Oakes, supra, note 12, at p. 136.
37Id., at pp. 138-139.
extent to which a particular right or freedom is limited, and the objective. 38

The "stringent standard of justification" enunciated in Oakes was relaxed in two cases dealing with the freedom of conscience and religion guaranteed by section 2(a) of the Charter. In Jones v. R., the Alberta School Act was challenged by a fundamentalist pastor who ran his own school and refused to subject his children to public education. 39 The pastor refused to seek permission from the school board to educate his own children and was therefore charged. Mr. Jones claimed that his religious freedom had been violated by being required to obtain a certificate from the state validating his school. According to the pastor, only God could authorize permission to educate. In using the s. 1 test Wilson J. concluded, in dissent, that "the government adduced no evidence to establish that having the parents apply for a certificate was the least drastic means of ensuring that their children were receiving efficient instruction." 40 According to Wilson J., the legislature could have kept the onus on the educational authorities by giving them the power to inspect on their own initiative. However, writing for the majority La Forest J. seemed to back away from the stringent Oakes test by stating that:

No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens. No is evidence necessary to establish the difficulty of administering a general provincial educational scheme if the onus lies on the education authority to enforce compliance. The obvious way to administer it is by requiring those who seek exemptions from the general scheme to make applications for that purpose. 41

The Oakes test was further qualified in Edwards Books and Art where Chief Justice Dickson stated that a reasonable limit is one that

38 Ibid., at p. 139. Dickson C.J. states that the standard of proof under s. 1 is the "civil standard, namely, proof by a preponderance of probability." At. p. 137.


40 Ibid., at p. 141.

41 Ibid., pp. 299-300.
"it was reasonable for the legislature to impose."  

The contrast between the Edwards Books and Art decision and the Big M. judgment illustrates the difficulty in predicting how the Court will decide under s. 1. In the Edwards Books and Art case, the Chief Justice decided that commercial regulation need not be "tuned with great precision in order to withstand judicial scrutiny. Simplicity and administrative convenience are legitimate concern for the drafters of such legislation." Dickson C.J.C. warned that, "the courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." Yet, the possibility for such judicial deference is not acknowledged by Joel Baken who has commented that in light of its subjective nature:

One would be hard-pressed to come up with standards any more open-textured and indeterminate than those prescribed in Section 1. Whether a governmental action is "reasonable" and "demonstrably justified in a free and democratic society" is a matter of opinion and political choice, not a technical legal question.

In an early article on the Charter, Prof. Russell had already speculated that s. 1 would provide a clear policy-making challenge to the courts by inviting the Supreme Court "to participate more systematically in making decisions." The Oakes decision shows that the Court has taken up the invitation, though not without the caution displayed in Jones and Edwards Books and Art. The recent Irwin Toy decision has reaffirmed the proper application of s 1 by stating that it is not necessary for governments to "choose the least ambitious means to protect vulnerable groups" if it can be proven that there is a

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42 Supra, note 33, at pp. 781-782.
43 Ibid., at p. 772.
44 Ibid. at pp. 781-782.
"sound evidentiary basis" for the legislative purpose of an enactment.47

In the recent Canadian Newspapers case, using the s. 1 test, the Court upheld a provision in the Criminal Code that prohibits the publication of the names of complainants in sexual assault cases.48 The Court recognized that the rationale for the legislation is that "a victim who fears publicity is assured, when deciding whether to report a crime or not, that the judge must prohibit upon request the publication of the complainants's identity or any information that could disclose it."49 Since the provision ensures a "case by case" approach, and since it was recognized that nothing prevents the public and the media from being present and reporting the facts of the case and the conduct of the trial, the s. 1 test passed scrutiny.

Another important test for s. 1 occurred in a recent labour arbitration case. The Supreme Court ruled that an arbitrator appointed pursuant to the Canada Labour Code could order an employer to send positive letters of recommendation as the exclusive response to enquiries about a former employee.50 Upon finding a radio-time salesman's dismissal to be unjust, the adjudicator ordered the salesman's former employer (Q-107 radio station in Toronto) to pay compensation, provide a positive letter of reference stating the accurate details of the employee's successful sales record and the result of the arbitrator's decision, and finally to make no other comment with respect to an inquiry on the employee's record. Slaight Communications Inc., which owns the aforementioned radio station, claimed that this was an unfair encroachment on its freedom of expression. The Court unanimously found that the order was contrary to s. 2(b) of the Charter. However, the majority in Slaight Communications determined that the arbitrator's order met the s. 1

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49Ibid., p. 697.
50Slaight Communications Inc. v. Davidson (May 4, 1989) not yet reported [hereinafter Slaight Communications].
Oakes test as a valid "legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee." Nonetheless, in dissent, Mr. Justice Jean Beetz said that the compulsory letter of recommendation is "totalitarian in nature and can never be justified under s. 1 of the Charter." The split judgement illustrates the conceptual difficulties that some of the judges have with the notion of positive liberty.

Although it was at first cautious in determining the scope of s. 1 analysis, the Supreme Court has since recognized its duty to determine the relative importance of rights, freedoms, and their limitations. In Oakes Chief Justice Dickson explained that:

Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principals of a free and democratic society. The Court will have to deal with these issues as it comes to define the equality provisions in s. 15 of the Charter.

52Ibid.
53Supra, note 12, at pp. 139-140.
VIII

EQUALITY AND ITS RESTRICTIONS

During the drafting of the Charter the heading of s. 15 was changed from "Anti-Discrimination Rights" to "Equality Rights" to avoid precluding positive equality rights.\(^{54}\) It has been urged that, under the provision, the Court should examine not only equality of opportunity but equality of right.\(^{55}\) To prepare Canadian society for these changes as the Charter became law, there was a three year delay before s. 15 went into effect. This lapse was designed to allow the legislatures to modify existing laws to conform with the new provision. It was expected that s. 15 would eventually come into conflict with s. 1. By April 17, 1985, the date on which the equality section was activated, little had been done to modify existing legislation. Nevertheless, by the spring of 1987 there were already 150 Charter cases in the courts based on s. 15,\(^ {56}\) and by the spring of 1989 two of these had reached the Supreme Court.\(^ {57}\)

The Andrews case involved a citizen of the United Kingdom who had taken law degrees at Oxford. Mark David Andrews petitioned the court after being denied the right to practice law in B.C. without first


becoming a Canadian citizen. In the first Charter case to reach the Supreme Court, Law Society of Upper Canada v. Skapinker, a similar restriction was upheld in Ontario. However, the Skapinker case involved the mobility rights in s. 6, because s. 15 had not yet come into force.

In Andrews, a lower court found that the requirement of Canadian citizenship to practice law in B.C. was rational and reasonable because of the "special commitment to the community which citizenship involves." The Supreme Court of British Columbia reversed this position. Writing for the court, Judge McLachlin noted that the legislature's objective in enacting the requirement was to ensure persons admitted to the bar "are familiar with Canadian institutions and have a commitment to Canadian society." The court recognized the province's claim as 'pressing and substantial', nevertheless, it determined that the means chosen - the requirement of citizenship - is not reasonably and demonstrably justified.

The Law Society of British Columbia appealed to the Supreme Court of Canada and ten intervenors were recognized. The Andrews decision provided the first test between ss. 15 and 1. Prof. Hogg had contended that laws which draw distinctions or classifications between individuals constitute violations of s. 15 and require that the analysis shift to s. 1. However, in the Court of Appeal, McLachlin J.A. (as she then was) had expressly rejected the professor's view. In order to constitute a violation of s. 15, it was determined that "discrimination" must be treated as an "unjustified differentiation" or an "unreasonable classification." The lower court decision held that if the Hogg interpretation were adopted, s. 15 would 'dwarf' the other provisions of the Charter and it would become the central issue of all

58 Ibid.
59 Supra, note 14.
60 The s. 1 question was not put.
61 Andrews v. Law Society of British Columbia (1987), 27 D.L.R. (4th) 600 (B.C.C.A.). Following this decision Mr. Andrews was admitted as a solicitor in B.C. and shortly thereafter became a Canadian citizen.
62 P.W. Hogg, Constitutional Law of Canada, supra, note 9, p. 800.
Charter litigation as the Fourteenth Amendment had with respect to the U.S. Constitution.\(^63\) It was ruled that in determining whether an impugned distinction is "fair and reasonable" its purposes or aims and effect on persons adversely affected must be determined. Judge McLachlin held that since the specific grounds enumerated under s. 15 are not exhaustive, the distinction of "citizenship" could be considered discrimination.\(^64\) She thus decided in Mr. Andrews' favour.

In the Supreme Court of Canada, Madam Justice Bertha Wilson wrote the majority opinion in Andrews. Wilson J. emphasised that "relative to citizens, non citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."\(^65\) Quoting from J.H. Ely, Wilson J. affirmed that since non-citizens do not have the right to vote, they are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."\(^66\) In a classic defense of equality rights and the importance of having a Charter to preserve essential freedoms, Madam Justice Wilson also reiterated John Stuart Mill's observations that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked ..."\(^67\) Even more importantly, Wilson J. established a flexibility that will allow the Charter to adapt to the needs of the times:

It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today. It is consistent with the constitutional status of s. 15 that it be interpreted with sufficient flexibility to ensure the "unremitting protection" of equal rights in years to come.


\(^{64}\) Ibid., at p. 610.

\(^{65}\) Andrews, supra, note 57, at p. 32.


\(^{67}\) Ibid., per Wilson J., from John Stuart Mill, On Liberty and Considerations of Representative Government (Oxford: Basil Blackwell, 1946), Book III.
In dissent, McIntyre J. also rejected the Hogg approach, because it would draw a straight line from finding a distinction to a determination of its validity under s. 1 thus denying any role for s. 15(1). The dissenting judge proceeded to refute the usefulness of the Oakes s. 1 test as it applies to s. 15 cases, preferring instead to ask "whether the limitation represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights." In so doing, McIntyre J. ruled that the restriction by the Law Society of B.C. was a valid qualification under s. 1. The senior justice even quoted Felix Frankfurter: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals." The Andrews decision illustrates the ideological split between Wilson J.'s bold reading of the Charter's provisions and McIntyre J.'s narrow and restrictive interpretation.

More recently, in R. v. Turpin Wilson J. continued her meticulous reading of the Charter by finding that equality rights are violated by sections of the Criminal Code which allow persons charged with murder the right to a non-jury trial in Alberta but necessitate a jury trial in all other parts of Canada. In her important ruling, Wilson J. reaffirmed the four basic equality rights contained in s. 15 - equality before the law and under the law, and equal protection and equal benefit of the law. Unlike Mr. Justice McIntyre's method in Andrews, Madam Justice Wilson's analysis identified the necessity of insuring that each of these four basic equality rights be given their "full independent content divorced from any justificatory factors applicable under s. 1 of the Charter." The Court stated that it would reject the reasoning of previous decisions which had turned on the equality before the law provisions of the Canadian Bill of Rights. In Turpin,

68Ibid., per McIntyre J., at p. 25.
70R. v. Turpin (May 4, 1989), not yet reported.
71Ibid.
Wilson J. stressed a consideration of the "larger social, political, and legal context" in determining whether inequality exists unconstitutionally. The Court will have to face these issues again soon, when it considers the validity of mandatory retirement under the equality provisions of the Charter.72

IX

THE NOTWITHSTANDING CLAUSE

Despite recourse to s. 1 protection, there are other ways for governments to place restrictions on rights. The legislative override clause (s. 33) of the Charter permits Parliament or Provincial Legislatures to enact legislation "notwithstanding" the rights set out in ss. 2 and 7 through 15.73 Federal and provincial governments may also initiate legislation to alter any provision of the Constitution. Anne Bayefsky has argued that, with the notwithstanding clause, the Charter may be described as a constitutional bill of rights but not an entrenched one.74 Yet, despite the inclusion of the non obstante clause, it has also been argued that the court must still determine the balance between the minority rights protected by the Charter and the majority's prerogative as preserved by s. 33 of the Charter.75

The controversy arises because s. 33 does not refer to s. 1. While Prof. Hogg reasons that the notwithstanding clause is not subject to the limitations of s. 1 because the framers clearly intended to give


73These are "fundamental rights", "legal rights", and "equality rights."

74A. Bayefsky, "Judicial Function under the Canadian Charter of Rights and Freedoms," in Bayefsky, ed. Legal Theory Meets Legal Practice (Edmonton: Academic Printing & Publishing, 1988), p. 148: "'Entrenchment' is a term which in the long Canadian debate was consistently used to mean placing individual rights and freedoms beyond the reach of ordinary legislatures by putting them in a constitution whose provisions could only be avoided by constitutional amendment."

the last word to the people's elected representatives, others have explained that s. 33 must necessarily be subject to s. 1. Despite the explanation of original intent, the literal possibility is still open for a future court to limit the use of the non obstante clause. For instance, the Supreme Court has already moved beyond the "drafter's intent" by reading substantive rights into s. 7, despite the framers' insistence on applying the section only to procedural rights.

Prof. Bayefsky has reasoned that the legislative history of s. 1 suggests that the drafters intended to end parliamentary sovereignty. In October of 1980 the proposed draft for s. 1 read:

TheCanadianCharterofRightsandFreedomsguaranteesthe rights and freedoms set out in it subject to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

The federal government was extensively criticised for holding on to the doctrine of parliamentary sovereignty by groups appearing before the Hays-Joyal Committee. Due to the political pressure exerted in committee, Prof. Bayefsky explains that the words referring to a "parliamentary system of government" were dropped, and replaced with reference to limits which "can be demonstrably justified in a free and democratic society." Therefore, the legislative history of s. 1 can

76Constitutional Law of Canada, supra note 9, at p. 691. Prof. Hogg is of the opinion that:

...once a Charter provision has been overridden by a statute, the Charter provision has no application whatsoever to the statute and therefore there is no need to show that the overriding statute is a 'reasonable limit' on the Charter provision or that the overriding statute can be 'demonstrably justified in a free and democratic society.'


78See discussion of s. 7 below.


80Professor Bayefsky emphasises her point by quoting Federal Justice Minister, Jean Chrétien, as he introduced the amendments to the Hays-Joyal Committee:
be said to point to the replacement of parliamentary supremacy. This brings s. 1 in direct conflict with the intent of the override provision.

At the time s. 33 was included, the assumption was that it would be politically difficult to declare a law notwithstanding provisions of the Charter. However, s. 33 has already been used in six legislative instances. An Act Respecting the Constitution Act, 1982 was passed in the National Assembly by the Party Québécois government to insert a notwithstanding clause (in respect of ss. 2 and 7-15 of the Charter) in every provincial statute passed prior to April 17, 1982. The government of Premier Robert Bourassa, let the Act lapse after the five year renewal deadline which passed in June of 1987. Nevertheless, Quebec's Liberal government remained undeterred and put s. 33 to use in a more specific context.

Before December 1988, the Bourassa government had sponsored the use of the notwithstanding clause on three separate occasions.81 Premier Grant Devine's Saskatchewan Conservative Government also inserted s. 33 into legislation.82 The preemptive fashion in which the clause was initially invoked to avoid judicial review pointed to the

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82 The regional, minority language rights controversy appears to suggest that the present Premiers of Saskatchewan and Quebec are of a like mind in many respects.
improbability of desuetude in relation to s. 33. Recently we have seen in Quebec that, contrary to previous expectations, the legislative override has become a politically feasible legislative option. The Supreme Court is best to keep this in mind, as one of the greatest political challenges facing it will be finding the proper balance between parliamentary and judicial authority.

X

NOTWITHSTANDING FRENCH-ONLY SIGN LAWS

The Supreme Court's early interpretation of the Charter has already brought the Court to the front and centre of Canadian political society. A recent example of its impact on the national community is the controversy generated by the response to the Court's invalidation of Quebec's French-only commercial sign provisions.

In direct reply to the Supreme Court's judgments on the province's sign laws, the government of Quebec invoked the notwithstanding clause. According to the Court's unanimous opinion in the Ford case, the evidence used to support Quebec's Charter of the French Language did not prove that the "requirement" of the use of French only is either


84 The tension has also been outlined by Mackay and Bauman, The Courts and the Charter, supra, note 27, p. 44.

85 Peter Russell, "The Supreme Court in the Eighties - Wrestling with the Charter," in Paul Fox (ed.), Politics: Canada, 6th ed., (Toronto: U. of T. Press, 1987). Prof. Russell has concluded that the court's function in the governance of Canada "should now be viewed as of the same importance to Canadian political science as the performance of the United States Supreme Court is to students of American Politics," at p. 151.

86 The provisions in question were enacted in 1977 by the province's Bill 101, also known as the Charter of the French Language.


88 It should be noted that both the provincial and the federal charters were overridden by the notwithstanding legislation enacted by Quebec.
necessary for the achievement of the legislative objective or proportionate to it." In the opinion of the Court, since it had not been demonstrated that the prohibition of the use of any language other than French was "necessary to the defence and enhancement of the status of the French language in Quebec" or that it was "proportionate to that legislative purpose," the curtailment of freedom of expression as protected in s. 2(b) of the Charter could not be justified under s. 1. On the use of the override provision of the Charter, the Court ruled that a blanket applications of s. 33, as it applied to s. 2 and ss. 7 to 15, would be permissible as long as such an invocation dealt with prospective derogation only. The Court properly refused to allow retrospective application of the override provision. In a surprise aside, the Court suggested that a requirement of the predominant display of French, without excluding other languages, would be justified under s. 1.

In contrast to the issue avoidance in which many politicians have been engaging by ignoring the controversial issues being addressed by the Supreme Court, Quebec's Premier Robert Bourassa responded with great haste immediately following the Court's judgment. Shortly after the ruling, the Quebec Government decided to achieve a partial compromise by allowing English signs inside business premises. This move caused nationalists within the province to demonstrate in the streets. Meanwhile, the Premier's invocation of the non obstante clause to require that only French be used on the exterior of commercial signs, was met with almost unanimous condemnation outside Quebec as an unnecessary curtailment of rights and freedoms. Prominent anglophone ministers within the Bourassa government soon offered their resignations. One journalist described the use of the notwithstanding

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89 Ford, supra, note 87, at p. 779.
90 Ibid., at p. 780.
91 Ibid., at p. 743.
92 With the exception of La Fédération des francophones hors Québec and the Secretary of State, Lucien Bouchard, the use of the notwithstanding clause in Bill 178 was met with widespread disapproval on the other side of the Ottawa River.
clause to circumvent a Supreme Court judgement as "a political atomic bomb."

This is a classic example of the Court's resounding influence.
For over a decade, in the name of collective rights, Quebec has
infringed upon the minority right of expression in English. Yet, by
interpreting such expression as a primary right, it is the Supreme
Court which finally forced Quebec to confront the issue of fundamental
freedoms and encouraged national awareness of the treatment of
linguistic minorities in the province. In fact, the dismay over
Quebec's use of section 33 was so intense outside the province that it
led the leader of Manitoba' Progressive Conservative Party, Gary
Filmon, to withdraw his support for provincial ratification of the 1987
Constitutional Accord94.

XI
EXPANDING JUDICIAL REVIEW AND THE POWER OF INVALIDATION
Prior to April 17, 1982, the authority of judicial review in
Canada rested on the principle of implicit necessity, as it had in the
United States after Chief Justice John Marshall's famous Marbury
decision.95 Some scholars held that judicial review was implicitly
guaranteed by ss. 96 to 101 of the Constitution Act, 1867.96 The

93Gilles Lessage, "Une dérogation légitime," Le Devoir (January 5,

94In fact all three parties in the province agreed to suspend
debate on the constitutional amendment to protest Quebec's action. The
Premier Bill Vander Zalm has also expressed misgivings about Quebec's
use of the notwithstanding clause prompting him to modify his original
support for the 1987 Accord. The Constitution Act, 1987 will be
discussed in the following chapter.

wrote:
Those who have framed written constitutions contemplate them as
forming the fundamental and paramount law of the nation, and,
consequently, the theory of every such government must be, that an
act of the legislature, repugnant to the constitution is void.

96The pundits in question are William Lederman and Noel Lyon, see
Mackay and Bauman, The Courts and the Charter, supra, note 27, p. 43.
Canadian Supreme Court recognized in the *Amax Potash* decision that it had a "high duty" to ensure that the legislatures "do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power"; yet, this constitutional function was not explicitly entrenched.

Before 1982, the power to invalidate provisions inconsistent with the Canadian Constitution was determined pursuant to the *Statute of Westminster, 1931*, s. 2. of the *Colonial Laws Validity Act, 1865*, which established the invalidity doctrine. The doctrine held that any act of Parliament or a provincial legislature which overstepped the constitutionally allocated powers of the *Constitution Act, 1867* could be deemed *ultra vires* or repugnant. Section 52, of the *Constitution Act, 1982* is revolutionary in this context. It not only explicitly places the *Charter* and the rest of the Constitution in a position which is unalterable by the normal legislative process, but it also distinctly mandates judicial review. The powerful section reads:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provision of the Constitution is, to the extent of the inconsistency, of no force or effect.

The Supreme Court has interpreted its power of review under the *primacy clause*, as to include common law and regulations as well as

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[97]*Amax Potash Ltd. v. Saskatchewan* [1977] 2 S.C.R. 576, at p. 590. Writing for the court Dickson J. (as he then was) explained that the wisdom of enactments consistent with the Canadian Constitution should not be questioned by the judiciary, but those inconsistent must surely be reviewed by the courts.

[98]*Statute of Westminster, 1931*, s. 2 of the *Colonial Laws Validity Act, 1865* (U.K.) 28 & 29 Vict., c. 63:

> Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Nonetheless, the Court has exhibited caution in its invalidation. In 1985, it held that all the laws, since 1890, enacted by the Manitoba Legislature in English only, were invalid and "of no force or effect," because they violated the *Manitoba Act, 1870* (part of the "Constitution of Canada" according to s. 52(2)). Yet, the Court granted temporary validity to the laws in question by allowing the Province of Manitoba time to reenact them in both official languages as required by the Constitution. By ensuring the continuity of the rule of law, the Court avoided a legal vacuum in Manitoba, and exercised its new-found authority under the *Constitution Act, 1982*.

However, William Conklin is highly critical of the *Manitoba Language Rights* decision because, in his view, the Court unnecessarily introduced two new constitutional doctrines (the de facto doctrine and the doctrine of state necessity) which have both been used by Third World courts to constitutionalize illegal regimes in the past. Prof. Conklin is uncomfortable with the fact that the Court was "willing to allow the government a 'temporary reprieve' from compliance with the Constitution 'in order to preserve society.'" Yet, with respect, Prof. Conklin's proposed alternative is unclear.

Minority language rights have traditionally been a contentious issue on the Canadian political scene. The Supreme Court triggered a new controversy by its February 1988 decision that Saskatchewan's 1886 guarantee of bilingual statutes was still valid. Since the provisions were not constitutionally entrenched, as they were for Manitoba, the Court ordered Saskatchewan to either translate all of its statutes into

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102*bid.*, quoting from *Manitoba Language Rights*, supra, note 100. at p. 763i-j.
French or introduce a bill to repeal the legislation.\textsuperscript{103} Despite the best wishes of the Prime Minister, the federal language commissioner, and sympathetic Canadians, it appeared that the Francosaskois\textsuperscript{104} would be on the losing end of the dispute.\textsuperscript{105} However, had the Supreme Court not acted to remind Saskatchewan of its legal responsibility, the provincial legislators might have avoided public awareness of their behaviour. Unfortunately, the Court was limited in what it could order the province to do.

The Saskatchewan debate illustrates the advantage of constitutionally entrenched minority language rights. Had former Saskatchewan Premier Allan Blakeney chosen to join New Brunswick's lead in the constitutional preservation of Canada's official languages during the 1981 constitutional negotiations, under s. 52(1) the Supreme Court could subsequently have invalidated any attempt by an intolerant Legislature of Saskatchewan to abrogate linguistic rights.\textsuperscript{106}

Thus far, the Supreme Court has invalidated numerous laws and various provisions of the Criminal Code because they breached rights and fundamental freedoms outlined in the Charter. Most notably, the Court determined that proof of intentional dangerous conduct causing death could not be substituted for proof of 'mens rea' with respect to the death of a victim. Applying its interpretation of s. 7 from Re. B.C. Motor Vehicle, the court held that the presumption of innocence,

\textsuperscript{103}The Court did not question the validity of the existing unilingual statutes as it did in Manitoba Language Rights.

\textsuperscript{104}Francophone citizens of Saskatchewan.

\textsuperscript{105}They may wish to offer special thanks to Premier Bourassa's endorsement of the Devine government's position and treatment of the English minority in Quebec.

\textsuperscript{106}For political analysis of Saskatchewan's position on language during the patriation process see Robert Sheppard and Michael Valpy, The National Deal: The Fight for a Canadian Constitution, (Toronto: Fleet Books, 1982).
protected by s. 11(d) of the Charter, was violated by s. 213(d) of the Criminal Code. 107

XII

JUDICIAL REMEDIES

The primacy clause of The Constitution Act, 1982 is not the only judicial remedy at the disposal of the invigorated Supreme Court. Section 24, has increased the Court's political role more than any other provision included in the Charter. The provision is based on the philosophy that in order to preserve certain liberties the court must be able to assume the role of provider as well as protector. "It is a vain thing," as we have been reminded, "to imagine a right without a remedy." 108 For this reason, the first part of s. 24 gives the court a broad license of enforcement. The section holds:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The term "have been infringed or denied," in the past tense,

107 R. v. Vaillancourt [1987] 2 S.C.R. 636. Section 213(d) of the Criminal Code provided that:
Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit ... robbery ... whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if ... he uses a weapon or has it upon his person during or at the time he commits or attempts to commit the offence ... and the death ensues as a consequence.

Mr. Vaillancourt had been charged with murder, after his accomplice fired at and killed a man in a pool hall. The accused testified that he did not intend anyone to be killed and was unaware that his partner was carrying a loaded gun.

points to a stricter standing requirement for s. 24 than for 52(1). Nevertheless, the enforcement section was devised to empower the judiciary with the authority to provide 'creative remedies' that previously would not have been available, regardless of proper standing. For instance, the previous draft of s. 24 read:

Where no other remedy is available or provided by law, the individual may, in accordance with the applicable procedure of any court in Canada of competent jurisdiction, request the court to define or enforce any of the individual rights or freedoms declared by this Charter, as they extend or apply to him or her by means of a declaration of the Court or by means of an injunction or similar relief accordingly as the circumstances require.

The important difference in the revised s. 24 is that it enables the Court to grant remedies it considers "appropriate and just in the circumstances," and therefore enhances judicial discretion. The range of remedies for breaches of the Charter is outlined in the broadest possible wording which was clearly meant to include more than declarations, injunctions or similar relief. In respect to enforcement, Prof. Hogg has suggested, that the Charter is in a

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109See Hogg, Constitutional Law of Canada, supra, note 9, at p. 695, n. 233. Prof. Hogg's view can be contrasted with Professors Knopff and Morton who argue that s. 24 appears to allow a person to litigate any Charter issue without demonstrating a personal interest distinct from the public at large. Cf., Knopff and Morton, Constitutionalism, Citizenship and Society in Canada, supra, note 5.

110James Crossland has emphasised the importance of the section with respect to the potential for judicial policy making. See J. Crossland, The Role of the Canadian Courts in the Evolution of Canadian Constitutionalism (M.A. Thesis. McGill University, March 1987), chapter 4.


112While the Constitution of the United States contains no provision for remedies outside its supremacy clause, Dale Gibson has indicated that the constitutions of India, Nigeria, West Germany, and "a considerable number of smaller countries" include "explicit remedial provisions of the type contained in section 24(1)." See Law of the Charter, supra, note 99, at p. 192.

"preferred position" since s. 24(1) is available only to a breach of the Charter, while other parts of the Constitution may only be challenged by referring to the traditional method of invalidation.114

Prof. Hogg has also recognized s. 24(1) as the source of both 'defensive' remedies, such as the exclusion of evidence, and 'affirmative' remedies to redress the wrong suffered by the applicant, or to encourage future compliance with the constitution.115 As an example of an affirmative remedy created by the judiciary, Andrew Dekany presents the hypothetical situation of a criminal trial where it is established that a police officer failed to inform the accused of the reason for his arrest, and thereby infringed his guaranteed right. Under s. 24(1) of the Charter, according to Mr. Dekany, a court could reprimand the police officer by referring his actions to a police disciplinary board, even if it was not otherwise empowered to do so.116

In an early use of 24(1) the court confirmed the Supreme Court of Nova Scotia's order to dismiss charges after an appellant had waited eleven months for a trial judge to make a decision on a motion for a directed verdict.117 Since the accused's right to be tried within a reasonable time had been infringed, the court of competent jurisdiction had "a broad discretion as to remedies."118 However, in another judgement the Court specified that delay must be attributable to Canadian authorities in order for the Charter to be applicable.119 In the Mellino case, there was a seventeen month delay between the respondent's discharge following an initial extradition hearing and the initiation of a second. Yet, since the delay was caused by the

114Constitutional Law of Canada, supra, note 9, p. 694.
115Ibid., pp. 696-697.
118Per Estey and Wilson JJ., Ibid. The justices were quick to caution:
...this does not mean that all remedies are available for the violation of all rights. The remedy or remedies must be tailored to the particular right which has been violated.
Government of Argentina, the majority rejected Mr. Mellino's application for judicial remedy under 24(1). 120

The court has shown little reluctance in employing judicial remedies for breaches of the Charter. In R. v. Smith, the mandatory seven year minimum sentence imposed by s. 5(2) of the Narcotics Control Act was invalidated as unjustified cruel and unusual punishment. 121 Edward Dewey Smith, who had pleaded guilty to importing seven and a half ounces of cocaine into Canada, was therefore spared numerous months in prison for an offence which the Court found to be designed for dissuading the trafficking not the mere possession of narcotics.

XIII

AFFIRMATIVE ACTION

Section 15(2) of the Charter expressly deals with the legislative remedy of affirmative action. The equality section of the Charter is said not to,

preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. 122

In the United States many legal battles have been waged on the constitutionality of affirmative action legislation. 123 The validity

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120 Even Madame Justice Wilson, who had consistently favoured the rights of the accused, sided with the majority. Mr. Justice Lamer was alone in dissenting. For Lamer J, it was not relevant whether the delay was due to the acts of the Argentinean or the Canadian authorities. In his view an unexplained seventeen-month delay constitutes an infringement of the respondent's s. 11(b) right. Ibid., at 540.


122 Charter, s. 15(2).

of affirmative action programs was first challenged in 1974 when the U.S. Supreme Court heard a case in which a white law school applicant was denied admission in favour of less qualified minority applicants.\(^\text{124}\) The first case eventually proved moot, but in 1973 and again in 1974 Allan Bakke applied for admission to the University of California Medical School at Davis and was twice rejected on the basis that there were too many properly qualified candidates. Yet, Mr. Bakke later learned that his Medical College Admission Test score and his undergraduate grades were superior to many of the minority students which were accepted during the years he was refused admission. The Davis medical school had set aside sixteen of its 100 openings for minority candidates, many of which were statistically less qualified than Allan Bakke. Mr. Bakke's lawyers successfully argued that the University of California medical school's admission procedure contravened the equal protection clause of the U.S. Constitution and Title VI of the Civil Right Act of 1964.\(^\text{125}\)

However, unlike the American Constitution the Canadian Charter expressly recognizes the constitutionality of affirmative action. Although Canadian affirmative action is not subject to the equality requirements of s. 15, it nonetheless has to be squared with the limits in s. 1. For this reason, Russell Juriansz anticipates that s. 15 of the Charter will "spawn a great deal of litigation" in connection with affirmative action.\(^\text{126}\)

The 15(2) clause of the Charter has never been invoked. However, the Supreme Court of Canada has unanimously recognized the power of human rights tribunals to establish hiring quotas for companies that

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\(^{124}\)Ibid., *DeFunis v. Odegard*.

\(^{125}\)Regents of the University of California v. Bakke (1978), *supra*, note 123.

discriminate against women and other disadvantaged groups.\textsuperscript{127} Although the \textit{Action Travail des Femmes} case did not involve the \textit{Charter}, it is of particular relevance since the court stated that "in any employment equity program there simply cannot be a radical dissociation of remedy and prevention for there is no prevention without some form of remedy."\textsuperscript{128} Through implication, Dickson C.J. hinted at a rationale the court may use in enforcing rights under s. 24. His Lordship held that remedies must "not be merely compensatory" but "prospective,"\textsuperscript{129} and that "systematic remedies must be built upon the experience of the past so as to prevent discrimination in the future."\textsuperscript{130} The case may have very significant consequences including the growing use of statistical evidence in litigation. Such evidence was used for the first time in \textit{Action Travail des Femmes} to make a case for discrimination in Canada.\textsuperscript{131}

\section*{XIV
EXCLUSION OF EVIDENCE}

There are numerous areas in which the court has directly exercised its new authority under ss. 24 and 52. The most dramatic change has occurred with the administration of criminal justice. The framers of the \textit{Charter} expressly dealt with this issue in the second part of the enforcement section which provides that:

\begin{quote}
24(2). Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
\end{quote}

\textsuperscript{127}\textit{CN v. Canada (Human Rights Commission)} [1987] 1 S.C.R. 1114 [hereinafter \textit{Action Travail des Femmes}].

\textsuperscript{128}\textit{Ibid.}, \textit{per} Brian Dickson C.J.C., at pp. 1141-1142.

\textsuperscript{129}\textit{Ibid.}, at p. 1142.

\textsuperscript{130}\textit{Ibid.}, at p. 1145.

\textsuperscript{131}On the use of evidence in similar cases see Béatrice Vizkelety, \textit{Proving Discrimination in Canada} (Toronto: Carswell, 1987).
Section 24(2) was included to add an additional remedy, that would not be subject to the same limitations as 24(1). While, s. 24(1) deals with the enforcement of a substantive right, s. 24(2) deals with the exclusion of evidence obtained through breach of a substantive right. The court has responded by interpreting the clause in a bold manner. Following the lead of the Supreme Court, the judiciary has moved away from the earlier 'crime control' model, and closer to the American-style 'due process' model. In the United States the exclusionary rule was incorporated to state criminal proceedings by the Warren Court. Although the rule has been qualified in recent years, it has applied to American federal proceedings since 1914.

The exclusion of evidence has been said to be at odds with the Tory tradition in Canadian history. Robert Fulford, among others, has expressed fear that the Charter will reverse the preference in Canadian law that "has tended to favour collective rights over individual rights." Yet, as Walter Tarnopolsky has emphasised: "A bill of rights must protect the savory and unsavory or it will protect no one at all." The dictum cited by Prof. Tarnopolsky (as he then was) is equally applicable to constitutionally established rights.

The Supreme Court made use of s. 24(2) for the first time in

132Rights, Freedoms and the Courts, supra, note 111, p. 460.
Therens v. The Queen.\textsuperscript{139} Since the police had failed to notify the accused of his s. 10(b) right "to be informed of the right to counsel on arrest or detention," the court decided that the evidence from a breath test should be excluded from trial because, in the view of the majority, its admission "would bring the administration of justice into disrepute."\textsuperscript{140} In the Therens case, Justice McIntyre's dissent was the first differing opinion after the first seven Charter judgments proved unanimous. The dissenting justice found that the exclusion of evidence "would bring the administration of justice into disrepute."

In the Clarkson ruling, a murder conviction was overturned as the accused's intoxicated confession was excluded.\textsuperscript{141} Writing for the Court, Madam Justice Wilson held that a woman's "drunken assertion that there was 'no point' in retaining counsel in the face of a murder charge could not possibly have been taken seriously by the police as a true waiver of her constitutional right." In 1986, after the Clarkson decision, Prof. Russell predicted that Canada would have a much more liberal exclusionary rule than the United States, if the majority's generous treatment of s. 24(2) prevailed in subsequent cases.\textsuperscript{142}

However, the Supreme Court was quick to establish the factors to be considered when making a decision under 24(2).\textsuperscript{143} The Collins case emphasises that the court must have "regard to all the circumstances" when rendering a judgement under the exclusionary clause. A possession of heroin charge was quashed because it was substantiated after the police had entered a pub and administered a throat-hold on Ms. Collins.

In two other decisions handed down on the same day as Collins, the court dismissed applications of 24(2) because the police had not acted

\textsuperscript{139}[1985] 1 S.C.R. 613.

\textsuperscript{140}The breach of s. 10(b) and exclusion under s. 24(2) were treated as separate questions.


\textsuperscript{142}P. Russell, supra, note 85, p. 162.

inadvertently and in good faith. Yet, in the Pohoretsky ruling, Mr. Justice Antonio Laar declared that the law enforcement authorities had 'wilfully and deliberately' violated the accused's right under s. 8 against an unreasonable search and seizure, by ordering a doctor to take a blood sample while the accused was in an 'incoherent and delirious' state. The court was satisfied, under the Collins specifications, that allowing the blood sample would have brought the administration of justice into disrepute.

In the Manninen case, the police informed the accused of his right to remain silent and obtain counsel. However, although Mr. Manninen indicated that he was not going to say anything until he saw his lawyer, the questioning continued. The accused was not even offered a telephone to obtain counsel. The Court therefore ruled that the action was not justified by any urgency and that the police officers' manner, of ignoring the rights they had just read the accused, was grounds for exclusion.

The Court has also held, however, that the onus is on the accused to prove that the right to counsel has been denied. The Baig decision quoted and confirmed Tarnopol'sky J.A.'s rationale cited from a previous case wherein the former professor said:


Although the sample showed an unacceptable level of intoxication, his Lordship declared the evidence inadmissible because the conduct of the police "was to conscript the appellant against himself." Ibid., at p. 949.


148The appeal was dismissed because:
...the respondent had the right not to be asked question, and he must not be held to have implicitly waived that right simply because he answered the question. Otherwise, the right not to be asked questions would only exist where the detainee refused to answer and, thus, were there is no need for any remedy or exclusionary rule.

Id., at 1244.

I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it.\textsuperscript{150}

Even if the accused proves that his right to counsel has been infringed under the onus requirement established in \textit{Baig}, the evidence may not necessarily be excluded under 24(2) of the \textit{Charter}. For instance, if the accused is found to be "deliberately attempting to make the investigation difficult" and is "actively obstructing it" evidence will be admitted.\textsuperscript{151} McIntyre J. has emphasized that, "the \textit{Charter} was not intended to turn the Canadian legal system upside down."\textsuperscript{152} Recently, Madam Justice Claire L'Heureux-Dubé seems to have echoed McIntyre J.'s sentiments when she ruled against the exclusion of evidence in \textit{R. v. Duguay}.\textsuperscript{153} L'Heureux-Dubé J. cited the majority opinion of the U.S. Supreme Court in \textit{U.S. v. Leon} where White J. determined that the indiscriminate exclusion of "inherently trustworthy tangible evidence" unreasonably obstructs the criminal investigation process and leads to disrespect for the judicial process.\textsuperscript{154} Likewise, in the \textit{Duguay} case, L'Heureux-Dubé J. refused to characterize the questioning of suspects in an unmarked patrol car as unlawful detention on par with torture or the practices of the Star Chamber as the trial judge and the majority of the Court of Appeal had suggested. "In the complete absence of compulsion of any kind," wrote the dissenting justice, "it is my view quite an exaggeration to suggest that two minutes spent in a police car

\textsuperscript{150}Ibid., at p. 540, from \textit{R. v. Anderson} [1984], 10 C.C.C. (3rd) 417 (Ont. C.A.), at p. 431.


\textsuperscript{154}Ibid., at p. 73. Quoting \textit{U.S. v. Leon}, supra, note , at pp. 907-908.
L’Heureux-Dubé noted that the victims of the robbery had reported the incident and sought help from the police and criminal process. As active participants in the investigation, the victims had been very co-operative with the police, yet the puisne justice remarks:

The process yielded nothing in return for their involvement and co-operation with the police. They were aware that the youths confessed that they were the culprits and that some of the stolen goods were found in their possession. I agree with Zuber J.A. (of the Ontario Court of Appeal) that it is "more likely that the exclusion of the evidence in this case will bring the administration of justice into disrepute."156

The dissent of the learned justice encourages many questions which the Court will have to address with respect to the exclusion of evidence and the repute of the administration of justice. Before being seated on the nation’s highest bench, John Sopinka, one of the Supreme Court’s newest members, expressed a preference for similar restraint.157 The lower courts appear to be of the same mind. The Ontario Court of Appeals decided in the recent Logan decision that confessions obtained while police officers posed as inmates were inadmissible.158 On the whole it appears that the courts will continue to carefully guard the integrity of the criminal process.

Thus far, the Supreme Court has had to deal with criminal issues relatively often. Of the first 92 decisions that the Supreme Court has issued under the Charter 70% dealt with criminal law.159 Patrick Monahan has described the criminal sections of the Charter, ss. 8 to

155Duguay, at pp. 79-80.
156Ibid., at p. 82.
157See J. Sopinka, "The Charter: A View From the Bar," in Gérald-A. Beaudoin, ed. Charter Cases 1986-87 (Montreal: Éditions Yvon Blais, 1987), pp. 403-417, esp. p.405-407. For evidence of Mr. Justice Sopinka’s conservatism on the bench consider the Lac-Corona case where, unlike the majority, Sopinka J. ruled that there need be only monetary payment to Corona and Lac need not rightfully transfer the lucrative gold mine to the swindled smaller company.
14, as an "attempt to counterbalance the overwhelming advantage enjoyed by the state over the individual in the context of legal proceedings." As seems to be his attitude with all Charter provisions, Michael Mandel has demonstrated himself ever ready to condemn the documents criminal justice sections. Prof. Mandel claims that although it appears "more important to acquit the innocent than to convict the guilty" this fact "seems to have noting to do with humanitarianism or crime prevention and everything to do with public relations." Like a cascade of failing fireworks, one conspiracy theory follows another in The Charter of Rights and the Legalization of Politics in Canada.

Despite Prof. Mandel's criticisms, the Supreme Court has recently delivered a judgement that may prove to be the most significant decision since Roncarelli v. Duplessis was issued thirty years ago. In Nelles v. Attorney-General of Ontario, a nurse won the right to sue the attorney-general for malicious prosecution. The police had visited Susan Nelles at her home in 1981 and began to inquire about her knowledge of infant murders. After she interrupted their questioning to ask permission to consult her lawyer, the police became convinced of her guilt. Although considerable evidence became available suggesting that other nurses could have committed the murders, the criminal prosecution was relentlessly continued. Ms. Nelles became the scapegoat and prime suspect; her reputation was tarnished. After a preliminary hearing finally discharged her on all four murder counts, Nurse Nelles sought the right to sue for malicious persecution.

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160 Politics and the Constitution, supra, note 21, p. 110.
161 The Charter of Rights and the Legalization of Politics in Canada, supra, note 4, p. 146. For a more objective analysis on these issues see James Morton and Scott Hutchison, The Presumption of Innocence (Toronto: Carswell, 1987).
163 Nelles v. Attorney-General of Ontario (August 14, 1989), not yet reported [hereinafter Nelles].
While English and American courts have asserted prosecutorial immunity, the Supreme Court of Canada took a bold step in the Nelles cases. In the majority opinion, Mr. Justice La*mer noted that "granting an absolute immunity to prosecutors is akin to granting a licence to subvert individual rights." La*mer J. was joined by Dickson C.J. and Wilson J., in observing that "the existence of an absolute immunity is especially alarming when the wrong has been committed by a person who should be held to the highest standards of public conduct in exercising the public trust." Sopinka J. took no part in the decision because he had been involved in the case as a lawyer for Ms. Nelles before being appointed the Supreme Court. Madame Justice L'Heureux-Dubé dissented from this important holding. It has already been predicted that the case will bring about "one of the most dramatic changes to the criminal justice system ever." By going much farther than the judicial processes in both the United Kingdom and the United States, Nelles sets into focus the Supreme Court of Canada's legal and political commitment to civil liberties and public accountability.

XV

CREATIVE INTERPRETATION

The Supreme Court's new authority under The Constitution Act, 1982 is not limited to increased invalidation and remedial power, the vague wording of the Charter has given the Court great interpretive power which has indirectly lead to a creative defence of rights. For instance, section seven was originally intended to be a procedural rather than substantive provision, however the court has taken great freedom with the definition of the "right to life, liberty, and

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165 Jbid.

166 Jbid., Mr. Makin quotes Paul Culiver, president of the Canadian Association of Crown Counsel.

security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.\textsuperscript{168} Such judicial activity has caused Richard Devlin to describe the provisions of the constitutional text as being "open-ended, promiscuous, and perennially pregnant" in nature.\textsuperscript{169}

In \textit{Hunter v. Southam}, Dickson C.J. declared that the search warrant provision contained in the \textit{Criminal Investigation Act} contravened an individual's right to be secure against "unreasonable searches and seizures."\textsuperscript{170} The court ruled that a search warrant can only be "reasonable" if it is pre-authorized by an independent and impartial third-party. Echoing Lord Sankey's "living tree" suggestion,\textsuperscript{171} it was emphasised in \textit{Hunter} that notwithstanding the intentions of its drafters, the \textit{Charter} must be "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."\textsuperscript{172}

The court dealt with procedural equality under s. 7 in \textit{Singh v. Minister of Employment and Immigration} by striking down provisions of the \textit{Immigration Act} which do not require an oral hearing at the final stage of the appeal process.\textsuperscript{173} As a result of the ruling, refugees are now entitled to an oral audience upon having their written application for refugee status refused. In subsequent judgments the Court has also moved to entertain substantive consideration. In the \textit{Motor Vehicles Reference}, the Court struck down an "absolute liability" provision of an act of the British Columbia Legislature. The impugned article had prescribed imprisonment for individuals convicted of driving without a valid driver's license, regardless of whether the

\textsuperscript{168} Section 7 of the \textit{Charter}.


\textsuperscript{171} See chapter 1.

\textsuperscript{172} \textit{Supra}, note 170, at p. 155.

\textsuperscript{173} \textit{Singh et al. v. Minister of Employment and Immigration, Canada} [1985] 1 S.C.R. 177.
accused was aware of the expiry of the licence. The court found the act to be inconsistent with "principles of fundamental justice" as guaranteed by s. 7.

XVI

REVIEWING EXECUTIVE ACTION

In Operation Dismantle Inc. v. The Queen, the Supreme Court agreed, for the first time, that cabinet directives were subject to judicial review. The Dismantle case saw a coalition of peace, labour and other groups challenge the constitutionality of Ottawa's agreement to permit the testing of the unarmed American cruise missile in Canada. The groups contended that the agreement increased the likelihood of nuclear war, and therefore threatened to infringe the right of Canadians to "security of the person" under s. 7 of the Charter. In deciding to hear the case, the court did not adopt the "political questions" doctrine as used by the U.S. Supreme Court in Baker v. Carr.

Murray Rankin and Andrew Roman contend that the Dismantle decision is not very surprising because it follows a larger trend. To be sure, during the 1980's, the extension of substantive judicial scrutiny to the exercise of royal prerogative powers has also been made by the courts of other Commonwealth countries. The House of Lords considered whether Prime Minister Margaret Thatcher was obliged to act fairly before forbidding the staff at a top secret military facility from belonging to trade unions. Similarly, the Supreme Court of India held that a Presidential Ordinance issued for national security

174 Supra, note 26.

175 Operation Dismantle v. the Queen [1985] 1 S.C.R. 441. [Hereinafter Dismantle].

176 396 U.S. 19.


purposes is "fortunately and unquestionably" subject to judicial review. In Australia, the High Court ruled that the Governor in Council could not grant or refuse, on a wholesale basis, applications by individuals to practice as insurers; instead the court required decisions to be based on the circumstances of each case and overruled the general policy. Although, the Supreme Court of Canada answered the s. 7 claim arising out of Dismantle in the negative, the very decision to render judgement on the case will have important ramifications on Canadian law.

XVII

THE ABORTION CONTROVERSY

The Morgentaler judgement is the court's most activist ruling to date. The majority decided that s. 251 of the Criminal Code was 'ultra vires' the Parliament of Canada. Where once, "the tacit recognition" of legislative supremacy may have impelled "Canadian judges to exercise judicial self-restraint," in light of the Morgentaler judgement, this appears to no longer be the case. In fact, the majority seems to have abandoned the "cautious activism" of its earlier decisions, in favour of a bolder approach. The Supreme Court's decision has created a legal vacuum that Parliament, to this day, has been hesitant to define.

180 FAI Insurances Ltd. v. Winneke [1982] 41 Aust. L.R. 1 (H.C. Aust.).
In a separate concurring decision, Madam Justice Wilson held that women have the right to reproductive freedom. The puisne justice connected a substantive reading of s. 7 with the guarantee of conscience in s. 2(a) of the Charter. She explained that:

the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe ... that in a free and democratic society it must be the conscience of the individual.¹⁸⁵

In a decision which has been said to follow the American model of substantive nonoriginalism,¹⁸⁶ Wilson J found that the impugned abortion legislation interfered not only with a woman's liberty, but with her right to "personal autonomy in decision-making" and to her "physical 'person'." She explains that under the criminal code abortion provision, a woman:

is truly being treated as a means — a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person? I believe that s. 251 of the Criminal Code deprives the pregnant woman of her right to security of the person as well as her right to liberty.¹⁸⁷

By recognizing the importance of such individual respect, Madam Justice Wilson also probes into the political theory behind the existence of the Charter. While she recognizes that the Charter allows wide discretion for legitimate government action, she underscores the limits which the document is meant to enforce. Articulating a balanced theory of the self, Wilson J. reasons,

¹⁸⁵⁸⁵Morgentaler, supra, note 182, at p. 494.
¹⁸⁷Morgentaler, supra, note 182, at p. 492.
an individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both.

Despite Chief Justice Dickson's majority opinion, and other concurring judgments, McIntyre and La Forest JJ. seemed hardly impressed with Madam Justice Wilson's philosophical position. Echoing the ideas of American Justices Byron White and William Rehnquist in Roe v. Wade, McIntyre J. declared for the dissenters in the Morgentaler judgement that,

the proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the Charter or any other section...

It cannot be said that the history, traditions and underlying philosophies of our society would support the proposition that a right to abortion could be implied in the Charter.189

The dissenting opinion warns of the tendency of courts to create new rights through excessive activism.190 In an ardent defence of judicial restraint his Lordship explained:

Difficult choices must be made and the personal views of judges will unavoidably be engaged from time to time. The decisions made by judges, however, and the interpretations that they advance or accept must be plausibly inferable from something in the Charter. It is not for the courts to manufacture a constitutional right out of whole cloth.191

The reasons of McIntyre J. and La Forest J. may incite one to recall H.L.A. Hart's comment on Roe v. Wade. Prof. Hart states that in

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188 White J., with Rehnquist dissenting, in Roe v. Wade [1973] 410 U.S. 113, at 221-222:
I find nothing in the language or history of the constitution to support the Court's judgement. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.

189 Supra, note 182, at pp. 469-470.

190 See Griswold v. Connecticut [1965] 381 U.S. 479, which read the right to privacy in the "penumbra" of the American Constitution.

191 Ibid., at p. 467.
Lochner v. U.S.\textsuperscript{192} Justice Oliver Wendell Holmes had justly "...protested against the laissez-faire decisions of his day that the Fourteenth Amendment had not enacted Herbert Spencer's Social Statics and its laissez-faire philosophy." However, if Mr. Justice Holmes had "survived into the modern period," adds H.L.A. Hart, "he might have protested that the Fourteenth Amendment had not enacted John Stuart Mill's On Liberty."\textsuperscript{193}

The Morgentaler decision has been one of the most controversial the Supreme Court has thus far handed down.\textsuperscript{194} Shortly after the decision, the Canadian Abortion Rights Action League (CARL), the Campaign Life Coalition, and numerous other pro-choice and pro-life groups began to lobby for government action. In the House of Commons, Justice Minister Ray Hnatyshyn noted that the Morgentaler decision "brings to our attention the new realities of the Charter of Rights and Freedoms of our country, and the role of the Supreme Court of Canada in defining the limitations and the abilities of legislatures at all levels of government to deal with important issues."\textsuperscript{195}

Yet, during the Charter debate a few years earlier, Prime Minister Trudeau had risen in the House to argue that the Charter would not affect the abortion law:

In other words, the charter does not say whether abortion will be easier or more difficult to practice in the future. The charter is absolutely neutral on this matter.\textsuperscript{196} P.M. Trudeau added, that the courts would not be allowed to determine policy:

... should a judge conclude that on the contrary, the charter does, to a certain extent, affect certain provisions of the Criminal Code, under the override clause we reserve the right to say: Notwithstanding this decision, notwithstanding the

\textsuperscript{192}(1905) 198 U.S. 45.


\textsuperscript{194}With the possible exception of Resolution to Amend the Constitution, Re. [1981] 1 S.C.R. 75.

\textsuperscript{195}Cited by Gordon Crann, supra, note 186, p. 499.

charter of rights as interpreted by this judge, the House legislatates in such and such a manner on the abortion issue. ¹⁹⁷

Nevertheless, within a week of the judgement, the federal government announced that the override section of the Charter would not be used to restore the invalidated provision of the Criminal Code.¹⁹⁸ Nor has a new abortion law been forthcoming for over twenty months after the decision. Despite Ottawa's inactivity, several provinces provided their own response to the Morgentaler verdict. Shortly thereafter, the British Columbia Civil Liberties Association launched a legal challenge to the provincial government's decision to eliminate public financing of abortions.¹⁹⁹

The behaviour of some of the provinces recalls the U.S. federal government's struggle for state compliance with Brown v. Board of Education decision.²⁰⁰ In the Morgentaler case, however, the Canadian Supreme Court has offered no direct remedy to pregnant women desiring an abortion with the exception of the invalidation of the statute making such behaviour criminal.

The Supreme Court also agreed to hear Joseph Borowski's challenge of a Saskatchewan Court of Appeal ruling which held that abortions do not violate the right to life, liberty and security of the fetus. Mr. Borowski contended that abortions violate the guarantees of s. 7 for the unborn. He attempted to obtain judicial remedy for those opposed to abortion and who see it as an infringement of the rights of the fetus.²⁰¹

¹⁹⁷Ibid.
²⁰¹Mr. Borowski was obviously not pleased with the first Charter decision on abortion. "They have just canonized anarchy and law-breaking," said Mr. Borowski upon learning of the Morgentaler judgement which in his opinion granted "licence to any doctor in the country to set up a corner butcher shop." See The Globe and Mail (January 29, 1988), p. A1-2.
An intense debate has been waged in the academic community as to whether pre-natal "rights" can practically be recognized. Morris Shumiatcgener contends that the issue of fetal rights in Borowski is the same as that which arose in the Henrietta Edwards Persons case.202 For Shumiatcgener the rights of the fetus can not be denied. Similarly, according to George Grant,

...the justice of a society is well defined in terms of how it treats the weak. And there is nothing human which is weaker than the foetus.203

However, Catherine Tolton has rightly underscored the difficulties with granting legal standing to the products of conception. Recognizing "rights" for the conceptus sets off a wide range of complex social and legal questions:

Would intentional disconnection of the power supply to a freezer full of frozen embryos be tantamount to mass murder? Could a pregnant woman with cancer be denied chemotherapy treatments because the treatments would harm the conceptus? Would the government be obliged to start paying "baby bonuses" from the time of conception.?204

On the other hand, Borowski's factum asserted that "the treatment accorded the weak, the disabled, the very old and the very young reflects the compassion and the sense of obligation of a society."205 Nonetheless, the difficulty of the Court's deliberation was amplified by the Women's Legal Education and Action Fund (LEAF) which, as an intervenor in the Borowski case, issued a factum which reminded the Court that a foetus is not an entirely separate being. Ms. Tolton summarizes the factum:

LEAF argues that the emphasis on science advocated by Borowski treats the pregnant woman as a container for the foetus - as an unconnected, unconcerned, and invisible life


205Ibid., p. 2.
support system. The foetus is portrayed as the autonomous "space-hero" and the pregnant woman as the "empty space" in which it floats.\textsuperscript{206} Deciding between these two controversial positions was not to be a facile nor comfortable task for the Court. However, since the provisions of the criminal code dealing with abortion had already been invalidated, Mr. Justice John Sopinka, writing for the majority, declared that the Borowski challenge was moot.\textsuperscript{207} The appeal failed to present a "live controversy" or concrete dispute. "The court must be sensitive to its role as the adjudicative branch in our political framework," wrote Sopinka J., "pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."\textsuperscript{208} As one might expect, this did not put the matter to rest.

Four months after the Borowski decision, fetal rights were at issue in the courts once again. Two former boyfriends of pregnant women managed to obtain lower court injunctions to prevent abortion. In the case of Barbara Dodd, the injunction was quickly lifted by a higher Ontario court. However, Chantal Daigle was not as fortunate. The Quebec Court of Appeal upheld an injunction, obtained on the request of Jean-Guy Tremblay, restricting her freedom. With unprecedented speed, reflecting the acknowledgment of its new-found political responsibilities, the Supreme Court of Canada prepared itself to hear Daigle's appeal just one week after the ruling of the Quebec high court. On August 8, 1989, the same day it heard the arguments, the Court issued a unanimous decision from the bench: The injunction should be quashed and should never have been issued in the first place. However, this point seemed practically (though certainly not politically or legally) moot since the pregnant woman had traveled to the U.S. to terminate her pregnancy the day before the case was

\textsuperscript{206}Ibid., p. 2, n. 14.

\textsuperscript{207}Borowski v. Attorney-General of Canada (1989), 57 D.L.R. 231 (S.C.C.). One gets the feeling that the Court was relieved.

\textsuperscript{208}Ibid., at p. 233.
heard. As in the earlier French-only commercial sign controversy, the opposing sides in the abortion debate engaged in widespread demonstrations. The court actions sparked a controversy which placed the issue on the front pages of all the nation's daily newspapers and encouraged great discussion among citizens. At the time of writing, the reasons for the Court's unanimous opinion are not yet available, but one can be sure that the divided federal government caucus will seek guidance from the Court's written judgement. Once again we see the Supreme Court of Canada at the centre of Canadian political discussion. Like the Patriation Reference, the Sunday Closing cases, and the Morgentaler decisions before it, the Charter thrust the Supreme Court into high-profile political action in Daigle v. Tremblay. The Daigle case once again demonstrates that the Court's activities often awaken sensitive issues that need governmental attention, but which if left to their own devices, politicians would otherwise ignore.

XVIII

ORGANIZED LABOUR AND THE CHARTER

Despite its activism in other areas, the Supreme Court has come under extensive criticism for its narrow interpretation of one social, political, and historical reality which it has not met under the Charter. Numerous academic observers have faulted the court for its non-recognition of fundamental labour rights.


210 Resolution to Amend the Constitution, Re. [1981] 1 S.C.R. 76.

211 Big M Drug Mart, supra, note 31 and Edwards Books and Art, supra, note 33.

212 Supra, note 182.

The Dolphin Delivery ruling was the Court's first decision on labour under the Charter.\textsuperscript{214} The Court held that trade union picketing is protected under freedom of expression guarantees. However, it simultaneously ruled that a restriction of secondary picketing, through court injunction, is a reasonable and justifiable limit under s. 1 of the Charter. By recognizing a constitutional right to picket, the Supreme Court of Canada went further than the American Supreme Court which denies constitutional protection for picketing which it views as amounting to conduct. Furthermore, the Dolphin Delivery ruling resolved a controversial question by declaring that the Charter does not apply to litigation between 'purely' private parties with no connection to legislation or other government action.

Prof. Dale Gibson had argued that if the Charter did not apply to the private sector, the right of private property would be placed above fundamental rights and freedoms.\textsuperscript{215} Yet, in Blainey v. Ontario Hockey Association, Mr. Justice Charles Dubin ruled that the Charter was not applicable to private action.\textsuperscript{216} This sentiment was affirmed in Dolphin Delivery by McIntyre J. David Beatty has consequently referred to the Dolphin Delivery decision as 'highly elitist' and 'profoundly antidemocratic.'\textsuperscript{217} According to Alan Hutchison and Andrew Petter, the ruling "let the political cat out of the constitutional bag and into the critical light."\textsuperscript{218} Edward Belobaba described Dolphin Delivery as

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\textsuperscript{214}Retail, Wholesale, Department Store Union, Local 580 v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573. [Hereinafter Dolphin Delivery, and R.W.D.S.U.]

\textsuperscript{215}Law of the Charter, supra, note 99.

\textsuperscript{216}[1986] 54 O.R. (2d) 513 (C.A.), at p. 521. Blainey is also a very significant decision in that it illustrates that provincial human rights legislation is subject to the Charter.


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"one step forward and two steps back". Mr. Belobaba says that if the Charter applies strictly to governmental action "what about the courts? What about the common law? The Supreme Court of Canada can and should do better." 219 Prof. Beatty has gone as far as to call for the overturning of the ruling. 220 One may hope, however, that the Dolphin Delivery decision does not prove to be the Waterloo of wider application for the Charter.

XIX

THE LABOUR TRILOGY

On April 9, 1987, the Supreme Court issued three decisions as to whether freedom of association guarantees workers the right to strike. 221 In the Alberta Labour Reference case, the Court upheld legislation which provides for interest arbitration in place of the right to strike for public employees. 222 The majority decision, written by Mr. Justice Le Dain and joined by Justices Beetz and La Forest, reasoned that the guarantee of freedom of association in s. 2(d) of the Charter does not include a guarantee of the right to bargain collectively and to strike. In a strongly worded separate opinion, Mr. Justice McIntyre held that:

People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. The group can exercise only the constitutional rights of its members on behalf of those members ... Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members.


220 Supra, note 217, p. 192.


222 Ibid., Alberta Labour Reference.
If the right asserted is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association.\textsuperscript{223}

The former British Columbia judge went on to explain that since the statutory right to strike in Canada, is "of relatively recent vintage."\textsuperscript{224} It could not be said, in his opinion, that it has achieved a status as a fundamental right which should be implied in the absence of specific reference in the Charter.\textsuperscript{225} Yet, by drawing on the proceedings leading up to the inclusion of freedom of association in the Charter, David Beatty and Steven Kennett explain that the reason no specific Charter reference exists to recognize the freedom of workers to bargain collectively is that those drafting the document feared that its specific recognition might be interpreted to diminish the right of association for non-labour groups.\textsuperscript{226} McIntyre J.'s assumption may therefore be erroneous. The judge might have done well to recall Emmett Hall's reminder that individual rights are "illusory" if not accompanied by social rights.\textsuperscript{227} The theoretical difficulties with the position taken by McIntyre J. have been pointed out by a number of observers. According to Michael MacNeil, "the idea that each person is and can be in complete control of his or her individual

\textsuperscript{223}Ibid., at p. 220.
\textsuperscript{224}Ibid., at p. 232.
\textsuperscript{225}Ibid., McIntyre J. reasoned that the right to strike: ...is truly a product of this century and, in its modern form, is in reality the product of the latter half of this century. It cannot be said that it has become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right, firmly embedded in our traditions, our political and social philosophy. There is then no basis ... for implying a constitutional right to strike.
destiny is a fabrication that does not correlate with the realities of complex relationships in a modern society."

The Chief Justice, with Madam Justice Wilson concurring, dissented from the holding in the Alberta Labour Reference. Chief Justice Dickson emphasised that section 2(d) of the Charter provides an "explicit and independent guarantee" of freedom of association, placing it in marked contrast to the First Amendment of the U.S. Constitution, which makes no reference to association. He also pointed to the U.N. Covenants on Economic, Social, and Cultural Rights, and on Civil and Political Rights, which protect the right of unions to strike and function freely, and ILO Convention No. 87: Concerning Freedom of Association, which ILO bodies have interpreted as to include collective bargaining rights. Dickson C.J. indicated that since Canada was a party to these international human rights documents, it was cognizant of the importance of freedom of association to trade unionism, and is under obligation to protect the associational freedoms of workers within Canada, subject to reasonable limits. The Chief Justice found the restrictions unjustifiable under s. 1 because the political objective was not of sufficient importance to justify the legislative prohibition of the freedom to strike.

In the Saskatchewan Dairy Workers judgement, the majority upheld the provincial Legislature's Dairy Workers (Maintenance Operation) Act which temporarily prohibited Saskatchewan's dairy employees from striking and the dairies from locking the employees out. However, in contrast to the Alberta Labour Reference case, the Chief Justice found the act's restriction justified under s. 1 and ruled that the criteria of proportionality met with the compulsory arbitration.

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228 Supra, note 213.
229 Alberta Labour Reference, supra, note 221, at p. 181.
231 Ibid., p. 192.
232 Ibid., p. 212.
233 Supra, note 221.
scheme enacted by the legislation. In the sole dissenting opinion, Wilson J. argued that the potential damage and inconvenience caused in the absence of the legislation could not constitute a "pressing and substantial concern" (as established in Oakes) to justify government intervention. In dissent, the astute justice reasoned that:

To determine under s. 1 of the Charter when that point has been reached, the government must satisfy the court that as a minimum the damage to the dairy industry as a consequence of the work stoppage would be considerably greater than that which would flow in the ordinary course of things from a work stoppage of reasonable duration. Industry and the public accept a certain amount of damage and inconvenience as the price of maintaining free negotiation in the work place. Justices Wilson and Dickson are the only members of the court to recognize the right to strike under the Charter. For this reason, none of their brethren considered the s. 1 test in Saskatchewan Dairy Workers.

In Public Service Alliance, the third labour decision in the trilogy handed down the same day, the majority ruled that the federal government's Public Sector Compensation Restrain Act, establishing the principle of six and five per cent inflation restraint, was not inconsistent with the Charter. However, in partial dissent, the Chief Justice stated that while the objective of reducing inflation was, at the time of the act's passage, of sufficient importance for the purpose of s. 1 of the Charter, not all of the means chosen to achieve the objective were "reasonable and demonstrably justified." Dickson C.J. explained that the removal of the right to strike over non-compensatory issues and the right to submit such disputes to binding arbitration, was not a justifiable infringement of the freedom of association and bore no apparent connection to the objectives of an

234 Ibid., at p. 293.
235 Ibid., at p. 300.
236 Supra, note 221.
inflation restraint programme.\textsuperscript{237} For Wilson J., dissenting in \textit{Public Service Alliance}, no part of the act could be saved by s. 1.\textsuperscript{238}

In its "right-to-strike" decisions, the Court's majority failed to recognize labour's most essential right and thereby failed to provide judicial remedy for restrictive legislative action. The Supreme Court's majority holding in the \textit{Alberta Labour Reference} clearly preferred a liberal theory of political society over a collectivist vision.\textsuperscript{239} Had the other justices sided with Dickson C.J. they would have recognized what Lily Harmer refers to as "the social nature of human beings, and the need to act in concert as a primary condition of community life, which is a large and necessary part of our modern society."\textsuperscript{240} Yet, the prevailing opinion of the Court emphasised the central tenets of liberalism. Prof. MacNeil has highlighted the conceptual difficulties with the majority position:

By failing to acknowledge community in the process of the interpretation of rights, courts may create boundaries between individuals, groups and society as a whole which do not reflect social reality ... Courts should not proceed on the basis of theoretical assumptions about the primacy of the autonomous individual. This is not to deny that rights have a very important role to play in protecting and promoting individual values. It is necessary, however, to recognize that groups and various forms of community are also important to the individual, and that rights which protect and promote communal forms of action are equally important and compatible with our constitutional history.\textsuperscript{241}

In addition to sparking challenging philosophical discussions, the labour decisions ignited political controversy. The Canadian Labour Congress criticized the judgments for failing to follow the lead of the International Labour Organization. The ILO has recognized the right to negotiate and the right to strike as integral freedoms under freedom of

\textsuperscript{237}Ibid., at pp. 258-286.

\textsuperscript{238}Ibid. at pp. 300-302.

\textsuperscript{239}On the theoretical assumptions in the labour judgments see articles by Lily Harmer and Michael MacNeil, \textit{supra}, note 213.

\textsuperscript{240}L. Harmer, \textit{supra}, note 213, p. 424.

\textsuperscript{241}\textit{Supra}, note 213, p. 92.
association in the U.N. Charter. The judgments appear to intensify the fire of Michael Mandel's ideological assault on the existence of the Charter. The sooner a majority of the Supreme Court begins to back away from the holding in the right-to-strike trilogy, the sooner many of the Charter's opponents will be deprived of piercing artillery.

XX

CONCLUSION

The judicial restraint and theoretical inflexibility displayed by the majority in the Court's labour decisions stands in contrast to the bold trend of the last seven years. The Court has derived considerable authority from the discussed provisions of a vague and seemingly dull document.

Noting its uninspiring "lawyers language" a distinguished observer remarked that the Charter "lacks the ringing eloquence that came so easily to our forebears of the eighteenth century." Despite the textual shortcomings, the court's interpretation of the Constitution Act, 1982 has brought judicial relief to those who could have expected little if anything from the traditional political process.

While parliamentarians avoided the issue for years, the Supreme Court of Canada invalidated the criminal restriction on abortion in 1988. In the interest of avoiding a controversial issue, the federal government would have done nothing at the time to protect the rights of pregnant women from being shackled by the criminal code. The Supreme Court, however, accepted the initiative in Morgentaler and sent a clear directive to Parliament to get on with the process of legislating. When elected representative again demonstrated themselves irresolute and evasive on the subject of abortion, the judicial process sent them another important missive via the Daigle controversy. The Supreme Court provided a legal and political avenue for Susan Nelles to

243 Legalization of Politics in Canada, supra, note 4, ff. 184-197.
completely clear her name and seek just compensation for her unjust persecution. State authorities, on the other hand, were prepared to let the issue fade away.

Shortly after the Charter came into effect, Prof. Tarnopolsky (as he then was) tried to ease the fear of the document's opponents by explaining that continuing in its "cautious tradition," the judiciary would not supplant legislators as policy-makers in the human rights field.245 Yet, seven years later the cautious tradition has given way to bold interpretation. Judicial intervention has properly exerted pressure on the law-makers to consider the constitutional implications of their enactments and the arbitrariness which can result from their hesitancy to fulfill their legislative duties.246 The Supreme Court has begun to cut the boulder of inactivity behind which many politicians have hidden. Quebec's Premier, Robert Bourassa, was forced to deal with his campaign promise to preserve the rights of anglophones within his province. Although, he choose to dodge his own word, the Supreme Court made sure that he was not allowed to do so without public recognition that fundamental rights and freedoms would be circumvented in the process.

As a result of the Constitution Act, 1982, Professors James Snell and Frederick Vaughan have noticed that the Supreme Court has achieved "a degree of institutional independence and a broad mandate unequalled by any other judicial body in the western world."247 The consensus seems to be international. Dr. Kenneth Pye, of Duke University Law


246On the latter point, consider the legal, social, and emotional difficulties which could have been avoided had a consistent abortion policy been in place to prevent the destructive impact of injunctions during the summer of 1989.

School, has concluded that Canadians are trying to achieve in a few years what it took decades to do in the United States. "The range of cases is quite extraordinary," explained Professor Pye, "The Supreme Court's willingness to entertain litigation now stands in contrast to the American courts."²⁴⁸ For Susan Nelles, Henry Morgentaler, David Edwin Oakes, Yvan Vaillancourt, and for countless others, the Supreme Court's "willingness to entertain litigation" was the only opportunity to challenge the will of the legislature with any hope of remedy. Where the political arm of government failed to reach, the Supreme Court of Canada extended the life jacket. F.R. Scott would have undoubtedly approved.

Chapter Five

Beyond Maturity

The Constitution of a country grows with the country, as the roots and branches of a tree reach out for greater sunlight and soil.

F.R. Scott¹

As an institution the Supreme Court has met significant challenges during the past two decades. Recently, Peter Russell declared that the adoption of the Charter "put the Supreme Court on the political map for the ordinary citizen," and that as a result, the Court has "reached full maturity."² Since finding its place on the landscape of Canadian politics, many questions have been raised about the judges of the powerful Court. The proposed Meech Lake Accord has also encouraged important discussion about the Supreme Court's proper constitutional role. In addition, the debate over the notwithstanding clause has been rekindled by recent political events and the reopening of the constitutional negotiating process. The previous chapter discussed the origins of the Court's structural and political maturity, this chapter will consider the prospects for taking the Supreme Court beyond its present responsibilities.

Important changes were made to the Court during the 1970's. The bilingual character of the institution was reaffirmed by beginning the practice of printing the Court's official reports in both English and French. Legal secretaries and law clerks were introduced to facilitate the justice's research and in 1975, the Court was finally given control of its own docket and allowed some discretion over most of the cases it chose to hear.³ The advent of the Charter significantly increased the

Supreme Court's workload. While applications for leave to appeal increased steadily from 158 in 1970-71 to 431 in 1980-81, they exploded to 501 during the first year of the Charter's enactment. The feeling of overload continues to be widespread. At its annual meeting in August 1987, the Canadian Bar Association unanimously passed a resolution calling for a new level of court to hear criminal appeals. A C.B.A. study group concluded that the Supreme Court "is not now able to hear all the cases that it ought to hear and ... the court takes too long to decide the cases that it does hear."5

II

JUDGES

Higher court judges in Canada have largely avoided political controversy. Yet, a few exceptions come to mind. In 1981, Mr. Justice Thomas Berger of the British Columbia Supreme Court (as he then was) publicly criticized the Trudeau government's failure to include aboriginal rights in the Charter, by writing an article in a national newspaper.

Prime Minister Trudeau did not take Thomas Berger's comments very kindly. For its part, the Canadian Judicial Council rebuked Justice Berger. In a public speech, Bora Laskin C.J.C. went even farther by suggesting that "a judge who feels so strongly on political issues that he must speak out is best advised to resign from the bench."6 Shortly after the Chief Justice's comments, Thomas Berger resigned. It is interesting to note, however, that this was not the first time that a sitting judge had commented on political matters.

Under the Canadian tradition of appointing leading judges to head royal commissions of inquiry, several members of the judiciary have


been required to make political statements as a result of their extra-judicial function. Most recently, Mr. Justice Charles Dubin has led an inquiry into drug abuse in Canadian amateur sport. The inquiry, triggered by the revocation of sprinter Ben Johnson's gold medal at the 1988 Seoul Olympics, has made Mr. Justice Dubin a frequently quoted high profile political character. In 1964, Supreme Court Justice, Emmett Hall, chaired the Royal Commission on Health Services which advised the creation of a national health care system. Mr. Justice Hall publicly defended the Commission's recommendations, as have the chairpersons of other royal commissions. However, by urging the adoption of his Health Services Report, Emmett Hall raised the ire of Minister Judy LeMarsh.

It was perhaps for this reason that a retired Emmett Hall was one of the few people who offered to publicly defend Berger's comments in 1982. There have been other cases of judicial opinions on political issues rendered outside the courts. Mr. Justice Samuel Freedman publicly supported the invocation of the War Measures Act, while Mr. Justice Donald Thorson actively supported nuclear disarmament. More recently, Chief Justice Brian Dickson has openly criticised both the federal government and the Government of British Columbia for underfunding universities. Unlike the Berger case, the comments of these judges were not met with harsh rebuke or condemnation.

We need to develop a consistent policy. Robert Fulford has said that Mr. Berger's greatest crime seems to have been having the gumption

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7 Mr. Berger thanked Emmett Hall, respectfully declined his help, and resigned as a result of Mr. Justice Laskin's speech. See Dennis Gruending, Emmett Hall: Establishment Radical (Toronto: Macmillan, 1985), p. 169.

8 Robert Fulford, "Disorder in the Court," Saturday Night Magazine (September 1982).

9 In an address delivered at convocation at the University of British Columbia, 30 May 1986. Quoted by Robert Martin, infra, note 15, p. 810.

10 A newspaper editorial seems to have been the only reproach in the last incident. "A Judge Speaks Out," Globe and Mail (3 June 1986), p. 6. See infra, note 15.
to sound like "the young Trudeau." It is disturbing to believe that judges are at liberty to speak freely on matters of pressing public importance only so long as they do not bruise the ego of the Prime Minister. The Canadian Judicial Council needs to establish a more uniform standard for comment. Judges are citizens and serve best by being allowed to speak at their own discretion when not exercising their adjudicative responsibilities. Supreme Court justices are among the most valuable members of the polity; if matters are serious enough to make them feel their comments unavoidable, their sapience is best shared with Canadian society.

Under the Charter, judges with intellectual depth are required. As the use of historical sources and extrinsic evidence increases, individuals who can interpret information from diverse sources will be called upon to act as adjudicators. J.R. Mallory recalls that the debate among legal scholars at the time of the UN Charter of Human Rights influenced many of the people now judges who were in law school at the time. The emeritus professor similarly foresees that the debate on the Charter will leave its mark on the next generation of judges who will achieve judicial rank after the turn of the century.

To be sure, there are always skeptics. For instance, Robert Martin has alleged that judges on the Supreme Court of Canada belong to the dominant class in Canadian society and actively contribute to the dominance of their class through their judgments. Drawing on the philosophy of Miliband, Joel Bakan has similarly advanced the belief

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11 Supra, note 8.


that judges are bound by their position in the dominant class and cannot "easily step outside of, nor transcend such influences."\textsuperscript{16}

It has not been shown, by the allegations of Prof. Martin nor Prof. Bakan, how the social class of the average Supreme Court justice differs from that of other key political players such as prime ministers, premiers or cabinet ministers. In fact, the real sociological distinction might be made by education levels not economic status. Furthermore, the system of judicial appointment has recently been revised to reflect a broader sample of Canadian society.\textsuperscript{17} Today, young citizens of the middle and lower classes, can earn scholarships, obtain law degrees, practice law and eventually be seated on the bench, if they have both the desire and the inclination. The arguments of Robert Martin and Joel Bakan appear outdated in this context.

III

TOWARDS ENTRENCHME\textsuperscript{T}

A. V. Dicey once observed that the American Supreme Court derives its existence from the Constitution and therefore can claim equality with the President and Congress.\textsuperscript{18} If the Meech Lake Constitutional Accord is ratified, the Supreme Court of Canada could claim the same technical equality with Parliament. Under the June 1987 accord, the Supreme Court would be explicitly recognized in the Constitution for the first time. Furthermore, former Senator Eugene Forsey has noted that the Meech Lake agreement will mean a considerable shift of power from Parliament and the legislatures to the courts in addition to the "massive shift" already produced by the Constitution Act, 1982.\textsuperscript{19}


\textsuperscript{17}For a brief and informative outline of the new system see Canada, Department of Justice, A New Judicial Appointments Process (Ottawa: Minister of Supply and Services, 1988).


Despite institutional changes, the Supreme Court's existence continued to be regulated by ordinary statute throughout the 1970's. The Court subsequently moved away from review of common and civil law and predominantly became a public law court dealing with criminal, constitutional, and administrative law cases.\textsuperscript{20}

Until 1982, the Supreme Court was not recognized in Canada's Constitution. In other words, the Court authority held no direct constitutional standing. There is widespread scholarly agreement that Parliament could have unilaterally abolished the highest court in the nation, if it had so desired.\textsuperscript{21} While the Court was resolving numerous jurisdictional disputes between the federal government and the provinces, it was itself under federal legislative jurisdiction. The Report of the Special Joint Committee on the 1987 Accord explained this predicament,

\begin{quote}
It became increasingly anomalous that so important a federal institution should be subject to the exclusive legislative authority of one of the major litigants before it, namely, the federal government.\textsuperscript{22}
\end{quote}

Since the mid-1950's, numerous constitutional proposals recommended the entrenchment of the Supreme Court, including the Tremblay Report of 1956, the 1971 Victoria Charter, and the Constitutional Amendment Bill, 1978 (Bill C-60).\textsuperscript{23}

Yet, even The Constitution Act, 1982 did not provide formal


\textsuperscript{21}This, of course, would nonetheless have been politically unlikely.


protection for the Court. A scheme for the constitutional entrenchment of the Court was not part of the proposals tabled in Parliament by the Trudeau government in October 1980, nor was it included in the accord reached in November 1981. This was most likely due to the difficulty in achieving agreement on the provincial role in the appointment of judges.

At present, there are only two specific references to the Supreme Court in the constitution and both refer to amendment. Section 41(d) of The Constitution Act, 1982 requires unanimity to "alter the composition of the Supreme Court of Canada," while s. 42(1) requires that an amendment to the Supreme Court of Canada, except one dealing with its composition, must attain the consent of the federal government and two-thirds of the provinces. Although, ss. 41 and 42 applies to amendments to the "Constitution of Canada," s.52(2) of the Constitution Act, 1982 which lists the instruments that make up the Constitution, it does not cite the Supreme Court Act. The formal constitution neither establishes nor defines the Supreme Court, yet, it contains provisions for its amendment! According to Peter Russell, the Constitution Act, 1982 "put the cart before the horse."

In his short but thorough monograph on the 1987 Constitutional Accord, Peter Hogg explains the differing interpretations of the Court's constitutional status. Prof. R.I Cheffins, we are told, argued that ss. 41(d) and 42(1)(d) accomplish the entrenchment of the Court; Prof. W.R. Lederman arrived at the more cautious conclusion that only those parts of the Supreme Court Act which define the "basic elements" of the Court are part of the Constitution of Canada, while the rest can


25Supra, note 23, p. 12.

be amended by the federal Parliament under s. 101. Prof. Hogg himself, on the other hand, believes that the references in ss. 41 and 42 have no application until the Supreme Court receives explicit constitutional status. "It is inappropriate," declares Dr. Hogg, "that the Court which serves as the guardian of the Constitution should be unprotected by the Constitution."29

It is somewhat ironic that a constitutional accord that was intended to legally enforce the notion of a distinct Quebec Society and to enshrine Canada's highest court within our constitution, has been jeopardized by Quebec's claim of a linguistic threat to its distinctness despite the Supreme Court's wisdom.31 It is this contentious claim of the need for linguistic protection under the banner of collective rights, which has led to Quebec's use of the notwithstanding clause.32 By issuing a clearly worded decision which


28Supra, note 26, p. S95.

29Meech Lake Constitutional Accord Annotated, supra, note 27, p. 29. "It is generally agreed," writes Professor Hogg, "that the Court should be accorded the same constitutional status as the Supreme Court of the United States and the High Court of Australia," at pp. 35-36.

30Quebec has been actively seeking constitutional renewal for a number of years. Its tactics have frequently involved threatening the constitutional order. In 1965, for example, Daniel Johnson commented that Quebec independence from Canada would be "inevitable" if a new constitution were not passed. See Claude Morin, Quebec versus Ottawa: The Struggle for Self-Government 1960-1972 (Toronto: U. of T. Press, 1976), p. 57.

31For criticism of the province's reaction to the sign laws judgments see P.K. Kuruvilla, "Quebec's Action Was Wrong," Policy Options X:4 (May 1989), pp. 7-8.

32Premier Filmon has attempted to bring the Supreme Court even closer to the political flame by requesting a reference opinion on the meaning of "distinct society" within the Accord. For a point of view that Quebec would surely not want to hear from the Court see Stephen Scott, "'Meech Lake' and Quebec Society: 'distinct' or distinctive?" in Real-A. Forest, ed., L'adhésion du Québec à L'Accord du Lac Meech
encouraged the province to invoke s. 33 - the Supreme Court may have indirectly postponed its own entrenchment. It may now appear to some, that any further discussion on the Meech Lake Accord would be fruitless and academic. Nonetheless, discussions of both the hypothetical and the academic serve to generate images of the Court’s proper constitutional place.

IV
ARRIVING AT MEECH LAKE

The 1987 Constitutional Accord is a direct result of the "Quebec round" of constitutional negotiations. During the First Minister's Conference that led to the agreement on the patriation of Canada's Constitution in 1981, some believed that Quebec was a victim of "the night of long knives." Agreement had been reached without consultation of Quebec's Premier; the Constitution was patriated without the province's signature.

In the summer of 1984, Brian Mulroney, leader of the Progressive Conservative Party of Canada, ran for election with the promise of initiating constitutional renewal. With Prime Minister Mulroney's election in September 1984, the Ministry of Federal-Provincial Relations began negotiations to seek the signature of the tenth province on the Constitution. Quebec expressed mutual interest and, after the election of Robert Bourassa's Liberal Government in December 1985, it presented proposals whose adoption would be necessary to secure the province's consent. Thus, a dialogue was begun to achieve a constitutional accord acceptable to Ottawa, Quebec and the other provinces. An agreement was reached at Meech Lake, on April 30, 1987, between the Prime Minister and ten provincial premiers to "bring Quebec into the constitutional family.”


33 For an account of one who claimed to have been personally wounded see René Lévesque, Attendez que je me rappelle ..., (Montreal: Québec Amérique, 1986), pp. 436-454.

34 The expression of James Crossland in Policy Options VII:10 (December 1986), pp. 18-20.
nomination of Supreme Court Justices was one of the proposals brought forward by Quebec and agreed to at Meech Lake. This agreement in principle was later specified in the Constitutional Accord reached at the Langevin Block while executive federalism experienced its sleepless night on June 1987.35

V

CHANGES TO THE SUPREME COURT OF CANADA

The Supreme Court is the institution most directly influenced by the Meech Lake agreement.36 The proposals contained in the Accord clarify some of the uncertainties associated with the Supreme Court provisions of the Constitution Act, 1982.37 If Manitoba and New Brunswick ratify the Accord before June 1990,38 s. 6 of the Constitution Amendment, 1987 would bring about six important constitutional changes to the Supreme Court.39 First, the institution would be continued as the general court of appeal for Canada. Second, the make-up of the Court, consisting of a chief justice and eight other justices with at least three judges coming from Quebec, would be recognized in the Constitution. Third, vacancies to the Supreme Court would be filled from lists supplied by the provinces. Fourth, the

35Achieved in the building that houses the Prime Minister's Office in Ottawa, the Accord itself is a product of 19 hours of continuous deliberation that went on right through the night of June 3rd and 4th 1987. See Globe and Mail (June 4, 1987), pp. A1-16.

36We are reminded by editors Kenneth Norrie and François Vaillancourt, "Introduction," Canadian Public Policy XIV:S (September 1988), p. S2. Their special supplementary issue of Canadian Public Policy, contains a useful collection of analytical writings on the Meech Lake Accord.


38Recently some doubt has arisen as to whether the two remaining provinces must ratify by 23 June 1990, the third anniversary of the Accord's ratification by the National Assembly of Québec. Frank McKenna, New Brunswick's Premier, has implied that the deadline may not be etched in stone. See Globe and Mail (13 January 1989), p. A3.

39Five new sections would follow s. 101, while six new sub-headings would be included into the Judicature part of the Constitution Act, 1867. See Appendix for related provisions.
appointment process, including the new provincial role in judicial nomination, would be entrenched. Fifth, the qualifications for appointment, the tenure of the justices and the process for fixing the salaries of the Supreme Court justices would be similarly protected. Finally, any constitutional amendment in relation to the Supreme Court would require the unanimous approval of the provinces, the House of Commons, and the Senate.⁴⁰

VI

TRADITION AND CONTINUITY

Under the Meech Lake Accord, the Supreme Court becomes a "creature of the constitution." Prof. Russell has claimed that this is important to national development as Canada evolves from English to a more Franco-American constitutionalism.⁴¹ Unlike the third chapter of the Australian Constitution which explicitly creates the High Court of Australia, and unlike the third article of the American Constitution which provides that judicial power "will be vested in one Supreme Court," the proposed amendment to the Canadian Constitution simply continues the previous role of the Supreme Court of Canada.⁴²

The regional composition of the Court is owed to tradition. There are three justices from each of Ontario and Quebec, two from the West and one from the Atlantic region. In 1979 this pattern was temporarily altered when William McIntyre of British Columbia replaced a retiring Ontario Judge. Shortly thereafter, however, the pattern was restored when the first woman appointed to the Court, Madame Justice Bertha Wilson, replaced Justice Martland of Alberta. "As with all major organs of government," Justice Mallory has reminded us that, "the Supreme Court is constituted, both de facto and de jure, on

⁴¹Peter Russell, supra, note 26, p. 894.
⁴²The proposed s. 101A(1) states that "[t]he court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada."
representative principles." Some witnesses appearing before the Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord suggested that regional representation should be guaranteed in the Constitution; others lamented that representation was not guaranteed for women, for the aboriginal peoples or other minorities.  

While the Accord does not explicitly recognize the regional nature of the Supreme Court, it does enshrine the Court’s composition at nine members, at least three of which must be from Quebec. Eugene Forsey explained that the words "at least three" may have been used by the Accord’s drafters to allow for the situation where one of the three Quebec judges on the Court is appointed Chief Justice and the vacancy left for a puisne judge is filled by another judge from the province, so that there would be a Chief Justice and three other justices from Quebec.  

The entrenchment of a three out of nine formula has already been proposed by the Victoria Charter in 1971; the 1978 Canadian Bar Association Report (Towards a New Canada), and the White paper of the Liberal Party of Quebec in 1980. Bill C-60, in 1978, proposed that four out of eleven judges be drawn from the civil law province; the Report of the Pepin-Robarts Commission, in 1979, advocated that five of eleven Supreme Court justices be appointed from Quebec. Both, the C-60 and Pepin-Robarts proposals, would have given the province increased representation. 

43 For a lucid introduction to the federal court system see Professor Mallory’s The Structure of Canadian Government, rev. ed. (Toronto: Gage, 1984), pp. 322-326.  
44 Report of the Joint Committee on the 1987 Constitutional Accord, supra, note 22, p. 82.  
45 101A(2) states that "the Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges."  
In its report on the Supreme Court of Canada, the Canadian Bar Association recommended that Quebec's share of the judges should be modified, from three out of nine, to "at least one-third of the total number." At the same time, the Association urged that the total number of judges not be specified in the Constitution. According to the C.B.A., adjustment of the Court's size would be best left to Parliament since it has already changed three times in the past, may have to change again, and the unanimity requirement in the amending procedure would make future change very difficult. In the Association's view, "the danger of court-packing is so remote and the need for future legitimate change is so likely, that the more flexible alternative is preferable."  

VII

DECENTRALIZING THE APPOINTMENT PROCESS

One of the most often heard criticisms of the Constitutional Accord, 1987 is that it transfers too much power from the federal government to the provinces. This point was heard early and it has been made repeatedly. Jack London, professor of law at the University of Manitoba, declared that the Accord would "balkanize" Canada. "Eleven power-hungry politicians have reached a hastily drafted agreement which may in fact be an agenda for the dismemberment of our country," alleged Michael Bliss, professor of Canadian History at the University of Toronto, who otherwise described the Accord as "smash and grab constitution making."

Pierre Trudeau was even less reserved in his journalistic condemnation of Meech Lake. In his invective, which often bordered on unabashed ad hominem attack, the former Prime

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49 Ibid., p. 18.
Minister declared that acceptance of the Accord's proposals would render the Canadian state "totally impotent" and would destine the nation "to eventually be governed by eunuchs."52

The argument, that the Accord excessively decentralizes Canada by granting the provinces unwarranted power, has equally been used with specific reference to the provisions affecting the Supreme Court. Defending the virtues of an integrated judiciary which he sees as being threatened by Meech Lake, David Baugh, Assistant Professor of Political Science at St. Francis Xavier University, has explained that the same method of appointment has been proposed for both the Senate and the Supreme Court, thereby obscuring their "radically different function in the Canadian political system."53 Dr. Baugh has lamented that, "with the demands upon the Courts increasing in the age of the Charter, now is not the time to emphasize local particularisms."54

Testifying before the Special Joint Committee on the 1987 Accord, Mr. Trudeau alleged that, with respect to the Supreme Court, provincial governments will be "exercising remote control over a body which thus far, has been entirely the responsibility of the federal government."55 A similar fear has been expressed by John Whyte who has cautioned that the altered appointment process could require future judges to act


54 Ibid. In opposing the method of nomination, he claims that "it is not customary to the perspective of provincial governments, which were created to represent particularistic [sic] interests, to cleave to the universal outlook."

under a mandate reflecting the interests of various provinces. History may question, however, whether such a ‘mandate’ will ever exist.

Political loyalty cannot be assured, nor should it be expected, when appointing candidates to the judiciary. Judges on the Supreme Court are responsible to the Constitution not the parties who appoint them. The political arena of American society brings two examples readily to mind. In one instance it is fair to say that Franklin Roosevelt would have been very surprised to read the later decisions of Felix Frankfurter whom he nominated to the United States Supreme Court. In another instance it can be said that Dwight Eisenhower discovered the true meaning of judicial independence after he appointed Earl Warren, a former California Governor and fellow Republican, to the U.S. Supreme Court. By naming Mr. Warren to the American Court, Dwight Eisenhower expected that the new Chief Justice would adhere to a strict constructionism. The inverse, however, turned out to be the case. Warren C.J.’s decisions reversed precedent, ended publicly supported racial discrimination and extended constitutional guarantees to segments of the population that had historically been neglected by political society. The Chief Justice adamantly resisted the conservative philosophy of the executive which appointed him. In fact, during the later years of his life, Mr. Eisenhower frequently


57 During the Spring of 1954, prior to the U.S. Supreme Court’s judgement in the school desegregation cases, the President invited Earl Warren to a White House dinner and sat him near John W. Davies, counsel for the segregated states. According to Chief Justice Warren, "Eisenhower went to considerable length to tell me what a great man Mr. Davis was." Later as the guests were leaving the dining room, President Eisenhower took Warren C.J. by the arm and explained that segregationists "...are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes." The Chief Justice wisely ignored the President and a few weeks later his court rendered Brown vs. The Board of Education of Topeka (1954) 347 U.S. 483. See Earl Warren, The Memoirs of Earl Warren, (Garden City, NY: Doubleday, 1977), at pp. 291-292.
remarked that the "biggest damned fool mistake" he ever made was appointing "that dumb son of a bitch Earl Warren."\(^5^8\)

On the question of alleged political bias in the Canadian judiciary, the Special Parliamentary Joint Committee on the 1987 Accord seemed unconvinced. The committee discounted the threat of regional fragmentation within the Court. Its report affirms that a provincial bias among newly appointed judges is no more likely than a federal bias among the present judges of the Supreme Court.\(^5^9\) Commenting on the outstanding recent appointments to the Court, Yves Fortier, a former President of the C.B.A. suggested to the committee that "there is no reason to believe that because another partner in Confederation is going to have a say in the appointment of judges ... this tradition of excellence is not going to be duplicated."\(^6^0\) Furthermore, Prof. Russell has said, that although the Meech Lake proposals give provincial governments a primary role in the appointment of Supreme Court judges, control over the appointment of Provincial Court of Appeal judges and appointments to the province's general jurisdiction trial courts remain entirely in Ottawa's hands.\(^6^1\)

Those who have sought leave to appeal from Provincial Court of Appeal and the Federal Court of Appeal have been half as successful


\(^5^9\)According to the Report of the Joint Committee on the 1987 Constitutional Accord, supra, note 22, at p. 83:
Legal scholars who have examined the issue [of] whether the Court has displayed a federal bias in its constitutional decisions have been unable to substantiate any such bias. Indeed, recent constitutional jurisprudence would, if anything, suggest a provincial bias. This is particularly evident in the Court's recent approach to the paramountcy doctrine, i.e. the Court has refused to declare inoperative provincial laws which are arguably repugnant to federal laws except in the limited circumstances where obedience to one law would result in a breach of the other.

\(^6^0\)Ibid., p. 86. "The cream rises to the top," explained Mr. Fortier, "whether you are looking at the cream with provincial eyes or with federal eyes."

\(^6^1\)Peter Russell, supra, note 26, p. 398.
this decade as compared to last.\textsuperscript{62} Prof. Russell reasons that, since the Supreme Court can review only 1 to 2 per cent of the four to five thousand decisions rendered by the provincial and federal courts of appeal each year, these intermediate review courts (over which the federal government has exclusive jurisdiction) become, in effect, final courts of appeal for many legal disputes.\textsuperscript{63} Following this argument, allowing provinces to nominate Supreme Court judges would not appear to substantially alter the judiciary's orientation. The Prime Minister, it should also be noted, retains the prerogative to appoint the crucial chair of Chief Justice of Canada from among the sitting members of the Court.

However, the judges on the present Supreme Court have been predominantly recruited from provincial courts of appeal; they are experienced, and are very highly regarded in the legal and academic communities. It is uncertain whether this quality would continue under the aforementioned appointment process. In fact, the manner of appointment was the most contentious issue in agreement on the Supreme Court's entrenchment.

Future Premiers and Prime Ministers should recall President Eisenhower's frustration and refrain from attempts to influence the independent branch. Judicial appointments are best made on merit, not political consideration.

\textbf{VIII}

\textbf{CONTROVERSIAL PROCEDURE AND ALTERNATIVES}

The new procedure for appointing judges is the most substantive change to the Supreme Court of Canada, brought about by the Meech Lake Accord. Under the \textit{Constitutional Amendment, 1987} s. 101C, when a vacancy occurs in Supreme Court of Canada the provinces submit names of qualified individuals and the federal Minister of Justice chooses a new judge from this list. When a vacancy occurs from Quebec, Ottawa must

\textsuperscript{62}Ibid. \textsuperscript{63}Ibid. The number has declined from just under 30 per cent to just over 15 per cent.
chose a person whose name has been submitted by the Government of Quebec. This method allows for provincial input while leaving the final decision to the federal government.

In rebuttal to Pierre Trudeau's written condemnation of the Accord, Lowell Murray, the federal Minister of Federal-Provincial Relations, defended every provision of the 1987 constitutional agreement and expressed surprise at Mr. Trudeau's opposition to a procedure based on the Victoria Charter and the former prime minister's own Bill C-60. Yet, as usual, the father of the Charter was ready to debate. "There is a great difference," retorted Mr. Trudeau in defence of his own earlier proposals, "between telling the provinces on one hand they will be able to choose between three names put forward by the Federal government to the Supreme Court, and on the other hand saying the only names of people who will go to the Supreme Court are to be named by the provinces."65

In fact, the method of appointment under the 1971 Victoria Charter was more complex. It involved the Attorney-General of Canada informing his provincial counterpart of the federal government's choice. The attorney-general of the concerned province would then have ninety days to approve the nomination or send it to a college consisting of ten attorneys-general or, if he so desired, to a college consisting of himself, the Attorney-General of Canada, and a president chosen between them.66 The federal Attorney-General would then submit the names of three candidates to the college. The Special Joint Committee of the Senate and House of Commons endorsed the appointment provisions of the Victoria Charter with the modification that both Attorneys-General submit the names to the college.

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66If the two parties could not agree on a suitable individual, the responsibility would fall on the chief justice of the province.
Bill C-60 retained the spirit of the Victoria method of nomination, while providing that the issue of nomination be taken to committee within ten days and that the choice of the committee be urgently approved by a House of the Federation. Ontario's advisory committee on the constitution recommended, in 1978, that judges be named by the federal government and ratified by a House of Provinces. That same year, a report of the Committee on the Constitution of the Canadian Bar Association advised that the Provincial role in the appointment of Supreme Court judges be exercised through an Upper House representing the provinces. The C.B.A. report recommended that the Upper House approve nominations in camera after public hearings. The Pepin-Robarts Report on Canadian Unity went further than the bar association by advising that the federal government submit names to the Council of the Federation only after direct provincial consultation.

To appreciate the horizon of possibilities, one may wish to note of the variety of methods used to make judicial appointments to the world's highest tribunals. In the United States, judicial appointments to the Supreme Court are made by the President and must be ratified by the Senate. This is a highly politicized process which may be contrasted with the nomination of Supreme Court judges in Colombia where judges are appointed by members of the bench.

In Great Britain, Law Lords are appointed by the Prime Minister on the recommendation of the Lord Chancellor acting on the advice of an administrative committee. The Australians, have a system whereby the Governor in Council of the Federation is under a statutory requirement to consult the States when nominating judges to the High Court. In New

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70 As witnessed by the rejection of Ronald Reagan's nomination of Robert Bork and Daniel Ginsburg, the confirmation of the President's choice is by no means a fait accompli.

71 Décar, supra, note 47, p. 95.
Zealand, judges are selected by the Attorney-General, from a list prepared by the Chief Justice. The name of the New Zealander selected by the Attorney-General must be given to the president of the bar association and approved by the bar before being submitted to the Cabinet and then the Governor General.⁷²

IX

DREADED DEADLOCK

But if ever the Supreme Court came to be composed of rash or corrupt men, the confederation would be threatened by anarchy or civil war.

Alexis de Tocqueville⁷³

One of the main shortcomings in the method of appointment in the Meech Lake Accord is that there is no provision for breaking a deadlock. If the provinces keep submitting names that are unacceptable to the federal government, an impasse will result. This appears less likely for appointments from outside of Quebec. Prof. Hogg is of the view that the federal government will be able to "shop around" among provincial lists and this will create a "healthy competition" among the provinces to contribute the most qualified candidate.⁷⁴ "A

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⁷²Ibid. Décary also explains that in Israel, judges are named by the President (who is head of state but not head of government), on the recommendation of a committee formed by 3 judges of the Supreme Court, 2 members of the government, 2 members of the Knesset and 2 members of the Bar. We also learn that in Belgium, the government presents a list of candidates to the Senate which narrows it to two names approved by a two thirds majority and the King chooses one of the two names. In contrast we have the West German example where half of the sixteen judges are elected by a committee of the federal Parliament, while the other half is selected by the Council of the Federation representing the States.


⁷⁴Meech Lake Constitutional Accord Annotated, supra, note 27, p. 35.
constitution that relies on comity," posits Peter Russell, "is to be preferred to one that anticipates discord."75

Others have been less optimistic and have cautioned that although provinces will be able to indefinitely nominate candidates, the federal government will not be able, "for fear of appearing unreasonable," to indefinitely reject provincial nominations.76 Peter Leslie, however, has underlined the political pressure on both levels of government not to play politics with judicial appointments. "I believe both orders of government will have every incentive to act reasonably and responsibly in the appointments process," writes Mr. Leslie, "the Canadian public ... would not put up with anything less.77

It has been suggested that although there may be eventual agreement between the levels of government, delay in the form of a prolonged deadlock would severely hamper the reduced membership on the Supreme Court from functioning efficiently.78 However, appearing before the Special Joint Committee, Robert Décary explained that it would be 'unthinkable' under our democratic system to suggest that governments could not reach agreement on judicial selection "during a reasonable period of time."79 Elsewhere, Guy Tremblay has argued that a deadlock breaking mechanism would not necessarily be desirable. Drawing upon the ideas of Montesquieu, Prof. Tremblay has suggested

75Peter Russell, supra, note 26, p. S102. Notwithstanding Professor Russell's assurances, it may be wiser to live under a Constitution that allow us to deal with the unanticipated.

76Peter Leslie, "Submission to the Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord," Queen's Quarterly, XCIV:IV (Winter 1987), p. 778. This is his own view.

77Ibid., p. 789

78One short-term solution would be to invoke s. 30 of the Supreme Court Act, under which the Chief Justice has the authority to appoint ad hoc judges "where at any time there is not a quorum" of regular judges available to sit. The Federal Court or provincial superior courts could provide the ad hoc justices.

79Report of the Joint Committee on the 1987 Constitutional Accord, supra, note 22, p. 84.
that constitutions are best organized in such a manner that cooperation is necessary to succeed.\textsuperscript{80}

It is worth noting however, that while there is a requirement on the part of the federal government to select names from provincial lists, there is no responsibility incumbent on any of the provinces, including Quebec, to submit candidates for nomination.\textsuperscript{81} This appears to present no great problem for Peter Leslie, Guy Tremblay, Robert Décary, Peter Hogg, or Peter Russell. In fact, in the likelihood of a separatist government in Quebec nominating only radicals to vacancies on the Supreme Court, Prof. Russell argues that:

No one can say that this will never happen any more than we can be sure that without Meech Lake a fiendishly illiberal government in Ottawa would not some time in the future load up the Court with right-wing centralizers.\textsuperscript{82}

Eugene Forsey and Stephen Scott appear to be much more preoccupied than Prof. Russell on the danger of Quebec's exclusive nomination of judges unacceptable to the rest of Canada. According to Dr. Forsey, a Péquiste government might not say, "we will snarl things up properly by not nominating anybody," but they might say "we will suggest someone for appointment in the Supreme Court who would make things very difficult for the rest of the members of the court and cause a great deal of trouble which will help us get our way and break up Confederation."

Along a similar vein, Stephen Scott fears that a so-called 'list' may contain one name only. With respect to such a dilemma, the McGill University Professor of Law explains:

I look back upon the last half-century, and realize that for about twenty years, no Supreme Court judge could have been appointed (under the 1987 Accord scheme) from Quebec who was not a product of Duplessism, or at least someone who had made his peace with Duplessism. For nearly another ten years, no judge could have been appointed unless nominated by

\textsuperscript{80}See Tremblay, "La réforme des institutions et de la formule d'amendement dans l'Accord du Lac Meech," in L'adhésion du Québec à L'Accord du Lac Meech, supra, note 32, pp. 84-85.

\textsuperscript{81}The provinces, including Quebec, 'may' nominate individuals but the federal government 'shall' choose from the nominations.

\textsuperscript{82}Russell, supra, note 26, p. S102.

\textsuperscript{83}Senate, Debates, 2nd Session, CXXXI:66 (1987), at p. 1545.
a government which was not merely dedicated to the
dismemberment of the Federation but which itself placed a
statue of Duplessis on Quebec City's colline parlementaire,
where the Legislature sits. We may hope that nothing
comparable will ever occur. To frame a constitution on such
assumptions is, however, naïve and, indeed, irresponsible.84

According to Prof. Scott, if the motive of provincial
participation is merely to exclude pro-federal bias and not encourage a
regional one, it would have been better to allow all provincial
governments to nominate qualified candidates for all provinces
especially Quebec.85 It would be difficult to disagree with Dr. Scott
on this point.

X

ONE LOOPS HOLE TO CONSIDER

Our constitution was intended to be a protective garment,
not a strait-jacket.

J.R. Mallory86

There may be a loop hole in the language under which the federal
government must make judicial appointments. In other words, the
situation may not necessarily be as inescapably constricting as may
first appear. Section 101C(1) provides that "where a vacancy occurs"
in the Supreme Court, each province may, "in relation to that vacancy,"
submit names of qualified persons for appointment.87 Section 101C(2)
then states that the federal government must appoint a person whose
name "has been submitted" under subsection (1). The specific use of
the past tense in subsection two may be the key to Ottawa's potential
rejection of spurious lists submitted by mischievous provinces,
including Quebec.

84Stephen Scott, "The Supreme Court of Canada and the 1987
Constitutional Accord," in L'adhésion du Québec à L'Accord du Lac
Meech, supra, note 32, p. 140.
85Ibid., p. 139.
86"Constitutional Amendment Now," The Dalhousie Review XXIII
(April 1943), p. 35.
87One may assume that there are four types of possible vacancies
to the Supreme Court: a vacancy from the Western Provinces, a vacancy
from Quebec or Ontario, and a vacancy from the Atlantic Provinces.
One may be tempted to assume that since there is no allowance made for a province to withdraw a name or list once it has been submitted, there would be nothing stopping the federal government from keeping provincial nominations on file and making use of them in deadlock situations. Under this scenario, a list submitted by a former government of Quebec or other province would be used to make the appropriate appointment to the Supreme Court and circumvent a more recent undesirable provincial list. This possibility has not yet been explored. 88

Admittedly, such a maneuver by the federal government would run contrary to the political spirit of the Meech Lake Accord. Then again, the same could be said of an attempt by a future Quebec government to submit unacceptable names to Ottawa. 89

Acceptable provincial nominees, who are not selected to the Supreme Court on their initial nomination, would be no less qualified if another vacancy for the same position arose a few years later. 90 This would be true regardless of the shifting whims of provincial politics, nationalist or otherwise. If a Supreme Court candidate is worthy of representing Quebec or another province for one vacancy and does not get selected, he or she will surely be worthy of representing the province when the next vacancy occurs for the same position. If the Meech Lake Accord is adopted, one might urge the federal Ministry of Justice to keep provincial nominations on file in case a future deadlock makes viable an attempt of this potential deadlock-breaking

88To the best of the author's knowledge.
89The same ploy could be orchestrated if other provinces attempted to sabotage the appointments process.
90Granted of course that the person in question had neither been disbarred and nor reached the age of 75.
Inventive devices may be necessary to shield against the "straight-jacket" effect.

XI

PUBLIC AND PROFESSIONAL SCRUTINY

While supporting the Meech Lake provisions dealing with the Supreme Court, Edward McWhinney, a constitutional expert of international renown, has encouraged that submissions of potential appointments be reviewed by a House Judiciary Committee for public hearings. Dr. McWhinney is one of a number of scholars who have made similar suggestions.

Considering the unprecedented media coverage of the courts' activities under the Charter, J.R. Mallory has said that, "since the public rarely perceives anything unless it receives the message from the media this coverage could be of enormous importance, adding to political discourse a dimension previously absent - even among political scientists." The growth in public awareness of the Charter and the open appointment process encouraged by the Meech Lake Accord

91 Provincial cooperation today could avoid future deadlocks. For example, if the Meech Lake court nomination process was presently being used, Robert Bourassa might send Ottawa the following recommendation:

With respect to a Quebec vacancy on the Supreme Court of Canada, the Province of Quebec nominates: Charles Gonthier, Paul-Arthur Gendreau, and Guy Gilbert.

If a separatist party comes to power in next few years and nominates nation-breakers to fill a Quebec vacancy to the Supreme Court, the federal government could rely on the Bourassa list. Notice that the wording of the above recommendation conformed to the text of the 1987 amendment and yet allows both the governments of Quebec and Ottawa to thwart a future separatist initiative. This would not be possible, however, if the recommendation were worded in a more specific manner. For example, it would be of little use, in the future, if Quebec's message to Ottawa read: "With respect to the vacancy left by Mr. Justice Jean Beetz [or any other specific judge] Quebec nominates ..." Under the Meech Lake Accord, cooperation among present governments is necessary to allow the federal government the ability to reject unreasonable lists in favour of competent candidates.

92 Canada, Proceedings of the Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord, XV, 31 August 1987, p. 64.

93 See J.R. Mallory, supra, note 14, p. 91.
will undoubtedly increase demands for judicial accountability and public scrutiny. Peter Russell, however, has warned of the subsequent risk of the process turning into an American-style popularity contest. Prof. Russell is also alert to this fact:

If a person is being considered for appointment to an office in which he or she can play such a powerful role for years in shaping the rights of citizens and the powers of government, why it will be asked has not the public a right to know something about where the individual stands on the basic principles of the constitution and the judiciary.94

The recent report of the C.B.A. on the Supreme Court of Canada recommends that, without any change in the Meech Lake text, statutory provisions could be introduced to ensure that provincial lists be compiled on the recommendation of advisory committees composed of representatives of the bench, the bar, non-lawyers and both levels of government.95 Such a method would encourage nomination lists being filled with candidates of high quality. It is difficult to imagine a situation in which the provisions in the present Meech Lake Accord would be preferable to the suggestion of the Bar Association.

XII

RESPONDING TO MEECH LAKE

"On the whole," said Eugene Forsey in his initial reaction to the Meech Lake Accord, "it looks to me that the price that would be paid is not an unreasonable one."96 However, the wise octogenarian was quick to change his mind. A few weeks later, in an essay published in Canada’s National Newspaper, Dr. Forsey tempered his original praise for the Accord by stating that if its "vague aspects" are not cleared up "we risk landing in a bog we can never escape."97 Eugene Forsey is not alone in sober reconsideration.

96 Dr. Forsey's comment was recorded in the Globe and Mail (23 May 1987), p. D2.
While the intent of the Meech Lake Accord and its proposed entrenchment of the Supreme Court of Canada may be praiseworthy, a close examination of the text reveals a few flaws that beg reconsideration. The Special Joint Committee recommended that s. 101C of the Accord be amended to allow for members of the Bar of both the Yukon and the Northwest Territories to be considered for appointment to the Supreme Court. Currently, Meech Lake's provisions would preclude such individuals from consideration unless they were also members of the Bar of a province. Let us, however, take this recommendation one step further. If we recognize that the intent of the 1987 Constitutional Accord is to allow provinces input into judicial appointments but not control, then we must side with Prof. Scott and encourage the Accord to be rewritten as to allow all governments (including the territories) to propose names for all seats on the Supreme Court, including the three reserved from the Province of Quebec.

With respect to skewed nominations, it is not reasonable to request provincial 'lists' without requiring a minimum number of names on such submissions. Furthermore, in light of the possibility of deceptive wrangling from a separatist court sabotage or from a federal government nominating judges from old nomination lists, we would all be better served by a clear, but not encouraged, deadlock breaking mechanism of last resort. The present alternative is dangerous and short-sighted. We may err needlessly on the side of carelessness by assuming that a spirit of federal-provincial cooperation will indefinitely continue.

Thus far, the Supreme Court has been reluctant to recognize any special status for the Charter with respect to the rest of the

98 Most importantly, the Accord increases the Court's legitimacy and relative independence from Parliament. Entrenching the qualification for Supreme Court judicial appointments, the tenure of its Justices and the process for fixing their salaries, reduces the possibility of certain types of political interference.

99 Professor Scott has suggested that nominating provinces submit a minimum number of seven names. See S. Scott, supra, note 84, p. 143.

100 Ibid.
Constitution. In the Catholic School Reference case, the Court overturned the Privy Council's Tiny decision of 1926 which had prevented the extension of separate school funding in the province of Ontario.\(^{101}\) It was held that the rights outlined in ss. 93(1) and 93(3) of the Constitution Act, 1867 were 'immune' from Charter review because s. 93 represented a "fundamental compromise of Confederation in denominational schools" and the province's plenary power to enact such legislation was constitutionally guaranteed. According to the majority, the Charter cannot provide for the automatic repeal of any provision of the Constitution of Canada. In light of this decision and submissions made to committee, the Canadian Senate has proposed that Meech Lake be modified to ensure that the interpretation of the Charter prevails over any other section or clause of the Constitution. Such a modification would improve both the Accord and the Charter.

If finally adopted the rest of the Meech Lake text would give the Supreme Court greater interpretive responsibilities. Premier Filmon has already advocated a reference case on the issue of Quebec's 'distinct society' and the term "national objectives," in reference to the spending power, has been described as "a gift to the constitutional lawyers of the future."

It will ultimately be up to the Court to give legal meaning to the words in the controversial clause. Therefore, although the Accord now appears to be skirting the Styx, it is essential that any future constitutional provisions dealing with the Supreme Court are themselves clear and cogent. Otherwise, future generations will be left with a constitution that is ineffectively rigid on the possibility of its amendment and dangerously equivocal in its provisions. Tomorrow's Canadians will surely regret our political and intellectual acquiescence if we do act not on the Accord's improvement while it is still possible.

\(^{101}\)Reference Re Bill 30, An Act to Amend the Education Act (Ont.) 1 S.C.R. 1148. See also Tiny Roman Catholic Separate School Trustees v. The King [1928] A.C. 363.
XIII

REMOVING THE NOTWITHSTANDING CLAUSE

The Charter itself might also be ameliorated. There are mixed opinions, however, about removing the notwithstanding clause.

It has been alleged that the Charter encourages issue avoidance and allows politicians to escape the toll of controversial political decisions.\[^{102}\] Yet, issue avoidance is by no means a recent phenomenon, the document cannot be blamed for legislators which lack resolve. The history of Canadian constitutional adjudication is replete with examples of the people's elected representatives turning to the Courts to avoid crucial policy options.\[^{103}\] In fact, more than four decades ago, Harold Innis cautioned that the Supreme Court "ought not to be in a position in which the government can use it as a doormat on which to wipe its muddy feet."\[^{104}\] However, then as today, someone must be charged with removing the muck of intolerance and injustice. History has shown that too many of our elected representatives are usually either frightened of the political consequences of wearing clean shoes or ineffectively covered in the sludge of prejudice or indifference. Yet, if the current political trend continues, the Supreme Court could be given greater authority in the protection of rights and freedoms.

Brian Mulroney has recently called for the removal of the notwithstanding clause from the Charter explaining that, "a Constitution which does not protect the inalienable rights of

\[^{102}\] Cf. F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms," C.J.P.S. XX:1 (March 1987), p. 51; Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989), "the Charter and the courts will continue to provide politicians with a means of avoiding going directly to the people when there is no political profit to be made, or when the likely results are unpalatable," p. 63.


individuals is not worth the paper its written on."105 Quebec has also consented to consider the deletion of the non obstante clause, if and when the Meech Lake Accord becomes law.

Although the use of the notwithstanding provision has been extensively criticised outside of Quebec, some observers are not convinced that it should be removed. In fact, Reg Whitaker has lauded the use of the notwithstanding clause by the Bourassa government and said that the cancelation of s. 33 would "be an act of folly."106 Prof. Whitaker has elsewhere referred to the notwithstanding clause as "a quintessentially and uniquely Canadian device which in effect says we have entrenched rights if necessary, but not necessarily entrenched rights."107 For his part, Patrick Monahan views s. 33 as a "saving provision, designed to protect legislative jurisdiction."108 However, considering the quality of Supreme Court's decisions and the way the clause has been used in Quebec, one is tempted to side with those who would have it removed.

Michael Mandel, in his usual conspiratorial manner, alleges that the Supreme Court intentionally sought to provoke a political debate on s. 33 by using its sign language judgments as a means of encouraging the repeal of s. 33.109 Yet, Prof. Mandel does not substantiate this allegation. To speculate that Supreme Court judges would intentionally use important judgments to lobby for specific Constitutional change is


106According to Prof. Whitaker, s. 33 is "the only way to temper the political havoc which could otherwise be wrought by the rationalist application of individual rights without regard to circumstance — especially in a society divided by language and culture." See R. Whitaker, "The Overriding Right," Policy Options X:4 (May 1989), pp. 3-6.


108Monahan places ss. 6(4) and 15(2) in the same category. See, Politics and the Constitution (Toronto: Carswell, 1987), p. 118.

109M. Mandel, supra, note 102, p. 81. In a passage dripping with suspect allusion, Prof. Mandel suggests that the judicial reticence during the Bill of Rights era was a political strategy to increase the power of the bench.
not only dubious, but it cradles the absurd. Yet, under the notwithstanding clause Juvenal’s timeless question¹¹⁰ must be answered as such: On matters of fundamental freedoms in Canada, the controllers still control themselves.

XIV
FINANCING COURT CHALLENGES

Lawyers have come under heavy criticism for allegedly taking advantage of the Charter by charging exorbitant fees. This practice is also said to block possible access to the Supreme Court. Peter Russell has noted that "the easiest way to score a cheap shot against the Charter with most audiences is to tell them how much money the legal profession is making out of it."¹¹¹

Nonetheless, although the Charter has increased opportunities for citizens to obtain remedies, the high cost of constitutional litigation has made such occasions elusive for many individuals. There have been few proposals to counteract this problem. David Matas has justly called for a comprehensive court challenges program to be implemented at the federal or provincial levels. Mr. Matas aptly summarizes the present dilemma:

The rich, can pay the cost of litigation out of their own pockets. The poor can ask for legal aid to pay. Those in between can do neither.¹¹²

Since the courts have given the Charter "full scope," Mr. Matas argues that litigants should be accorded the same opportunity.

An additional solution might be to increase the costs awarded by the Court. For instance, in representing Guy Thibault, Guy Bertrand charged a relatively low fee of $73 000. Although Mr. Bertrand’s appeal on behalf of his client was successful, Mr. Thibault was awarded only $350 in costs. Mr. Bertrand says that 80% of similar cases are

¹¹⁰See epigram, supra, Chapter 1, p. 1.


stopped because of the inability of litigants to meet high fees.\textsuperscript{113} The feasibility of granting higher cost payments to successful litigants needs further study. The Supreme Court must not be a forum for the rich, it must be accessible to the average Canadian.

XV

CONCLUSION

A number of things can be done to ensure that the Supreme Court functions smoothly and fairly as it meets the Charter challenge. The first is to endorse the C.B.A. proposal to create a new level of court to hear criminal appeals. This would reduce the case load of the overburdened high court. Secondly, the Judicial Council should develop a consistent policy towards the comments of judges while off the bench. A Supreme Court justice's integrity need not be at stake because he or she has spoken out on an important issue in his or her capacity as a public citizen. Thirdly, the provisions of Meech Lake dealing with the Supreme Court should be clarified. In the event that the provisions are not amended and the Accord is adopted, the federal government should avoid the "straight-jacket" effect described above by keeping all loop holes open. Fourthly, the notwithstanding clause should be removed from the constitution. To ensure democracy is not thwarted or ignored, a national referendum would best be held on the issue of s. 33. Finally, the federal and provincial governments should establish a comprehensive court challenges financing system that allows all citizens equal access to the Courts. These measures would help the Charter and the Supreme Court of Canada to take a step beyond political maturity. Clarity and justice would be concomitantly increased. In the event that Meech Lake is scuttled and a new constitutional process is initiated, the equivocal articles of the Accord should serve as a lesson in what must be avoided and how to effectively deal with the Supreme Court's future entrenchment.

\textsuperscript{113}Michel C. Auger, "Une majorité d'affaires criminelles,"\textit{ Le Devoir} (14 avril 1989), p. 10.
Chapter Six

Unfinished Artwork

If human rights and harmonious relations between cultures are forms of the beautiful, then the state is a work of art that is never finished.

F.R. Scott

Under the Charter, the Supreme Court's expanded mandate has provoked extensive discussion on the theoretical reorientation of Canadian political society. Some scholars have alleged that the judiciary has assumed power at the expense of democracy. Others have urged that the Charter be located in the "communitarian tradition of Canadian politics." There have even been suggestions for the repeal of the Charter. This chapter will evaluate the appropriateness of non-elected officials making important policy choices, it will consider the "communitarian tradition," and will examine the necessity of having a charter in the constitution.

II

DEMOCRACY AND THE JUDICIARY

"The people's claim to rule does not rest upon their knowledge of truth," writes Michael Walzer, "they are the subjects of the law, and if the law is to bind them as free men and women, they must also be its makers." People often enact laws, however, which bind not only themselves, but also minorities and individuals who may be adversely affected by a particular enactment and whose freedom must also be respected. For this reason the Charter gives the Supreme Court of Canada authority.


2Walzer reasons that the argument for democracy is persuasively put "not in terms of what people know but in terms of who they are." See "Philosophy and Democracy," Political Theory IX:3 (August 1981), p. 383.
Some critics have alleged that the document gives inordinate power to the least democratic arm of government. Yet, it is important to remember that democracy does not necessarily imply that majorities have open reign on all issues. As Charles L. Black has stated,

The premises of democracy are inarticulate and complex. But one proposition that is not among them, if the practice of democracy is to mean anything, is the proposition that democracy requires that all decisions on policy be made by public opinion from day to day, or even by those departments that are most responsive to public opinion.³

There is more to justice than majoritarian democracy. Barry Strayer has observed that the Canadian Constitution is not founded on the theory of popular sovereignty. Unlike its American counterpart, the people did not participate directly in its adoption.⁴ Yet, despite Michael Mandel's unsubstantiated allegations, the Charter was never meant to circumvent democracy. If necessary, it may even be amended by the constitutional process. The strength of the Charter, and its interpretation, comes in its capacity to reconsider and examine the will of the majority as executed by the people's elected representatives and to hold it up to a standard of justice.

Patrick Monahan claims that:

The faulty assumption is that values like justice and freedom can be defined in some external, elite forum and then simply announced to a grateful, stupefied public. But the reality is precisely the opposite. Public values cannot be abstractly defined in some prepolitical setting and then imported, like bottle mineral water, into the polluted atmosphere of politics."⁵

With his colleague, Allan Hutchison, Prof. Monahan has a problem with the portrayal of the Court "as an enlightened oracle proclaiming the gospel to the stupefied masses." For both Patrick Monahan and Prof. Hutchison, democracy is incompatible with judicial activism because it

necessarily entails "the greatest engagement by people in the greatest possible range of communal tasks and public action."\(^6\)

Legislatures and the public, however, are beginning to consider the ideals of the Charter when drafting and debating legislation. Discussions of constitutionality are best debated outside of court with the greatest number of participants. As David Beatty and Steven Kennett suggest, "constitutional adjudication should only occur where the earlier conversation failed to persuade."\(^7\)

According to Prof. Mallory, the central purpose of the Charter is "to nourish an atmosphere of civility that will act as a restraint on the old Adam in us all." Unlike some modern critical legal scholars, Prof. Mallory understands that the reality of "Adam" will not be ignored through greater majoritarian democracy. "The great value of constitutional guarantees" said F.R. Scott, "is that the courts can use them to check tides of opinion that can easily produce statutory infringements of our freedoms."\(^8\) When citizens are acting in the aggregate, more restraint is necessary not less. For thinkers such as Prof. Mallory, the Charter provides "the restraint and discipline to preserve a truly civil polity."\(^9\)

Over two hundred years ago, James Madison implied that government was "the greatest of all reflections on human nature."\(^10\) Notwithstanding Prof. Monahan's admonition for distinctly Canadian analysis, human tendencies do not seem to transform once over the

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\(^8\) F.R. Scott, Civil Liberties and Canadian Federalism. (Toronto: University of Toronto Press, 1959), p. 27.


forty-ninth parallel. "If men were angels," wrote Madison, "no
government would be necessary. If angels were to govern, neither
external nor internal controls would be necessary."11 If people were
flawless, the issue would not be about having a Charter or improving
democracy, but about the redundancy of formal government. Yet,
fallible people need governments, and governments composed of people
need to be checked by constitutions. This is not to deny the positive
role of the state, but rather to recognize that negative constraints
must be in place before positive freedoms can be promoted.

Although, it is primarily a restrictive document, the Charter has
the potential to increase positive rights. J.R. Mallory has said that
the document has "the capacity to become a lesson in civic values to
new generations of citizens and public men and women."12 Yet, Patrick
Monahan rejects the possibility that the public will have confidence in
what he describes as an "external, elite forum" which will ultimately
define the Charter. Prof. Monahan explains that, in the United States,
"measures of public confidence in various governmental institutions
typically rank the Supreme Court below both the President and
Congress."13 He assumes that the situation will be similar in Canada.
However, by focusing on the Canadian experience, as Prof. Monahan
continually urges us to do, one will notice that after seven years of
generous interpretation of the Charter, the Supreme Court of Canada
ranks well above Parliament in public approval. In a recent Gallup
Poll, Canadians were asked how much confidence they had in their
institutions. Fifty-nine per cent responded that they had a great deal
of respect for the Supreme Court, while only thirty per cent could say
the same about the House of Commons, and only eighteen per cent about

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11Ibid.

12See J.R. Mallory, "The Continuing Evolution of Canadian
Constitutionalism," in Alan Cairns and Cynthia Williams, eds.,
Constitutionalism, Citizenship and Society in Canada (Toronto: U. of T.

13Politics and the Constitution, supra, note 5, p. 137.
political parties. Where then, under Patrick Monahan's deference for the public will, does this leave the notion that judicial review should be limited because people will reject an institution which makes decisions in which majorities do not directly participate?

Furthermore, it should be noted that since 1979, confidence in the Supreme Court of Canada has increased from seventy-nine to eighty-three per cent. It is now the second most respected institution in the country. Ironically, it appears that Prof. Monahan's observations about public confidence in the Supreme Court may apply in the United States, but are not applicable in Canada.

III

COMMUNITARIANISM

Patrick Monahan has called for the interpretation of the Charter within the "communitarian tradition" of Canada's past. He goes to great lengths to illustrate how sections of the document reinforce this tradition. For instance, Prof. Monahan claims that the language freedoms expressed in ss. 16 to 23 are neither wholly individualist nor wholly communitarian. According to his theory "community is both a prerequisite for individual freedom and a corollary of it." He emphasises that although "any member of the public" is guaranteed the right to communicate in English or French through s. 20, that right only becomes operative where "there is a significant demand for communications with and services from that office in that language." Other examples of communitarian elements in the Charter which Patrick Monahan highlights are s. 25, which he sees as ensuring that the traditions of aboriginal communities are not undermined, s. 27 which

14Gallup Canada Newsletter, February 9, 1989. Poll conducted nationally in early January 1989, after the Quebec sign language decision, and accurate within a four percentage point margin, 19 in 20 times.

15Ibid. Only Canada's public schools ranked higher than the Supreme Court.

16Politics and the Constitution supra, note 5, p. 112.
preserves and enhances multicultural communities, and s. 29 which protects religious and language communities.\footnote{Ibid., p. 114.} According to Prof. Monahan s. 1, 6(4), and 15(2) affirm that recognizing the rights of some may mean suspending the rights of others.

However, William Conklin properly rejects Prof. Monahan's affirmation that ss. 1 and 33 balance legislative with judicial supremacy. For Prof. Conklin, these sections are merely minor exceptions of paramount and permanent rights which shape an Aristotelian conception of citizenship. "Contrary to common opinion," writes Prof. Conklin, "it seems that section 33 of the Charter may reinforce the paramount, universal and permanent character of the Charter's rights."\footnote{William Conklin, Images of a Constitution (Toronto: University of Toronto Press, 1989), p. 240.} Section 1 must unavoidably allow the judiciary to review an enactment of s. 33. Otherwise, he rhetorically asks: "why enact the Charter of Rights in the first place?"\footnote{Ibid., p. 241.}

Another question worth posing is just what exactly is meant by the "communitarian" tradition which Prof. Monahan and others advocate? Charles Taylor, for instance, satirically writes,

> In spite of the importance of certain crucial court decisions in Canadian history [...] Canadians appear to Americans as inexplicably supine and long-suffering when it comes to redress of grievances [...] How does one explain this from a Canadian perspective? I'm not quite sure myself. South of the border, there is only one conceivable explanation — we are accustomed to sitting there and taking it without murmur; we lack a lively sense of our own worth and our own rights. Canadians are just backwards.\footnote{Charles Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada," in Constitutionalism, Citizenship and Society in Canada, supra, note 12, p. 227, n. 24.}

In comparison to the American experience with legislative protection of rights and freedoms, Canadians are surely not "backwards" but quite progressive. Yet, as observed in Chapters Two and Three, there have been instances in our history where communitarianism has been more of a hinderance than an aid in preserving fundamental freedoms. Consider,
for instance, the wide-spread public support for the invocation of the War Measures Act in 1970 with little evidence of an apprehended insurrection. The advocates of communitarianism would be hard pressed to condemn such a popular measure despite the fact it trampled over basic civil liberties.

Other serious questions, however, must also be asked. If the majority, through their elected representatives, removes the rights of individuals or even disenfranchises a whole class of citizens as occurred in B.C.21, what do the communitarians propose we do? Shall we wait a decade or more until the majority changes its mind and becomes more tolerant in its own sweet time or shall the courts be empowered to intervene rapidly and provide remedies?

Those making the case for limiting judicial review remind one of those advocating a slow solution to the Apartheid situation in South Africa. Surely, it would on surface seem more desirable if the integration of blacks occurred with majority white consent, but how much longer must South African Blacks suffer before the white majority awakens to a communitarian vision that includes Blacks. Similarly, how long should Canadians wait for democracy to perfect itself before we stop the suffering caused by its imperfections. Under Prof. Monahan's reasoning, the Morgentaler judgement would have to be condemned because it did not defer to the people's elected representatives, while the Alberta Labour Reference decision would have to be praised because it did not interfere with the will of the legislature. "Even a 90 or 95 per cent majority still leaves a minority at its mercy," says Professor Siegan, "the purpose of the court is to stand as a shield and guardian for the individual against the democratic process, whatever it may be."22

Allan Hutchison and Patrick Monahan have assaulted the respect paid to A.V. Dicey's conception of the Rule of Law. They claim that "attempts to characterize the Rule of Law as the butler of democracy are false and misleading" and "further evidence of the demise of

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21 See Chapter 2.
contestability as the touchstone of politics." However, it is unclear what adjudicative principles these critical legal scholars would adopt once having destroyed Dicey's framework.

The Charter makes a number of affirmative promises that grant the Supreme Court of Canada a clear role in promoting positive freedom. Brian Slattery has recognized that the document grants duties to legislatures and governments not only to respect rights in the negative sense, by non-interfering in their exercise, but also grants them the positive responsibility for maintaining and strengthening the conditions which are necessary for freedom. By interpreting such responsibility, the Court's political character has become an accomplished fact. David Beatty has written that

It is now possible to conceptualize the relationship between the judiciary and the other two branches of government as a cooperative venture rather than an adversarial and antagonistic confrontation.

Peter Russell predicts that, by the end of this century, Canadian judges will be more powerful within the Canadian polity than American judges are in theirs.

IV

THE NECESSARY CHARTER

Although respect for the Supreme Court among Canadians has been rising since the late 1970's, Daniel Latouche has lamented that the judiciary is not as predictable as the elected branch because it "cannot have the unity of thought and action that characterizes a

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23The Rule of Law: Ideal or Ideology, supra, note 6, p. 99.


government." So it should be. When that unity of mind leads governments to suspend freedoms of the press or padlock establishments on political whim, we are better off ignoring Professor Latouche's jeremiad. Better the possibility of remedy than the predictability of injustice.

Michael Mandel has urged that the Charter, and the alleged "legalization of politics" which it brings, be made to wither away. Yet, a non-romantic and no-nonsense familiarity with Canada's experience with the Judicial Committee of the Privy Council and the Supreme Court under the Constitution Act, 1967, will lead one to recognize that Canadians may ill afford to take Prof. Mandel's advice. Michael Mandel's ideas are disturbing in many ways. In his latest book, he also implies that Chief Justice Brian Dickson is a power hungry individual, he challenges the integrity of Chief Justice Jules Deschênes of the Quebec Superior Court, and he engages in an unrelenting attempt to excoriate the entire legal profession. Yet, nowhere in Michael Mandel's book is there any mention of the work of his Osgoode Hall colleague, Patrick Monahan. Perhaps this is because even the otherwise critical Prof. Monahan has realized that the "experience under the Charter cuts against the claims of the critics and in favour of the proponents of an entrenched Charter." Although Prof. Mandel is skeptical of courts and legal adjudication, Thomas Berger has rightly observed that: "Judges may not be wiser than politicians, but they should be able to stand more firmly against angry winds blowing in the streets." While Canada has had a record of relative tolerance, Mr. Berger well documents periods in our history where freedoms were indeed fragile. Michael Mandel's


29 Ibid., p. 108.

30 Politics and the Constitution, supra, note 5, p. 44.

prescription would have been hopelessly ineffective in providing remedies and justice in these instances.

Prof. Monahan claims that "where the interests of the disadvantaged have been advanced, this has usually been accomplished through political rather than judicial means."\(^{32}\) Before the Constitution Act, 1982 this may well have been a correct generalization, but it certainly has not been applicable since. During the past five years, the Supreme Court of Canada has advanced the interests of the disadvantaged where political representatives feared to tread.

Although Canada has the world's highest ratio of refugees to total population,\(^{33}\) the present federal government has taken harsh measures to deal with this class of people. Few politicians have "stuck their necks out" for refugees. While the federal government has been primarily concerned with administrative convenience, through the Singh decision, the Supreme Court has ensured that the majority will not ignore procedural justice for the disadvantaged new arrivals.\(^{34}\)

Refugees are not the only group in Canadian society for whom a Charter is essential to prevent de facto exclusion from the political process. Dale Gibson has noted that, "Canada's treatment of native people over the years has been an unmitigated disgrace."\(^{35}\) While political solutions have invariably resulted in deadlock, the Charter may turn out to be a saving document for native rights.\(^{36}\) Thomas Berger has said that judges have "an especial obligation to be

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\(^{32}\)Politics and the Constitution, supra, note 5, pp. 252-253.


\(^{34}\)Singh et al. v. Minister of Employment and Immigration [1985] 1 S.C.R. 177.


\(^{36}\)For a succinct discussion of native rights under the Charter see Bruce H. Wildsmith, Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms (University of Saskatchewan: Native Law Centre, 1988).
concerned about the position of minorities." Political representatives may not always be concerned with aiding those who do not form a major voting block. For his part, David Beatty has concluded that "equality can be secured through the process of judicial review in a way it cannot in our democratic processes of politics." 

V

CONCLUSION

For all its advantages and its political impact on the Supreme Court, the Charter still appears to be a document which many would use in different ways. Richard Devlin would use the document as a vehicle to sneak into the heavily guarded Troy of liberalism:

I suggest that we seek out emancipatory trojan horses—deviationist sub-texts—within the citadel of contemporary jurisprudential discourse and reconstruct them to advance more radically democratic forms of social interaction. Mr. Devlin would wheel in the Charter to "articulate communitarian conceptions of speech and action as strategic counter-paradigms to those which currently monopolize our terms of reference." Such a scheme is symptomatic of the revolutionary prescriptions for the document. Yet, Noel Lyon has put expectations for the Charter in their proper perspective. Prof. Lyon explains that there is a cathedral, currently under construction in Barcelona, which will take at least one hundred and fifty years to complete and whose completion no living person will witness. Thus, he notes that:

Similarly it is not given to us or any other generation to fulfil the promise of the Charter. The "instant annotations" that began to appear even before the Charter came into force are a bit like the booms and derricks of the modern pre-fab construction industry. We mean to take possession of the Charter and complete construction of the new Constitution as

40Ibid.
quickly as possible, as though it were an exposition site or a hydroelectric project.\textsuperscript{41} Such immediate understanding is surely not possible. We cannot just add water to the Charter and watch it bloom. It will take time for the Supreme Court to define its full potential. According to William Conklin we must identify the telos of the document or the consummated end toward which it grows. It is the rationalist image which suggests that the legislature alone ultimately interprets the text, but the teleological image embodies an understanding whereby the judges inevitably "share the role with the legislature."\textsuperscript{42} To use the expression of an American scholar, the Supreme Court's most significant function under the Charter may eventually be seen as "structuring a dialogue between the state and those whose liberty its laws confine."\textsuperscript{43} Under the Charter the Supreme Court shares a hand in the proper functioning of government in Canada.

For Prof. Conklin, as we have seen, the text of the Charter raises questions of "ought" with respect to social and cultural practice, making Ivan Rand's Aristotelian image far superior than its historicist or rationalist counterparts.\textsuperscript{44} According to William Conklin, the text of the constitution requires "practice to critique theory and theory to critique practice."\textsuperscript{45} Prof. Conklin rightly explains that if the gap between the theory and practice of constitutional discourse is narrowed, lawyers will "finally have found a role in alleviating the pain and suffering about them."

Bora Laskin once said,

\begin{itemize}
  \item \textsuperscript{42}\textit{Images of a Constitution}, supra, note 18, p. 266.
  \item \textsuperscript{43}Laurence Tribe, \textit{American Constitutional Law} (Mineola: Foundation Press, 1978), p. 269.
  \item \textsuperscript{44}\textit{Images of a Constitution}, supra, note 18, p. 218.
  \item \textsuperscript{45}\textit{Ibid.}, p. 276.
\end{itemize}
The Constitution is as open as the minds of those called upon to interpret it; it is as closed as their minds are closed. With their open minds, Bertha Wilson and Brian Dickson have gained well deserved approval from scholars such as William Conklin. The Chief Justice and Wilson J. are commended for breaking away from the rationalist hold of contemporary legal culture in favour of a teleological image of a constitution steeped in political and legal theory.

In 1959, F.R. Scott urged that economic and cultural rights be included in the constitution. Unfortunately they were not. Andrew Petter and Allan Hutchison argue that the Charter now embodies classical liberal values and is therefore ineffective in dealing with the needs of the economically disadvantaged. The Charter may one day be improved by recognizing economic and cultural rights as the United Nations has already done since 1948. "Freedom," Emmett Hall was fond of saying, "begins with breakfast."

Future improvements notwithstanding, even as ardent a critic of the Charter as Allan Hutchison concedes that the document might be used as "a platform from which to develop a more caring and egalitarian society." This is the highest social, cultural, legal, and


47Images of a Constitution, supra, note 18, p. 159.

48Professor Scott noted even then: "We live in the age of the positive state, not the negative state, and it is important that we keep before us the democratic goals toward which all state power should be aimed." The Canadian Constitution and Human Rights (Toronto: Canadian Broadcasting Corporation, 1959), p. 52.


ultimately political, challenge which the Supreme Court faces under the Charter. The justices can play a key role in helping to create a harmonious society. The Charter is a paint brush to be used on what F.R. Scott referred to as "the work of art that is never finished."52

After seven years, the Supreme Court of Canada is still finding its proper place within the Canadian political context. "Why is it," asks Joel Bakan, "that labour relations, provincial Sunday closing legislation, criminal procedure and language rights are too political for the Court to touch, while anti-combines legislation, abortion and the testing of cruise missiles are within the purview of judicial scrutiny?"53 The answer has a lot to do with the self discovery of the institution.

In the larger context of Canadian society, academic controversy over legitimacy is isolated and unrepresentative of the general approval with which the Supreme Court has been met. It has been said that the first batch of Charter cases asserted the Supreme Court's activism,54 while the second large group of cases demonstrated a more balanced and cautious approach in the interpretation of rights.55 Recently, however, the Court has begun to reassert its original

52 Supra, note 1.


Christopher Manfredi has observed that, "judicial policy-making poses a difficult dilemma: the attempt to increase judicial capacity may ultimately destroy judicial legitimacy." Yet, on the whole, during the first seven years under the Constitution Act, 1982 the Supreme Court of Canada has rendered decision based on solid constitutional principles and has mapped out new legal territory for succeeding generations without engaging in the kind of controversial activism experienced in the U.S. during the Earl Warren period. For the most part, the Court seems to have followed Professor Dworkin's warning that courts must not engage in acts of discretion motivated solely by sympathy or moral outrage, but must rather base their decisions on the identification of solid judicial principles. The Court's public approval rating is a testament to the legitimacy it is currently enjoying. Canadians have more faith in their Supreme Court than they have in Parliament.

A Charter or a Bill of Rights will not alone secure rights and freedoms. This has been plainly evident throughout history. One need only think of the United States prior to 1954, Canada between 1960 and 1982, or late eighteenth century France. Since 1982, however, the Supreme Court of Canada has been ensuring that the arrival of the Charter has not been the ineffective nocturnal landing into unknown territory predicted by Patrick Monahan, but a real opportunity to challenge unconstitutional injustice with hope for judicial remedy.


59 Gallup Canada Newsletter, supra, note 14.

60 The French Declaration of the Rights of Man, adopted by the Constituent Assembly of the First Republic, was demolished by the Reign of Terror just three years after it became law.
By securing human rights and freedoms, the Supreme Court of Canada has added vital colour to the artwork of the Canadian State. The political impact of the Charter has been remarkable. In numerous areas, the Supreme Court of Canada’s bold interpretation of rights and freedoms is setting an example for the highest courts of the world to follow.
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