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LAW, POLICY AND STATUTORY INTERPRETATION UNDER A CONSTITUTIONALLY ENTRENCHED CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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An entrenched Charter would involve the courts in political matters, . . . [it] grants to the courts an important part of the legislative powers now vested in Parliament.

Premier Sterling Lyon¹

I. Introduction

On September 28th, 1981, the Supreme Court of Canada held that the Federal Government had the legal right to unilaterally request entrenchment by the United Kingdom Parliament of a Charter of Rights and Freedoms in the Canadian Constitution.² On November 5th, 1981, the Premiers of all provinces except Quebec consented to the Federal Government's making such request. On April 17th, 1982, Her Majesty the Queen signed into law the Canada Act of the United Kingdom Parliament which enacted the Constitution Act, 1982 containing the Charter requested by Canada. What impact will this entrenchment have upon judicial decision-making?

Premier Lyon's statement reflects the traditional Anglo-Canadian approach to statutory interpretation which assumes that the exercise of a purely mechanical "finding" function by the judiciary will reveal the policy which Parliament has chosen to have applied as law. The approach denies the need for judges to concern themselves

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¹ Notes for a Statement on the Entrenchment of a Charter of Rights by Sterling Lyon, Premier of Manitoba, First Ministers' Conference on the Constitution, Sept. 9th, 1980, Canadian Intergovernmental Conference Secretariat Document 800-14/072, pp. 3-5.

² *Reference Re Amendment of the Constitution of Canada* (No. 3) (1981), 120 D.L.R. (3d) 385 (Que. C.A.).

with the formulation of policy, holding that Parliament alone has the authority to do this. The judge's role is considered to be merely one of reading the words of a statute and applying Parliament's choice of policy to particular circumstances. He has no discretion concerning the content of the rules he applies as law, no creative function to perform. He merely applies the law as he "finds" it.³

Implicit in this approach is the assumption by the judiciary that words have immutable meanings which become self-evident upon reading. Analysis of the communication process, however, reveals this to be an untenable premise.⁴ Communication involves the use of words or other signs for the purpose of mediating between the subjective events of two or more persons. The role of the interpreter is to designate the shared subjectivities of communicators—in the case of a one-way communication to determine the intention which the communicator is attempting to convey to his audience. Since subjective events cannot be directly observed, the interpreter must attempt to infer them from the words and other signs used by the communicator. Complete lack of ambiguity cannot be attained, however, in statutory language or any other form of communication because the same signs may be used, in different contexts, to call up very different symbols.

It is submitted that a statute should be regarded as a prescriptive communication from the community's authorized legislators to the community generally,⁵ designed to project a community policy with respect to the shaping and sharing of values. It follows from the fact that there is communication involved that determination of the legislator's intended choice of policy will always be a matter of inference. And the policy actually applied by the judicial interpreter as law will depend upon the inferences he *chooses* to draw.⁶ His choice of inference will inevitably be affected by both his personal values and by the values he believes to be of fundamental importance to the community (as revealed by constitution, statute, convention, or otherwise). To permit his discretion to be based solely upon personal values and uncontrolled by fundamental community policies is to give

³ See, for example *R. v. Dubois*, [1935] S.C.R. 378; *Re Navy League of Canada*, [1927] 2 D.L.R. 184 (N.S.C.A.).

⁴ The influence of Myres S. McDougal and Harold D. Lasswell will be apparent throughout this article. This particular paragraph is inspired by McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* (1967), Introduction and pp. 35-39 and authorities cited therein. See also Probert, *Law, Language and Communication* (1972).

⁵ This view, that a statute is a communication, not just between the legislator and the courts, but also for the ordinary citizen, was emphasized by the United Kingdom Law Commission in its *Statute Law Revision: First Report* (Law Comm. No. 22, 1969), para. 4.

⁶ *Ibid.*, para. 70.

the judge the ultimate legislative power. This is contrary to the traditional Anglo-Canadian constitutional structure.⁷ Accordingly, such "arbitrary" decision-making is in theory considered unacceptable (although, as we shall see, it occurs all too often in practice). Instead the "proper" judicial decision is a "principled" one, that is, one which, by relying on established legal principles, presumably reflects basic community values. The judge must determine the shared expectations created in the community by the statutory communication—not just his personal reaction.

A constitutional Charter of Rights and Freedoms is a special type of statute in that it sets forth fundamental perspectives, the demands, expectations and identifications of the community, communicated to legislators and enacted as an expression of basic community values. A constitution suffers from the same problem of ambiguity of language, and requires the judicial interpreter to make the same choice of inference as to policy, as does a statute. This article will consider the adequacy of the traditional principles of statutory interpretation for the task of controlling judicial discretion and will analyze how an entrenched Charter of Rights may impact upon this task. The principles and analytical techniques employed by the courts will be assessed to determine how well they ensured, prior to the entrenched Charter of Rights and Freedoms, that the Canadian community's constitutional values were promoted—to determine how well they ensured that it was the policy of Parliament, not that of the judiciary, which was applied as law. It will be necessary to clarify the goals of statutory interpretation while examining the traditional strategies employed to secure them. Past trends in the management of principles of interpretation will be appraised to determine their conformity to fundamental community policies and an attempt will be made to set out some of the factors which have conditioned these trends. The article will then consider probable developments in the judicial process if present trends continue and suggest some alternatives which are open to the judicial decision-maker both with and without an entrenched Charter of Rights and Freedoms. It will be seen that, far from leading to the erosion of parliamentary authority to decide which policies should be applied as law, the adoption of a Canadian Charter of Rights and Freedoms should result in better control of judicial discretion. Parlia-

⁷ "The theory of positive law, which is an integral part of our constitutional arrangements, requires that judges operate within some kind of objective framework rather than having an open discretion in deciding legal issues. This calls for an analytical technique for applying logic and reason to an established body of legal principles in deciding cases that come before them. If judges were free to ignore the law or to read into it whatever happened to suit their personal preferences, they would cease to be judges and become tyrants, and respect for the law would have to be replaced by some other basis for inducing compliance." J. Noel Lyon and Ronald G. Atkey, *Canadian Constitutional Law in a Modern Perspective* (1970), p. 33.

ment's spelling out of basic community values in the Charter should restrict the judiciary's current practice of utilizing their own personal values in choosing between conflicting policies inferable from ambiguous statutory language. Unfortunately some of the potential benefit of a Charter in controlling judicial discretion will be lost by enactment of the proposed Charter because of its failure to fully spell out the attributes of Canadian federalism and thereby give adequate content to the rights and freedoms expressed. But the Charter will help preserve the principle of the supremacy of Parliament by bringing judicial policy-making out of the closet and setting constraints for the political function of our courts.

II. *Clarification of the Goals and Strategies of Interpretation.*

1. *Goals.*

Certain fundamental community policies determine the objectives which the judiciary should strive to promote in the process of statutory interpretation.

The maximum realization of human dignity appears to be accepted as the overriding goal of the Canadian people, as indeed it must be in any Parliamentary democracy. The constitutional structures which evolve in a community are shaped by its overriding goals. A key feature of the Canadian constitutional structure is the relationship of Parliament and the courts. Expressed by the concept of the supremacy of Parliament, the relationship has been described as meaning "that the courts will always recognize as law the rules which Parliament makes by legislation; that is, rules made in the customary manner and expressed in the customary form".⁸ In other words, Parliament, and not the courts, ultimately decides which policies will be enforced as laws. This relationship is generally accepted to be the only one compatible with democratic ideals, the argument being that to allow the judiciary to promote policy contrary to that adopted as law by Parliament would be inconsistent with the concept of majority rule.⁹

Some writers have questioned whether the "counter-majoritarian" character of judicial "activism" or "policy-making"

⁸ Sir Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), p. 149. The British North America Act, 1867, 30 and 31 Vict., c. 3, as am. (U.K.), also found in R.S.C., 1970, App. II, No. 5, and hereinafter cited as B.N.A. Act, in its preamble states that Canada is to have a constitution "similar in principle to that of the United Kingdom", i.e. a parliamentary democracy. (Since the enactment of the Canada Act this year the B.N.A. Act becomes the Constitution Act, 1867.)

⁹ "In defense of the concept of parliamentary supremacy and the less aggressive role of the courts, it is the parliamentarians who are elected by the populace, and who are ultimately directly accountable to their constituents." Cheffins, *The Constitutional Process in Canada* (1969), p. 22.

should necessarily dictate against its acceptance.¹⁰ For the purposes of this article it will be assumed that the overriding goal of maximizing the realization of human dignity is best secured when Parliament has the ultimate legislative authority. This is not to deny the need for judicial policy-making. The courts will still have the task of determining the shared expectations of the community generated by the statutory communication and the creative functions of supplementing statutes by explicit reference to community policy, in order to resolve ambiguities, cure omissions or avoid contradictions.¹¹ Also they will in certain cases be authorized to exercise a "policing and integration" function¹² which will permit them to reject the policy of Parliament discovered in a particular statute when this is held incompatible with the fundamental constitutional policies previously set out by Parliament. Even without an entrenched Charter of Rights there has been, therefore, a policing role for the courts with respect to the distribution of legislative authority under the B.N.A. Act. Also federal legislation has been held inoperative because it conflicted with The Canadian Bill of Rights and here the courts have had to give content to concepts such as "equality before the law",¹³ which will be found also in the new Charter. Both the supplementing and the policing function can only be expedited by reference to a properly drafted entrenched Charter of Rights containing Parliament's articulation of the community's fundamental goals and values. It will be argued below that the same is true for the primary task of determining the shared community expectations generated by a statutory enactment. The performance of none of these tasks conflicts with the concept of Parliamentary supremacy so long as express reference is made to what is being done and so long as the judge seeks to apply community values and not just his own. But the judicial policy-making role must be ultimately subordinate to that of Parliament—the courts cannot oppose Parliament's choice of policy.

In summary, the court's primary aim in statutory interpretation must be: *the ascertainment of the shared community expectations generated by the social policy prescribed as law by Parliament.* If the techniques or strategies employed by the judiciary detract from this primary goal they should be rejected as contrary to fundamental community policies.

¹⁰ See Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966) and the discussion in Weiler, *Two Models of Decision-Making* (1968), 46 Can. Bar Rev. 406, at pp. 466-471.

¹¹ McDougal, Lasswell and Miller, *op. cit.*, footnote 4, pp. 39-45.

¹² *Ibid.*

¹³ *Regina v. Drybones* (1970), 9 D.L.R. (3d) 473 (S.C.C.).

2. *Strategies*.¹⁴

The supremacy of Parliament is obviously a mere illusion if judicial decisions concerning the meaning of statutory language are permitted to be completely arbitrary, that is, if "the decision in any particular case might just as well have gone one way as another"¹⁵ whatever the words of the statute. It becomes important therefore to search for strategies or techniques of interpretation which will control decision making and ensure that the judge's attention is kept fixed on the primary aim of ascertaining Parliament's policy.

An authoritative judicial decision has traditionally been viewed as involving something more than purely arbitrary choice between alternatives—it must "be characterized by the quality of rationality which is a prerequisite for . . . [its] moral force and acceptability . . .".¹⁶ In other words, "an appropriate judicial decision must be justifiable by a reasoned opinion which establishes the judgment as a conclusion from accepted premises".¹⁷ When searching for the meaning of language both syntactic and semantic analysis should be performed—the judge must not only logically develop the relationship between signs and abstract concepts but must also relate these signs and concepts to the empirically known world.¹⁸ It is not sufficient that a decision be "genuinely principled"¹⁹—the principles applied should reflect fundamental "extra-legal, policy or value considerations".²⁰ If the principles upon which it is based reflect only the judges personal preferences and not those of the

¹⁴ It has been found useful to view the judicial process in terms of *participants*, in certain *situations*, pursuing *objectives* by the use of *strategies* to manipulate *base values*, and thereby achieving *outcomes* with various long term *effects*. This model will be discussed in more detail below. See discussion, *infra*.

¹⁵ Lloyd, Introduction to Jurisprudence (2nd ed., 1965), p. 382.

¹⁶ Weiler, *op. cit.*, footnote 10, at p. 419.

¹⁷ *Ibid.*, at p. 431.

¹⁸ Smith, The Unique Nature of the Concepts of Western Law (1968), 46 Can. Bar Rev. 191, especially at pp. 222-225.

¹⁹ See Wechsler, The Nature of Judicial Reasoning (1964) reprinted in MacGuigan, Jurisprudence: Readings and Cases (1968), p. 618, where Professor Wechsler, having asked ". . . how determinations that do not derive from any true compulsion of the text or even of its earlier interpretation can be asserted to have a legal quality" continued "My answer was 'that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved'. Granting that 'the courts decide, or should decide, only the case they have before them', I suggested that they must 'decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply' . . .".

²⁰ Weiler, Legal Values and Judicial Decision-Making (1970), 48 Can. Bar Rev. 1, at p. 46.

community, a decision will be classified as arbitrary even though apparently following logically from such "principles".

For judicial interpretation of statutes to remain compatible with the fundamental community policies implied by the doctrine of parliamentary supremacy, the judges' decisions must be based upon principles which tend to ensure that Parliament's policy, not the judiciary's, is applied as law. Accepting that Parliament's intention, not being an observable fact, must be inferred by the judiciary, it follows that the judges' decisions will more probably approximate that desired by Parliament if the inference is drawn after a weighing of *all* relevant evidence. To make any one feature of the legislative process, such as the words of a statute, the exclusive index of legislative intent is to decrease that probability. Accordingly, if principles of interpretation are adopted to assist the judicial decision-maker in ascribing detailed reference to general statutory prescriptions, they should be designed so as to systematically direct his attention to all features of the statute's context.²¹ Principles may at times be used, however, which are nothing more than concealed judicial value-judgments. When these impede the judiciary in carrying out their main objective of ascertaining legislative policy they should be rejected.

III. Trends in Conceptions of Goals and Strategies of Interpretation.

1. Goals.

The constitutional relationship described by the doctrine of parliamentary supremacy requires that the primary goal of statutory interpretation be the determination of the social policy intended by Parliament. An examination of cases reveals, however, that often in practice the courts take the position that: "The question is, not what may be supposed to have been intended, *but what has been said*."²² This approach is demonstrated by Lord Simonds in *Magor and St. Mellons R.D.C. v. Newport Corp'n*,²³ where he states:

²¹ "The probability of maximizing the realization of the goals sought by interpretation is increased if individual decision-makers employ a comprehensive set of principles of interpretation that include principles of both content and procedure. Principles of content guide the choice of subject matter relevant to evaluating the alternatives of policy open to the decision-maker. Principles of procedure are agendas and techniques for bringing pertinent content to the focus of the decision-maker's attention." McDougal, Lasswell and Miller, *op. cit.*, footnote 4, p. 47. The principles developed by the latter to assist in the interpretation of international agreements may be applied, with slight modification, in the interpretation of statutes.

²² *Brophy v. A.G. for Manitoba*, [1895] A.C. 202, at p. 216 (P.C.), italics added.

²³ [1952] A.C. 189, at p. 191 (H.L.). See Hogg, *Constitutional Law of Canada* (1977), pp. 96-97, for a discussion of whether the B.N.A. Act as a constitutional

. . . the general proposition that it is the duty of the court to find out the intention of Parliament . . . cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited. . . .

The emphasis is shifted from searching for the actual policy of Parliament to examining how much of that policy has been expressed in writing in one particular instrument.

One reason for this approach appears to be the judiciary's conclusion that the "intention" of the legislature cannot be established with complete certainty:²⁴

"Intention of the Legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.²⁵

But the question still remains: *What* has the legislature "chosen to enact"? Conceding that Parliament's intention cannot be absolutely confirmed does not justify using the text of a statute as the *exclusive* criterion of such intention. The objective then must be to determine how to obtain the highest degree of confirmation:

One assumes . . . that characterizations of subjectivity will be approximations, and that any degree of approximation is to be preferred to undisciplined and arbitrary preclusion of relevant indices of . . . [intention]. If the light cannot be dazzling there is no reason for sulking in the dark.²⁶

Weiler makes the same point when he states that "it is important that jurisprudence shed the fallacy that simply because the legal rules do not decide the case with objective, impersonal, logically necessary and self-evident certainty, and because the same issue appears to opposing counsel and majority and dissenting judges to be reasonably amenable to different solutions, then there is no *reasoned* way of

document should be treated, for purposes of interpretation, as an ordinary statute reflecting the intentions of the U.K. Parliament of 1867 as well as those of the Fathers of Confederation or whether it should be treated as a "living" or "organic" document requiring changing or "progressive" interpretation as Canada changes. The latter is the prevailing view. *Re Residential Tenancies Act of Ontario* (1981), 37 N.R. 158, at p. 168 (S.C.C.).

²⁴ Another reason is that part of the judiciary believes that such intention *can* be established with complete certainty—by analyzing the statutory language. See *infra*.

²⁵ *Salomon v. Salomon & Company*, [1897] A.C. 22, at p. 38 per Lord Watson. See also Heuston, *Essays in Constitutional Law* (1961), p. 7; ". . . the extraction of a precise expression of will from a multiplicity of human beings is, despite all the realists say, an artificial process and one which cannot be accomplished without arbitrary rules".

²⁶ McDougal, Lasswell and Miller, *op. cit.*, footnote 4, p. xviii.

justifying one solution as more *probable* than another".²⁷ The court's decision as to the meaning of the language of a statute will more probably conform to that intended by Parliament when the decision is made after *all* features of the legislative process have been examined, rather than when only some of the features are considered. While the impressions formed from reading the words of a statute alone may often be the strongest evidence of Parliamentary policy, such impressions should be only provisional—if examination of other features of the legislative process reveals stronger evidence elsewhere, the preliminary inferences should be revised in the light of such examination. By assigning an arbitrary weighting to the words of a statute, as is still often the practice today, the judiciary impedes rather than assists itself in its attempt to determine the actual policy which Parliament has decided to have applied as law. The primary aim of interpretation is obscured, the judiciary engaging in artificial word games instead of conscientiously searching for the policy most probably intended.

2. *Strategies.*

(a) *The Literal Approach and the Plain Meaning Rule.*

Emphasis upon the language of a statute to the exclusion of all other features of the legislative process can be consistent with the fundamental community policy expressed by the doctrine of Parliamentary supremacy only if words in themselves have the capability of revealing Parliament's intended policy with complete certainty and lack of ambiguity. And this is the premise upon which the judiciary developed its approach; "if the precise words used are plain and unambiguous . . . we are bound to construe them in their ordinary sense, even though it do lead . . . to an absurdity or manifest injustice".²⁸

For a time the courts applied what was known as "The Golden Rule" and they would depart from the "ordinary sense" of statutory language to avoid "absurdity or manifest injustice".²⁹ Eventually, however, it was pointed out that determination of what is "absurd" or "unjust" involves a value-judgment:

²⁷ *Op. cit.*, footnote 10, at pp. 435-436.

²⁸ *Abley v. Dale* (1851), 11 C.B. 378, at p. 391, 138 E.R. 519, at p. 525, per Jervis C.J.

²⁹ "The rule by which we are to be guided in construing acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." *Perry v. Skinner* (1837), 2 M. & W. 471, at p. 476, 150 E.R. 843, at 845, per Parke B.

By what criterion are your Lordships to judge whether a particular enactment, if literally read, is so absurd that Parliament cannot have intended it to be so read and that the courts ought not to give effect to its plain meaning? . . . what seems absurd to one man does not seem absurd to another. . . .³⁰

The Golden Rule was accordingly rejected—it is no longer considered a permissible approach to statutory interpretation.³¹

The courts have failed, however, to acknowledge that the same criticism may be made of the use of the “plain meaning rule”. What seems “plain” to one man does not seem “plain” to another.³² They have gone so far as to admit that the meaning of a “general” word may be affected by other words used in the same Act or by the subject matter with which the Act deals. But the courts will generally rely upon pseudo-logical “grammatical rules of construction”³³ to justify their decision concerning the meaning which the general word is to have in a particular case. They will deny that they have a discretion to exercise, tending instead to treat their task as merely the mechanical one of *finding* the meaning which will automatically become obvious when their “rules” are applied. In other words they deny the necessity of “interpretation”—the necessity of giving a meaning to a text. They ignore the fact that generally some such “rule” can be found to justify *any* conclusion. “In effect, the inevitable value-judgment is made, but its nature as a necessary choice between logically equal alternatives is unfortunately obscured for all concerned”.³⁴ The danger arising from this technique is that it misleads the judiciary into believing “that some decision-making situations are virtually self-executing, not worthy of a full contextual analysis”.³⁵ The courts end up with an oversimplified view of what is involved in seeking to ascertain the genuine policy intended by Parliament. The plain meaning rule encourages superficial analysis and thereby lessens the probability of the courts’ decisions coinciding with those sought by Parliament.

³⁰ *Altringham Electric Supply Company Limited v. Sale Urban District Council* (1963), 154 L.T.R. 379 (H.L.), per Lord MacMillan, quoted in Read, MacDonald and Fordham, *Cases and other Materials on Legislation* (2nd ed., 1959), p. 1017.

³¹ *I.R.C. v. Hinchy*, [1960] A.C. 748, at pp. 767-768 (H.L.).

³² See, *Ellerman Lines Limited v. Murray*, [1931] A.C. 126, at pp. 148-150 (H.L.), where there were three differing views as to the “plain meaning” of the words “in fact unemployed” discussed in Lord MacMillan’s opinion.

³³ E.g., “*noscitur a sociis*”; “*eiusdem generis*”; “*expressio unius, exclusio alterius*”—See Willis, *Statute Interpretation in a Nutshell* (1938), 16 Can. Bar Rev. 1, for a more complete survey of the techniques used by the courts. See also Maxwell, *The Interpretation of Statutes* (10th ed., 1953), and Driedger, *The Construction of Statutes* (1974).

³⁴ Lederman, *The Courts and the Canadian Constitution* (1964), p. 196.

³⁵ McDougal, Lasswell and Miller, *op. cit.*, footnote 4, p. 81.

(b) *The Purpose Approach.*

When the courts have found it necessary or useful to decide that the language of a statute is ambiguous and not "plain" they have often held that the meaning of the language must be sought by ascertaining:

First. What was the common law before the making of the Act?

Second. What was the mischief and defect for which the common law did not provide?

Third. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?

And Fourth. The true reason of the remedy.³⁶

While this statement of approach at first glance appears to comply admirably with the courts' professed overriding aim of determining Parliament's policy, in practice this is not the case. Although references to "public policy" or "the object of the Act" are used both to restrict the meaning of general terms and to extend the meaning of precise, narrow terms, the courts refuse to carry out the type of examination which will reveal what should logically be considered some of the strongest evidence of legislative policy. Generally, they refuse to study the record of debates in Parliament,³⁷ reports of Royal Commissions³⁸ or departmental committees,³⁹ white papers,⁴⁰ or similar "extrinsic evidence", although this type of evidence will be admitted in a constitutional case to establish facts upon which legislative validity may depend.⁴¹

The reason given for refusing to consider such evidence is the fact that it is impossible to obtain complete assurance as to which recommendations have been accepted by the legislature.⁴² Those accepted by individual legislators, for example, may not have been accepted by the majority and the individual legislators may have changed their minds after participating in the debate. This, however, goes merely to weight—not to admissibility. A more logical approach

³⁶ *Heydon's Case* (1584), 3 Co 7a, 76 E.R. 637.

³⁷ *Gosselin v. The King* (1903), 33 S.C.R. 255; *Assam Railways and Trading Company v. Inland Revenue Commissioners*, [1935] A.C. 445, at p. 458 (H.L.); *The A.G. of Canda and the Reader's Digest Association (Canada) Ltd et al.*, [1961] S.C.R. 775.

³⁸ *Ibid.*

³⁹ *Re Colbourne Engineering Company Limited's Application* (1954), 72 R.P.C. 169.

⁴⁰ *Katikiro of Buganda v. A.-G.*, [1960] 3 All E.R. 849 at p. 855 (P.C.).

⁴¹ *Anti-Inflation Reference* (1976), 68 D.L.R. (3d) 452 (S.C.C.); *Re Residential Tenancies Act of Ontario*, *supra*, footnote 23; *Société Asbestos Limitée v. La Société Nationale De l'Amiante and A. G. Que.* (1981), Que. C.C., No 500-09 000594-804. Leave to appeal refused by the Supreme Court of Canada. See also, Hogg, Proof of Facts in Constitutional Cases (1976), 26 U. of T.L.J. 386.

⁴² *Gosselin v. The King*, *supra*, footnote 37.

would be to consider all relevant evidence and then base a decision upon that which is considered the strongest indicator of legislative policy. But this the courts refuse to do.

The effect of course is to decrease the probability of a court's decision coinciding with that sought by Parliament. When an arbitrary decision is made concerning what should be treated as evidence of legislative policy and what should not be, consequent reference to such policy becomes mere speculation.

(c) *Presumptions.*

Where the language of a statute is considered to be ambiguous the courts will also often justify their choice of meaning by the use of certain "presumptions". They might, for example, presume that the legislature did not intend to take away a common law right in a particular statute. Or they might presume that since the Act in question is a penal statute the legislature intended that it be strictly construed (that the meaning of its language be restricted to the narrowest sense). The problem is that, just as with the so-called "grammatical rules of construction",⁴³ for every presumption which directs a judge to one result there is a conflicting presumption which could direct him to the opposite conclusion.

While originally the presumptions may have been accurate guidelines for ascertaining legislative policy, there is no evidence that this is so today. Willis gave an accurate assessment of their function:⁴⁴

If . . . a court resorts to these old presumptions, it is doing something very different from attempting to ascertain the probable intention of the legislature, it is flying in the face of the legislature. Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are a means of controlling that intent. Together they form a sort of common law "Bill of Rights".

It is submitted that the courts are only paying lip service to the doctrine of parliamentary supremacy if they are permitted to conceal their value-judgments by the use of such strategies.

(d) *Strategies of Constitutional Interpretation.*

Just as in the interpretation of ordinary statutes, the courts utilize the plain meaning rule, the purpose approach and presumptions in the interpretation of constitutional documents such as the B.N.A. Act.⁴⁵ Here also the judiciary is reluctant to admit it engages in value-judgments and uses a conclusory or question begging approach,

⁴³ *Supra*, footnote 33.

⁴⁴ Willis, *op. cit.*, footnote 33, at p. 17.

⁴⁵ Hogg, *op. cit.*, footnote 23, pp. 77-99.

involving the placing of labels upon activities and legislation. Statutes are labelled as either "directly" or "indirectly", "relating to" or "aimed at" various subject matters and therefore having as their "pith and substance" or "primary purpose" such and such. The such and such is so described by the court as to relate to one of the heads of federal or provincial authority set out in sections 91 and 92 of the B.N.A. Act. Naturally enough, the court is then able to find that the such and such is a matter exclusively within the jurisdiction of the government having the particular head of authority.⁴⁶

IV. Probable Future Developments.

Examination of past trends in statutory interpretation reveals that the traditional Anglo-Canadian model of the judicial decision-making process is based upon a fallacious assumption, namely, that Parliament's policy is unambiguously communicated to the courts by the language of a statute. From that belief it follows that the judge's role need only be one of articulating rules previously established by Parliament. However, no communication of any significance can be devoid of ambiguity. The subjectivities of the members of Parliament cannot be directly observed. One can only draw inferences as to such subjectivities from the signs used by Parliament in expressing the majority's will. The judge has to *choose* which inference he will draw. To deny the existence of such a choice does not prevent its occurrence. It merely conceals the true nature of the operation.

Once judicial discretion in drawing inferences is recognized, because of the nature of language, as being unavoidable, the mere exercise of the discretion can no longer be considered "... a naked usurpation of the legislative function under the thin guise of interpretation".⁴⁷ Instead it is the *manner* in which the discretion is exercised which determines whether the decision of the judiciary remains consistent with the expressed ideal of parliamentary supremacy. Denial of the existence of the discretion gives the judge unlimited freedom to decide as he will. His decision need not be explained and may therefore be completely arbitrary. On the other hand, where a judge considers the alternative inferences available and makes an explicit choice, supporting his decision by reference to all the features of the legislative process, the weight he has given to each feature will become obvious to the reviewing authority—whether it be an appeal court or Parliament. If the proper weight has not been given

⁴⁶ See Barry, *International Electrical Energy Transfers: The Constitutional Background* (1981), 12 J. of Bus. Admin. 213, at p. 227. Also Barry, *Review of Towards a New Canada* (1979), 5 Dal. L.J. 402, at pp. 406-407.

⁴⁷ *Magor and St. Mellons R.D.C. v. Newport Corp'n*, *supra*, footnote 23, per Lord Simonds.

to the language of the statute or to other evidence such as the debates in Parliament, this may then be corrected. It is only where Parliament's communication is made ineffective and incapable of controlling the judiciary's discretion that the legislative function is usurped by the courts.

The traditional view is that *any* policy-making by the judiciary derogates from Parliament's legislative authority. This does not logically follow. It is only judicial policy-making which flies in the face of Parliament's choice of policy which should be rejected. The creative function of the judge in the development of the common law is being recognized.⁴⁸ A similar creative function has to be exercised by the courts in statutory interpretation. Where, for example, there are gaps in a statute and it does not provide specifically for a particular case, it does not follow logically from the doctrine of the supremacy of Parliament that the courts cannot supplement the statute by applying what they conclude is the general policy of the Act.⁴⁹ Also, there is no justification for concluding that an absurd or unjust decision must be made because a reading of the words of a statute alone appears to require it. The ultimate question is always: What is the policy chosen by Parliament? Policy-making by the judiciary must inevitably occur because of the ambiguity of language. The problem is to ensure that such policy-making conforms to that sought by Parliament. This problem cannot be simplified by treating words as the exclusive index of legislative intent and purporting to restrict the courts' role to a purely enunciative one. Because of the nature of language this will merely result in decisions becoming artificial word games unconcerned with Parliamentary policy. Arbitrary decision-making will continue; legal principles will relate less and less to society and the element of certainty will disappear from the law.

1. *Arbitrary Decision-making.*

The most ironic consequence to flow from the judiciary's professed lack of concern with policy is that the courts thereby obtain the opportunity to engage in uncontrolled, arbitrary, policy-making. By attributing his own "ordinary" or "plain" meaning to words used in a statute when even a dictionary meaning may be modified by the "context of the statute, its history and policy, the social problem

⁴⁸ "The common law must be developed to meeting changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation"; *Ares v. Venner*. [1970] 1 S.C.R. 608, at p. 623, per Hall J.

⁴⁹ See, McDougal, Lasswell and Miller, *op. cit.*, footnote 4, pp. 39-45.

involved, the legal result at stake, *etc.*”,⁵⁰ the judge is able to conceal the value-judgment which he makes. Whether this concealment be unconscious or deliberate, the fact remains that the judge has *chosen* the meaning he applies from several alternative ones. This choice may be a blind one, made without adequate consideration of all features of the legislative process or it may be a choice made only after the judge satisfies himself as to the policy behind the statute. Either way, unless the court has carried out the type of analysis which is most likely to reveal Parliament’s policy, it is impossible to conclude that his decision is determined by such policy. The judgment is not “rational”, “principled” or “a conclusion from accepted premises” (the premises being Parliament’s policy).⁵¹ Instead, it is arbitrary because it, “might just as well have gone one way as another” whatever the actual policy chosen by the legislature. It is only coincidental if the judge’s choice of policy is the same as that of Parliament.

That the traditional approach to interpretation is “. . . a stratagem deliberately adopted by decision-makers as a means of preserving a wide range of freedom of judgment behind a smoke-screen of doctrinal ambiguity”,⁵² appears to be a commonly held view. The technique has been defended on the grounds that it creates a “common law Bill of Rights”.⁵³ However, this sort of approach is entirely incompatible with the ideals of a majoritarian democracy as it permits the surreptitious substitution of the judiciary’s own policy for that of Parliament. The resulting frustration of fundamental community policy will continue, however, so long as judges are permitted to justify their decisions by reference to principles which are not accurate guides to legislative intent, or, in the case of constitutional interpretation, by reference to labels which, applied to legislation, reveal little or nothing about what is considered appropriate as the overall federal-provincial division of authority.

2. Lack of Empirical Reference.

Perhaps the most alarming consequence flowing from the present approach to statutory interpretation, is the tendency for the courts to become more concerned with the manipulation of abstract concepts, than with inquiring into the effects their decisions will have on society. Accepting that Parliament’s policy will be automatically revealed through the mechanical utilization of legal rules, the courts naturally become inclined to justify their decisions through the

⁵⁰ Hancock, *Fallacy of the Transplanted Category* (1959), 37 Can. Bar Rev. 535, at p. 559.

⁵¹ See discussion, *supra*.

⁵² McDougal, Lasswell and Miller, *op. cit.*, footnote 4, p. 370.

⁵³ Cheffins, *op. cit.*, footnote 9, pp. 21-22.

analysis of these rules. The resulting body of legal doctrine will lead to societal effects not contemplated by Parliament if the initial rules chosen do not adequately guide the judge in determining legislative intent. Furthermore, Parliament's policies are communicated to the courts against the background of traditional community goals and values. At present, these goals are not expressed with sufficient empirical reference to the values sought to be promoted. For example, the judge may refer to "the liberty of the subject" but this phrase in itself will not reveal the community's preferred patterns of power, enlightenment, wealth, well-being, skill, affection, respect and rectitude. Decisions justified by the manipulation of rules (or "presumptions") containing such vague, inarticulate statements of community policy will not necessarily have an effect which is compatible with fundamental community values.⁵⁴

It is not surprising, therefore, when one considers the rules presently applied by the courts, that occasionally "hard cases"⁵⁵ arise which judges have difficulty in fitting into the analytical framework previously developed and which apparently can only be satisfactorily dealt with by the injection of an irrational element into the law. Thus, the observation has been made that:

"Paradoxical as it may sound, the law has frequently owed more to its weak judges than it has has to its strong ones. A bad reason may often make good law. . . . It will not infrequently be found that the judge of greatest legal acumen, the greatest analyzer, is the very one who resists innovation and extension. This indeed, is one of the pitfalls of much learning." . . . Strong judges to the man learned in law are too often like those referred to by Erle, C.J., as men "who delighted in nothing so much as a strong decision. Now a strong decision is a decision opposed to common sense and common convenience. . . ."⁵⁶

With respect, it is submitted that these "strong" judges are all too often relying upon *weak* premises when their superior logic leads them to nonsensical conclusions. In the case of statutory interpretation, the premises are often concealed in the "principles of interpretation" applied. For example, the "plain meaning rule" erroneously assumes that the meaning of language is self-evident. The underlying assumptions not corresponding with reality, should there be surprise when deductions following logically from them lead to unacceptable conclusions? On the contrary, ". . . before any particular decision is deemed to have been truly justified, the rule upon which its justifica-

⁵⁴ See Lyon, *A Fresh Approach to Constitutional Law: Use of a Policy-Science Model* (1967), 45 Can. Bar Rev. 554, at p. 562.

⁵⁵ "A phrase used to indicate decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: Hard cases make bad law." Black's Law Dictionary (4th ed., 1951).

⁵⁶ Wright, *An Extra-Legal Approach to Law* (1932), 10 Can. Bar Rev. 1, at p. 17, quoting Street and Goodhart in part.

tion depends must be shown to be itself desirable, and its introduction into the legal system itself defensible".⁵⁷

Another major defect because of lack of empirical reference in the traditional approach to statutory interpretation is that the approach does not provide techniques for ensuring that the courts understand the social problems with which Parliament wished to deal. (In constitutional law the criticism has usually revolved around alleged judicial failure to comprehend the impact of their decisions upon the federal-provincial balance of power.) At least as far back as the sixteenth century the courts recognized that proper significance could be given to statutory language only after one determined: "What was the mischief and defect for which the common law did not provide?"⁵⁸ Yet almost four hundred years later Canadian courts place very little emphasis on utilization of the social and behavioural sciences to assist them in decision-making. In the United States the "Brandeis brief" is used to bring economic and other social data to the attention of the judge. In Canada until very recently a lawyer used this device at his peril—witness the case of *Samur v. Quebec*⁵⁹ where the Supreme Court of Canada penalized the successful appellant, by depriving him of the cost of preparing his factum, because of the amount of sociological information it contained. Decisions such as this do nothing to ensure that judicial decision-making will be something more than "arid conceptualism". A few recent cases indicate that the Supreme Court of Canada may be becoming more receptive to admission of social-science briefs.⁶⁰

3. *Loss of Certainty in the Law.*

Together with, and necessarily following from, the arbitrariness and irrationality permitted by the present approach to statutory interpretation comes a loss of certainty. Future decision-makers do not have clearly available to them the factors upon which judges have based previous decisions. It becomes impossible to predict with any

⁵⁷ Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (1961), p. 173. This writer concludes that a judicial decision is "rational" only after a "two-level procedure of justification" has been followed, that is, the decision must be formally deducible from a legal rule and the legal rule or premise must be one which when implemented will produce socially desirable consequences. See also Lyon, *The Central Fallacy of Canadian Constitutional Law* (1976), 22 McGill L.J. 40, at p. 48: "Confused or obscure legal decisions may not be simply the product of technically inadequate reasoning. They may flow from fundamental defects in the conceptual framework within which that reasoning is done."

⁵⁸ *Heydon's Case*, *supra*, footnote 36.

⁵⁹ [1953] 4 D.L.R. 641, at p. 666.

⁶⁰ *Morgentaler v. The Queen* (1975), 53 D.L.R. (3d) 161 (S.C.C.) and *Anti-Inflation Reference*, *supra*, footnote 41.

degree of accuracy the manner in which a court will decide a similar issue under slightly different circumstances. The value of precedents as "guides to future conduct"⁶¹ is decreased.

The traditional technique employed by the courts to afford certainty to the law has been the doctrine of *stare decisis*. Based upon the rationale that "[t]o take the same course as has been adopted in the past, not only confers the advantage of the accumulated experience of the past but also saves the effort of having to think out a problem anew each time it arises",⁶² the doctrine until recently was taken in England and Canada to mean that the decisions of a court bound it and the courts below it in the judicial hierarchy to decide in the same way in the future.

In 1966, the rule that decisions of the House of Lords were binding on itself was relaxed. Lord Gardiner L.C. made the following statement on behalf of himself and the Lords of Appeal in Ordinary prior to handing down judgments on July 26th of that year:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to the individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.⁶³

The Supreme Court of Canada has adopted the same position.⁶⁴ Lower courts, however, are still bound by decisions of courts superior to them in the judicial hierarchy.

Even before this pronouncement the fetters of *stare decisis* were not as restrictive as the bare statement of the doctrine might lead one to believe. It is only the *ratio decidendi*, or, the principle actually necessary to justify the particular decision, that is binding. The courts will study the language used by the previous judge and examine the facts of the earlier case in order to determine whether a particular formulation of principle is wider or narrower than was necessary for the decision. In the case of statutory interpretation, if the court concludes that an earlier decision of a court of co-ordinate jurisdiction was given "in ignorance of the terms of a statute", the decision will be considered as given "*per incuriam*" (through inadvertance) and disregarded.⁶⁵

⁶¹ Lloyd, *op. cit.*, footnote 15, p. 366.

⁶² *Ibid.*

⁶³ See Note, [1966] 3 All E.R. 77 (H.L.).

⁶⁴ *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *A.V.G. Management Science Ltd v. Barwell Developments Ltd*, [1979] 2 S.C.R. 43.

⁶⁵ *Young v. Bristol Aeroplane Co. Ltd*, [1944] K.B. 718, at p. 729, per Lord Greene M.R.

Obviously the doctrine of *stare decisis* becomes inoperative, therefore, when it is impossible to determine the principles upon which previous cases are based. Such principles can only be determined when the weight which the judge has given to every feature of the previous case is ascertainable. The facts which the judge considered material or immaterial must be ascertained in order for a later court to be able to find in his decision a principle which can be applied to the facts before it. If a judge bases his decision simply on the "plain meaning" of a word without reference to all features of the word's context, and a later court realizes that meaning is affected by context, how can the later court obtain guidance from the previous decision? Artificial "distinguishing" of cases becomes the fashion and each judge is free to decide as he pleases, rationalizing that previous cases to the contrary were based on facts different from the ones now before him. "The glorious uncertainty of the law"⁶⁶ is the result.

V. Recommended Alternatives.

1. Improved Decisions Without Constitutional Change.

By now, hopefully, it has become apparent that there is nothing fundamentally wrong with the process of statutory interpretation except that the judiciary is operating on the wrong assumptions.⁶⁷

While theoretically accepting that their primary goal must be to determine the policy which Parliament intended to have applied as law, the courts have assumed that Parliament's policy will be automatically apparent from statutory language. Consequently they have assumed that the judiciary's function is simply one of mechanically finding and applying the self-evident policy.

In reality, however, Parliament's policy, or projected programme of goal values and practices, being a subjective event and unobservable, can never be determined with complete certainty. All the courts can do is attempt to ascertain the social effects which Parliament most probably sought to bring about. The court must draw inferences as to legislative intent from the objective evidence available. This task can be properly performed only by systematic examination of all features of the social process. To place undue emphasis upon any one feature—such as statutory language—is merely to lessen the probability of the inference drawn being correct.

It is submitted that before any significant transformation of the judicial approach to statutory interpretation will be possible, the

⁶⁶ *Perrault v. Gauthier* (1898), 28 S.C.R. 241, at p. 245, per Girouard J.

⁶⁷ To paraphrase Townsend, *Up the Organization* (1970), p. 119: "There's nothing fundamentally wrong with our country except that the leaders of all our major organizations are operating on the wrong assumptions."

judiciary will have to acknowledge that it *must* exercise a discretion—that it always must *choose* which of several inferences as to legislative intent is the proper one to be drawn. To this extent the courts make policy and such policy-making is unavoidable. This is not to say that the courts must usurp the function of the legislature. So long as their decisions are genuinely based upon factors indicative of legislative policy, the courts remain subordinate to Parliament. When, however, judicial decisions are arbitrary and uncontrolled by evidence of legislative intent, they are contrary to the community goals and values implied by the doctrine of the supremacy of Parliament.

The existence or nonexistence of a judicial discretion is, therefore, not the crucial issue. The discretion necessarily exists because of the inherent ambiguity of language. The key question is, rather: how should the discretion be exercised in order to best promote fundamental community policy? The necessity for systematic examination of all features of the social process has already been mentioned. To adequately perform this task, the court must develop a framework for inquiry—the contextual background of most statutes is too complex to be usefully analyzed without the court having some sort of map to follow. Fortunately, policy-science models of the social process are available, providing the judicial decision-maker with a descriptive framework within which to work.

One useful model adopted by McDougal and Lasswell⁶⁸ is the model of the social process which views human interaction as: *participants* in certain *situations* pursuing *objectives* by employing *strategies* to manipulate *base values* (resources) and causing *outcomes* with various long term *effects*. The objectives, or goal-values, as well as the base values, may be conveniently classified as power, enlightenment, wealth, well-being, skill, affection, respect and rectitude. By making specific reference to what it means in terms of each value and each phase of the process, a judge is then able to give empirical content to any abstract legal concept. The fundamental community values may be explicitly described, and their significance more properly understood, when reference is made to such a model.

Even with the use of a model, however, the judge's task will be a formidable one. He will still find it useful to employ principles of interpretation which the past experience of judicial decision-makers indicates would be of assistance in determining the policy of Parliament. It is not within the scope of this article to discuss all of the available principles relating to the processes of legislation, claim and decision.⁶⁹ Hopefully, however, a few examples will suffice to de-

⁶⁸ The Identification and Appraisal of Diverse Systems of Public Order (1959), 53 Am. J. Int. L. 1, and also, *op. cit.*, footnote 4.

⁶⁹ For details of comparable principles employed in the process of interpreting international agreements, see McDougal, Lasswell and Miller, *op. cit.*, footnote 4.

monstrate the usefulness of the policy-oriented approach suggested by McDougal and Lasswell.

The recommended principles are designed to act as guidelines for the judicial decision-maker. Accordingly it helps to have principles of interpretation "relating to both content (events to be observed) and procedure (order and techniques of observation)".⁷⁰ The first principle of content should make the decision-maker aware of the necessity of viewing the language of the statute in its total context before reaching a decision concerning the meaning to be attributed to the language.⁷¹ This "Contextual Principle" requires, *inter alia*, that the entire process of legislation be considered.

Principles of interpretation may be related to each phase of the process of legislation. Thus, the characteristics of the *participants* in the process, the cultures, classes and interest groups for example, from which members of Parliament are drawn, will affect the meaning which should be given to their language. This becomes especially important when the statute being interpreted was enacted some time in the past. Also a principle stressing the relevance of the participants' characteristics will be indispensable if Parliamentary debates are to be utilized effectively in the ascertainment of legislative policy.

With respect to *objectives*, the "Principle of Projecting Expectations" would require the courts to distinguish between the primary objectives of Parliament and other minor, incidental, objectives. Preference would be given to interpretations which promoted the primary objectives. An associated principle would, when there was doubt about objectives, raise a presumption in favour of those which corresponded most closely with the traditionally accepted community goals and values.⁷²

The meaning to be given to statutory language will also be determined by the *situation*—by the time and place, degree of institutionalization and level of crisis—within which the statute was enacted. This principle has been applied in the past, most notably with respect to crisis factors. For example, the presumption against interference with the liberty of the subject is given less weight than is normally the case when the statutory provision under consideration is one brought into force because of "war, invasion, or insurrection, real or apprehended".⁷³ There is an obvious danger of over-reaction

⁷⁰ *Ibid.*, p. 12; see also footnote 21.

⁷¹ See Driedger, *op. cit.*, footnote 33, pp. 1-2 and 67.

⁷² For example, the presumption that a legislature did not intend to exceed its authority. *Société Asbestos Limitée v. La Société Nationale De L'Amiante and A.G. Que.*, *supra*, footnote 41.

⁷³ War Measures Act, R.S.C., 1952, c. 288, s. 2.

here so it should be stressed that overemphasis on this one feature of the legislative process may be as misleading as ignoring it altogether.

The *base values* or resources at the disposal of members of Parliament will affect the weight which should be given to their respective views when a judge comes to rely upon parliamentary debates to add significance to statutory language. For example, the power position of the Prime Minister might lead a court to tentatively presume that the views expressed by him will more probably be reflected in statutory language than the views of a "maverick" member of the majority party.

The "Principle of Logical Relationship", one of the principles relating to *strategies*, would presume that the statute was intended to be logically consistent, both internally and with other statutes, unless a contrary purpose was indicated. Other principles, such as the *ejusdem generis* one now used, would assist in determining the level of generality intended by the legislators.

Obviously, the *outcome* phase of the legislative process—the bringing into force of a statute, worded in a particular manner—will be of great significance in determining legislative policy and principles adopted would stress the importance of this phase, that is, the importance of the words actually used; but not to the extent of ignoring all other phases.

Principles relating to *effects*—the post-outcome phase—would also be necessary. For example, the impact different interpretations of a statute would have on society should be considered and a presumption made in favour of the interpretation that would least interfere with, or best promote, fundamental community values.

Principles of procedure should also be employed to disclose relevant content to the judicial decision-maker in the most clarifying order. These would stress the need for a contextual approach, would examine the possible lexical operations open to the interpreter in solving semantic problems, would promote the employment of logical operations in the interpretation of statutes and, generally, apart from indicating an economic order or agenda of inquiry, would specify the detailed operations that are necessary to ensure the effective application of the principles of content.

If this policy-oriented approach to the interpretation of statutes were adopted, the deficiencies of the present system would be avoided. There would be less fear of arbitrary judicial decision-making because of the fact that the reasons for decisions would have to be made explicit. These reasons could then "be subjected to independent scrutiny and objective verification".⁷⁴ Lower courts

⁷⁴ Wasserstrom, *op. cit.*, footnote 57, p. 173.

would be aware of the likelihood of their decisions being overruled on appeal while the highest courts would have as a deterrent the possibility of political interference with the judiciary in the event that the policy of Parliament was consistently ignored. The suggested approach would also ensure that abstract legal concepts were given empirical reference—the law would be clearly related to society. By stressing the necessity of clarifying community values and assessing the effects decisions will have on them, for example, the approach will force the judiciary to employ the tools of the social and behavioural sciences. New life will then be infused into the law. Finally, the explicit reasons for decision which result from the use of an objective framework of inquiry, would ensure that future decision-makers were aware of the weight given to every factor in a previous case. This of course is indispensable for that uniformity of decision which adds certainty to the law.

2. *Improved Decisions After Entrenchment of the Charter.*

The entrenchment of a Charter of Rights and Freedoms should have two main impacts upon judicial decision-making. First, by setting out the fundamental values of the Canadian people, the Charter will provide criteria for judges to apply in resolving statutory ambiguities. Second, by requiring judges to police legislation in terms of compatibility with these fundamental values, the Canadian judiciary will be compelled to *publicly* perform a policy-making function—a function performed at the present time but in a hidden fashion.

The Charter identifies four “fundamental freedoms”, namely: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of information; freedom of peaceful assembly; and freedom of association. The Charter also identifies certain “democratic rights” (namely, the rights to vote and stand for election and the duration and scheduling of legislative bodies); certain “mobility rights” (namely, the right of citizens to enter, remain in and leave Canada and the right of residents to pursue the gaining of a livelihood in any province); certain “legal rights” (including: the right to life, liberty and security of the person; the right to be secure against unreasonable search and seizure; the right not to be arbitrarily detained; the right on arrest or detention to information, counsel and *habeas corpus*; the right once charged to information, early trial, protection against self-incrimination, presumption of innocence, bail, trial by jury, non-retroactivity of offences, no double jeopardy; the right not to be subjected to cruel and unusual punishment; and the right to an interpreter); the “equality rights”, namely, equality before and under the law and the equal protection and equal benefit of the law without

discrimination, and certain "language rights" (including: the right to certain access to the two official languages in the legislatures and governmental institutions of some provinces as well as federally; and the limited right to educational instruction in an official language even though it may be the minority language in a province).

Although past cases applying "the common law bill of rights" as well as those interpreting the Canadian Bill of Rights⁷⁵ and the Human Rights Codes of the provinces have already developed considerable jurisprudence to flesh out the concepts involved in the rights expressed, the Charter is still somewhat deficient in the manner of enunciating these fundamental values. While the Charter does set out certain "democratic rights" such as the right to vote and to stand for election, a better understanding of the shaping and sharing of *power* within Canada would be available if the Charter dealt more fully with basic questions such as:

- To what extent may Parliament or provincial legislatures interfere with the concepts of "one man, one vote" and "equal protection of the law" by redistribution of legislative districts on the basis of areal extent and other factors as well as population?
- At what point do public protests and demonstrations exceed the limits of acceptable behaviour?
- At what point do municipal restrictions upon assemblies, posters, parades, sound trucks, and so forth unduly interfere with those activities necessary for a healthy political process?
- What sorts of political or other beliefs may be grounds for disentitlement to membership in public office?
- Are there any justifiable grounds for banning monetary contributions to political parties by certain persons or groups?

With respect to *enlightenment* the Charter could more fully address itself to questions such as:

- How should the line be drawn between freedom of the press and avoidance of that concentration of power which comes from the concentration of press ownership?
- Are there any techniques of disseminating information so powerful (or insidious) in their impact that they should be forbidden?
- Is there any sort of information which should be withheld from public distribution?

⁷⁵ R.S.C., 1970, Appendix III.

—What criteria should be applied in limiting the public's access to governmental files?

—At what point does computerization and numbering become a threat to individual dignity?

On the shaping and sharing of *wealth* the Charter is even less specific than for other values—thus probably reflecting the lack of consensus within Canada on the matter of “economic rights”. Parliament and the legislatures are committed to,

- (a) Promoting equal opportunities for the well-being of Canadians;
- (b) Furthering economic developments to reduce disparity in opportunities; and
- (c) Providing essential public services of reasonable quality to all Canadians,

as well as to the principle of making equalization payments. But little guidance is given to determining to what extent rights such as the right to work, the right to protection against unemployment, the right to social security, and so forth, such as are included in the Universal Declaration of Human Rights,⁷⁶ are applicable within Canada. Perhaps the most basic question left unanswered is the extent to which private ownership of property is deserving of protection because of its role in ensuring freedom and dignity of the individual?

The *well-being* of individuals is the *sine qua non* for enjoyment of most other basic rights and freedoms. A citizen receives little benefit from rights such as equality before and under the law if lack of nutrition or medical care renders him unable to take advantage of opportunities as they arise. The rights given in the Charter to security of the person and to protection against cruel and unusual treatment or punishment recognizes this value within the legal process. A more general recognition of the relationship of well-being to human dignity would help focus attention on the need to promote the well-being of citizens if one is to have a truly free and democratic society.

Turning to *skill* or “those creative impulses and endeavours which ought to be encouraged in a free society”,⁷⁷ the Charter lacks specificity as to, for example, criteria for balancing daring literature or art against the moral code of the community. Promotion and protection of creative activity is a fundamental Canadian value worthy of express constitutional recognition.

The importance of the family to the Canadian way of life was identified in the preamble to the Canadian Bill of Rights.⁷⁸ This is one recognition, albeit indirect, that *affection* or the need for human

⁷⁶ [1948-49] Yr Bk U.N. 537.

⁷⁷ *The Queen v. Dominion News and Gifts (1962) Ltd* (1963), 42 W.W.R. 65, at p. 79, per Freedman J.A.

⁷⁸ *Supra*, footnote 75.

relationships, the need to love and be loved, has the status of a fundamental value. But no reference to this value appears in the Charter. This omission will probably become ever more glaring as we move into what promises to be a time of test-tube babies, surrogate mothers, homosexual marriages and other assaults upon traditional ways of developing human relationships.

Respect, that basic need of every individual to be recognized as a human person, exhibited by man's search for status, glory, reputation, prestige, recognition, honour and similar goals, is partly recognized in the Charter by the "equality rights" providing for equality before and under the law, and equal protection and equal benefit of the law without discrimination. But this fundamental value could be more fully articulated in terms of recognition and respect for individuals on their merits.

Rectitude is a convenient classification for those values dealing with matters of morality, conscience and religious activity. The preamble to the Charter states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law". Freedom of conscience and religion is also declared. We may expect some exciting jurisprudence once attempts are made to define the concept of God. It will also be interesting to see whether freedom of religion will be limited to monotheistic religions which "recognize the supremacy of God", thereby leaving Buddhists, Hindus and certain other faiths less protected.⁷⁹

Despite the limitations discussed above, the Charter contains sufficient reference to fundamental values to provide standards against which judicial decisions may be evaluated. Just as importantly, however, judges will have to expressly acknowledge their creative function of choosing between competing values in order to resolve statutory ambiguities. Section 1 of the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This section will make it necessary for judges to decide what are these "reasonable" limits. And to make this decision the judges will most times have to weigh the individual right or freedom sought against what is necessary for the preservation of that essential quantum of order in society without which no citizen is free.

It is submitted that the Charter could have gone farther to assist judges in this balancing of values. It could have, as did the Canadian Bill of Rights in its preamble, expressly affirmed "the dignity and worth of the human person", the overriding goal of any parliamentary democracy. It could have expressly described the public order neces-

⁷⁹ For a fuller discussion of the value processes deserving of constitutional protection see J. Noel Lyon and Ronald G. Atkey, *op. cit.*, footnote 7, Ch. 11.

sary for the maximum realization of human dignity, as one oriented, in terms of providing minimum order, towards the minimum of coercion and the maximum of persuasion in regulating individuals, while in terms of promoting optimum order as being designed to work towards the greatest production and the widest possible sharing of human dignity values among all Canadians.⁸⁰ Perhaps the Charter should expressly require that public decision-making have the objective of doing the least harm to the greatest number instead of the normally accepted utilitarian goal of the greatest good for the greatest number. The consequences, especially for minority groups, are quite different for each approach.⁸¹

VI. Conclusion.

The Canadian judicial process will inevitably fall into disrepute if the present strategies or techniques of statutory interpretation continue to be employed. Even though the vast majority of judges genuinely strive to bring about results that are in accord with legislative policy and community expectations, their decisions will appear more and more artificial and erratic if they do not incorporate available knowledge about the social process. As information relating to the process of communication increases and becomes more widely disseminated, the unsoundness of the premises upon which the judiciary now bases its decisions will become apparent. The myth that the judge is *forced* into the decision he reaches because of the language of a statute will no longer be accepted. The existence of a judicial discretion will be recognized. Judges will no longer be able to disclaim all responsibility for the policy applied as law. They will have to acknowledge that the ambiguity inherent in all communication puts them in a position to choose such policy. Unless their act of choice is disciplined and controlled by the policy-oriented approach to interpretation, judicial decisions, because of their arbitrariness, artificiality, and unpredictability will lose the community respect upon which their authority depends.

Entrenchment of a Canadian Charter of Rights and Freedoms could provide the opportunity for a fresh new approach to statutory interpretation. The Charter, by setting out the fundamental values of Canadians, provides criteria for judges to apply in resolving statutory ambiguities. They will no longer be justified in basing decisions upon their own personal values. Their decisions will accordingly be more principled, less arbitrary. Of course the Charter will itself contain

⁸⁰ See McDougal, Lasswell and Vlasic, *Law and Public Order in Space* (1963), esp. Ch. 2, for a fuller discussion of a public order of human dignity—there discussed in the context of a world community.

⁸¹ See Karl Popper, *Open Society and its Enemies* (5th rev. ed., 1966).

ambiguous language. It is regrettable, therefore, that the final draft of the Charter has had omitted from it a statement of the aims and essential attributes of the Canadian nation set out in a manner which would compel judges to systematically refer to the impact on all relevant values before arriving at their decisions. Such a statement would provide more precise direction to the judiciary than the broader concepts such as "freedom of conscience and religion", "freedom of thought, belief, opinion and expression", "the right to life, liberty and security" and so forth contained in the final draft. But the fact that the light is not dazzling will no longer justify sulking in the dark. Judges, after entrenchment of the Charter, will be forced to admit they must make choices between competing values. They will no longer be able to portray themselves as mere mechanical finders and appliers of the law. Instead they will be forced to give content to concepts such as "equality before and under the law" by specific reference to the nature of Canadian society. They will have to fully and clearly articulate the policy consideration underlying their decisions and have to describe the probable effect of their decisions upon Canadian society. Artificial, question-begging, decision-making should be reduced with fewer sterile exercises in logical derivation and more contact with reality. Greater certainty should result as well as the injection of new life into the law by reference to other disciplines.

Instead of a grudging acceptance of this new legal order, the exciting possibilities for improved legal reasoning and more disciplined judicial decision-making should encourage politicians, as well as judges, to eagerly look forward to the process of statutory interpretation under a Charter of Rights and Freedoms. Rather than being a threat to the supremacy of Parliament, the new approach, requiring, as it does, recognition that policy considerations underlie judicial decisions and providing constitutional criteria for the choice of this policy, will *strengthen* the ability of Parliament to properly control the development of the law.
