

## THE POLITICAL PURPOSES OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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*As we begin to perceive the effects of The Canadian Charter of Rights and Freedoms, it is important to bear in mind the political purposes for making this change in our Constitution. Two primary purposes can be indentified. For the political leaders who were the Charter's chief sponsors, national unity was the main rationale for insisting on placing the Charter at the top of the constitutional reform agenda. The second purpose was the conviction that a Charter will better protect rights and freedoms. Belief in this purpose is the main explanation for widespread public support of the Charter.*

*National unity, it was thought, would be strengthened by the Charter's symbolic effects and particularly by its provisions concerning mobility and language rights. An examination of these expectations suggests that they were somewhat unrealistic. The Charter's most important unifying consequences will more likely flow from a dimension of entrenching rights about which the Charter's political sponsors were, for the most part, silent—namely, the national policy making role the Supreme Court will assume as the final arbiter of the Charter.*

*In believing the second purpose, the Canadian public were victims of false advertising. Fundamental rights and freedoms are not zero-sum entities which citizens either possess in their entirety or not at all. In all liberal democracies, limits are placed on the extent to which fundamental rights and freedoms are enjoyed. The Charter's principle effect is to change the way in which decisions about these limits are made. There is no guarantee that this new decision-making system, in which judicial review plays a central role, will result in better or even in more liberal decisions about these limits. Now that the Charter is in force, Canadians must overcome the baby talk used to sell it and learn to address the potentialities of the Charter more realistically.*

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*Maintenant que nous commençons à percevoir les effets de la Charte canadienne des droits et libertés, il est important de tenir compte des desseins politiques qui ont amené à réaliser ce changement dans notre Constitution; on peut en retenir deux principaux. 1. Aux yeux des "leaders" politiques qui furent les principaux promoteurs de la Charte, la principale raison de leur insistance à la faire figurer parmi les priorités de la réforme constitutionnelle était qu'elle permettrait de parvenir à l'unité nationale. 2. L'autre objectif portait à croire que la Charte protégerait plus efficacement les droits et libertés; c'est de cette conviction qu'est né le vaste appui du public canadien à cette Charte.*

*L'unité nationale, pensait-on, serait renforcée grâce aux effets symboliques de la Charte, en particulier par ses dispositions portant sur la liberté de circula-*

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*tion et sur les droits linguistiques. En examinant de plus près ces espoirs, on s'aperçoit qu'ils manquaient quelque peu de réalisme. Il est plus vraisemblable que les effets d'unification les plus importants de cette Charte découleront de la portée de l'enchâssement de droits sur lesquels les promoteurs de la Charte ont gardé le silence—à savoir le rôle politique que la Cour suprême du Canada aura à assumer en tant qu'arbitre ultime de ladite Charte.*

*En ce qui concerne le second objectif, les Canadiens ont été victimes de déclarations mensongères. Les droits et libertés fondamentaux ne constituent pas une perte ou un gain que les citoyens possèdent complètement ou ne possèdent pas du tout. Dans toutes les démocraties libérales, il existe des limites imposées à l'exercice des droits et libertés. La Charte aura pour principal effet de changer la manière dont les décisions portant sur les limites de ces droits et libertés seront prises. Rien ne garantit que ce nouveau système où le pouvoir judiciaire jouera un rôle central, aboutira à des limites meilleures ou plus libérales. Maintenant que la Charte est en vigueur, il est temps pour les Canadiens d'aller au-delà du babillage qui a servi à en vendre l'idée et à apprendre à aborder de façon plus réaliste les promesses qu'elle renferme.*

Discussion of Canada's new constitutional Charter of Rights and Freedoms should not overlook the broad political purposes which inspired Canadian politicians to propose it and induced so many Canadian citizens to support it. In the long run, it is in terms of these broad political purposes that the Charter should be, and probably will be, judged.

The political purposes of the Charter can be thought of as falling into two general categories. These two kinds of purposes are, as I shall show, closely related, although analytically distinct. The first has to do with national unity and the Charter's capacity to offset, if not reverse, the centrifugal forces which some believe threaten the survival of Canada as a unified country. This national unity function of the Charter is most relevant to explaining why politicians, especially those who led the federal government, pushed so hard for a charter. The second kind of purpose is the conviction that a charter will better protect, indeed will even "guarantee", fundamental rights and freedoms. Belief in this purpose is most relevant to explaining the widespread public support for the Charter. In this article I will examine each of these purposes in turn and the prospects of their being fulfilled by the Charter.

### I. *Nation's Unity.*

To understand the national unity rationale of the Charter, it is necessary to recall the context in which the federal government made a charter its number one priority for constitutional reform.

In the mid-1960's right up to the Confederation of Tomorrow Conference organized by the Premier of Ontario, John Robarts, in the fall of 1967, the Liberal Government in Ottawa was not interested in constitutional reform of any kind. Patriation with an amending formula had been very nearly achieved in 1964. Since then only Quebec had been pushing for

constitutional change. But Quebec had drastically raised the stakes. The Lesage Liberals followed by Daniel Johnson's Union Nationale administration insisted that the price of Quebec's support for patriation of the Canadian Constitution would be agreement on substantive constitutional reform giving Quebec more recognition and power as the French Canadian homeland. This demand of Quebec provincial leaders for major constitutional change reflected a wholly new phase in Quebec nationalism. Historically the constitutional position of Quebec leaders had been profoundly conservative. Their prime concern had been to preserve the rights they believed had been acquired for Quebec and French Canada in the constitution of 1867. But now, under the impetus of Quebec's "quiet revolution", the province's leading politicians had become constitutional radicals.<sup>1</sup> So long as these Quebec demands for radical change were the central preoccupation of constitutional debate, it was not in the federal government's interest to encourage the process of constitutional reform. The proposals likely to dominate such a debate, if they went far enough to placate Quebec nationalism, would either go too far in weakening the involvement of the federal government in the life of Quebec or else give Quebec representatives in federal institutions such a privileged place as to alienate opinion in the rest of the country. So the Pearson government at first tried to respond to Quebec through pragmatic adjustments in fiscal and administrative arrangements and took a dim view of Premier Robarts' constitutional initiative.<sup>2</sup>

However, the very success of the Confederation of Tomorrow Conference in raising national expectations about both the necessity and the possibility of responding creatively to Quebec's constitutional discontents seemed to convince the Prime Minister and his Justice Minister, Pierre Trudeau, who was soon to succeed him, that a different strategy was needed. The constitutional issue could no longer be kept on the back burner. But if constitutional reform was to be seriously pursued, it was essential that Quebec's demands be countered by proposals designed to have a unifying effect on Canada. It was at this point that the federal government urged that a charter of rights be at the top of the constitutional reform agenda.

After the Confederation of Tomorrow Conference, Prime Minister Pearson suggested to the provincial governments "that first priority should be given to that part of the Constitution which should deal with the rights of the individual—both his rights as a citizen of a democratic federal state and his rights as a member of the linguistic community in which he has chosen

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<sup>1</sup> For accounts of these developments in Quebec politics and the constitutional demands they generated see McRoberts and Postgate, *Quebec: Social Change and Political Crisis* (rev. ed., 1980) and McWhinney, *Quebec and the Constitution, 1960-1978* (1979).

<sup>2</sup> For an account of government strategies at the constitutional conferences from 1967 to 1971 see Simeon, *Federal-Provincial Diplomacy* (1972).

to live".<sup>3</sup> This was the position his government took at the Constitutional Conference in February 1968. Prime Minister Trudeau took exactly the same position. His government's paper prepared for the February 1969 Constitutional Conference repeated the commitment to a charter of rights as the first priority in constitutional change. "To reach agreement on common values", Trudeau argued, was "an essential first step" in any process of constitutional renewal.<sup>4</sup> From this point until the final enactment of the Constitution Act, 1982, giving constitutional expression to fundamental rights including language rights was the Trudeau government's first constitutional priority. And throughout, the fundamental basic rationale for this constitutional strategy was the perceived value of such a measure as a popular and unifying counter to decentralizing provincial demands in the Canadian constitutional debate.

The Charter's attractiveness to the leaders of the federal Liberal Party as the centrepiece of their constitutional strategy was decisive in improving the political fortunes of the project of entrenching rights and freedoms in the Canadian constitution. Since World War II there had been a great deal of discussion of the Bill of Rights idea both within and outside Parliament.<sup>5</sup> The prime stimulus of this discussion was international—the concern for human rights arising from the war against fascism and Canada's obligations under the United Nations Declaration of Human Rights. Domestic events also stimulated interest in a Bill of Rights. At the federal level, there was regret concerning the treatment of Japanese Canadians during the war and the denial of traditional legal rights in the investigation of a spy ring following the Gouzenko disclosures in 1946. At the provincial level the persecution of Jehovah's Witnesses by the Duplessis administration in Quebec, the treatment of Doukhobors and other religious minorities in the west and the repression of trade unionism in Newfoundland were major *causes célèbres*. There was also a touch of the national unity theme in the submissions made on a number of occasions to parliamentary committees on the implications of post-war immigration. The addition of such large numbers of new Canadians with no education or experience in liberal democratic values, it was argued, meant that Canada could no longer rely on the British method of protecting civil liberties. For such a heterogeneous population a written code was needed.<sup>6</sup> Liberal leaders were not moved by these arguments for a Canadian Bill of Rights. The C.C.F. was the only national party to commit itself to establishing a Bill of Rights. And it was under a Progressive Conservative government led by John Diefenbaker that

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<sup>3</sup> *Federalism for the Future* (1968), p. 8.

<sup>4</sup> *The Constitution and The People of Canada* (1969), p. 14.

<sup>5</sup> For a summary of these discussions see Tarnopolsky, *The Canadian Bill of Rights* (1975).

<sup>6</sup> See, for instance, the submission of Dr. Eugene Forsey to the Senate Special Committee on Human Rights and Fundamental Freedoms, April 27th, 1950, pp. 79-81.

a statutory Bill of Rights affecting only the federal level of government was enacted in 1960.

Pierre Trudeau, before he entered politics and joined the Liberal Party, expressed interest in a constitutional Bill of Rights. In 1965, as a legal academic writing a background paper on how to deal with the Quebec agitation for constitutional change, he placed a Bill of Rights in first place on his list of constitutional reform proposals.<sup>7</sup> But the main thrust of his paper was to dissuade Quebecers from relying on constitutional reform to solve their problems of political and social modernization. His constitutional reform proposals were for "some day" in the future. Whenever a Bill of Rights was added to the constitution, he saw the abolition of the federal power of reservation and disallowance over provincial legislation as a logical *quid pro quo*. This emphasis on the connection between a constitutional Bill of Rights and the federal powers of reservation and disallowance underlines a constitutional charter's capacity for imposing national standards on the provinces. This link appeared again in the Trudeau government's 1978 constitutional initiative<sup>8</sup> but was not part of the constitutional package which contained the new Charter. To have made a change in powers a *quid pro quo* for a charter of rights would not have fitted in very well with a political campaign in which the Charter was being sold as part of a "people's package" and provincial premiers were being chastised for trying to swap rights for powers. In any event, by 1967 that distant day when constitutional reforms should be undertaken had suddenly arrived. Speaking to the Canadian Bar Association as Justice Minister in 1967 Trudeau announced his government's conclusion that a constitutional Bill of Rights proposal was "the best basis on which to begin a dialogue on constitution reform between the federal government and provincial governments", and he emphasized that in taking this approach: "Essentially we will be testing—and, hopefully, establishing—the unity of Canada."<sup>9</sup>

After 1967 there were factors other than constitutional strategy which provided additional reasons for adopting a constitutional charter of rights. The application of the European Convention on Human Rights to the United Kingdom, Canada's accession to the International Covenant of Civil and Political Rights in 1976 and the enactment of human rights legislation by most of the Canadian provinces increased Canadian interest in a constitutional codification of basic rights.<sup>10</sup> The invocation of the War Measures Act in 1970 and the excesses of the R.C.M.P.'s Security Service

<sup>7</sup> Quebec and the Constitutional Problem, in Trudeau, *Federalism and the French Canadians* (1968).

<sup>8</sup> The Constitutional Amendment Bill (1978), p. iv.

<sup>9</sup> *Op cit.*, footnote 7, p. 54.

<sup>10</sup> See Bayefsky, *The Impact of the European Convention on Human Rights in the United Kingdom: Implications for Canada* (1981), 13 *Ottawa L. Rev.* 507 and Cheffins and Tucker, *Provincial Constitutions and Civil Liberties in MacDonald and Humphrey, The Practice of Freedom* (1979).

stimulated civil libertarian interest in a constitutional Bill of Rights, as did the Supreme Court's generally narrow interpretation of the "Diefenbaker" Bill. But I doubt that any of these developments had much to do with the Trudeau government's commitment to the Charter—except insofar as they indicated greater public support for such a measure.

Aside from the political and strategic advantages of the Charter, it may also have had some purely intellectual or even aesthetic attractions for Mr. Trudeau and some of his colleagues. Federal government position papers put forward the view that the rational approach to the constitution was to begin with a statement of the fundamental values of the Canadian political community.<sup>11</sup> This notion of constitutional rationality, of the constitution as a logical construct built on an explicit formulation of first principles, may be a manifestation of French rationalism and the civil law tradition with its penchant for deduction from codified principles in contrast with English empiricism and the inductive nature of common law. Even if there is some validity in this kind of ethnic stereotyping, it surely cannot account for the strength of the Trudeau government's political commitment to the Charter.

That commitment proved to be very strong indeed. A version of a constitutional Bill of Rights took pride of place in the Victoria Charter which Mr. Trudeau came so close to negotiating successfully with the provincial Premiers in 1971.<sup>12</sup> Again in 1978 when, in response to the electoral victory of the separatists in Quebec, the federal government embarked on another serious programme of constitutional reform, a constitutional charter, albeit one which at first would not bind the provinces, was given a prominent position.<sup>13</sup> But it was the inclusion of a constitutional Charter of Rights binding on the provinces in the package of constitutional change which Mr. Trudeau threatened to achieve, if necessary, unilaterally without provincial support that demonstrates how deeply he and his government believed in its benefits. At this point, when federal-provincial negotiations on the constitution were at an impasse, it would have been ever so much easier, from a political point of view, for the federal government to have proceeded simply with patriation and an amending formula.<sup>14</sup> The insistence on coupling a constitutional charter with patriation shows how strongly the Trudeau government believed in the nation-building potential of a constitutional charter. They would risk dividing the country in order that it might become more united. This nation-building

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<sup>11</sup> For a discussion of this tendency see Donald V. Smiley, *Canada in Question: Federalism in the Eighties* (3rd ed., 1980), pp. 71-72.

<sup>12</sup> *Ibid.*, pp. 76-79.

<sup>13</sup> The Constitutional Amendment Bill (1978), ss 5-29.

<sup>14</sup> For accounts of these negotiations see McWhinney, *Canada and The Constitution, 1979-82* (1982); Milne, *The New Canadian Constitution* (1981) and Zukowsky, *Struggle Over the Constitution: From the Quebec Referendum to the Supreme Court* (1981).

aspect of the Charter was the central thesis of Mr. Trudeau's final parliamentary speech on the Charter:<sup>15</sup>

Lest the forces of self-interest tear us apart, we must now define the common thread that binds us together.

Will the Charter fulfill the expectations of its political sponsors in promoting national unity? In the context of the immediate exigencies of Canada's constitutional debate the Charter did provide a useful counterpoise to demands for greater provincial powers. But the national unity benefits of such a manoeuvre were discounted, if not eliminated by Mr. Trudeau's unilateralism and by the failure, in the end, to secure the Quebec government's assent to the constitutional package. The thirst for more provincial power or more effective representation in national institutions evident in Quebec and western Canada has not been quenched by "the people's package". In the long run, the Charter's efficacy in contributing to national unity will depend not on its utility to federal politicians at a particular stage in the constitutional debate but on its real potential for strengthening the Canadian political community.

The most frequently and widely acclaimed unifying effect of a charter is its capacity to serve as a unifying symbol. The symbolic function of a constitutional charter was, for instance, emphasized by the Canadian Bar Association's Committee on the Constitution:<sup>16</sup>

A clear statement in the Constitution of the fundamental values all Canadians share would, we think, have an important unifying effect. It would inculcate in all citizens, young and old, a consciousness of the importance of civil liberties and an authoritative expression of the particular rights and liberties our society considers fundamental.

Lawyers and politicians seem very confident about the Charter's symbolic impact. And they may be right! Social scientists have stressed the important role that symbols play in shaping political attitudes and beliefs. Murray Edelman, for example, in his classic study of *The Symbolic Uses of Politics* goes so far as to suggest that all political constitutions are "largely irrational, in genesis and in impact".<sup>17</sup> But exactly how the emotional chemistry of laws as political symbols operates, in precisely what kind of circumstances a particular set of symbols (for instance a constitutional charter of rights) will have a particular effect (for instance strengthening national unity), has not been established.

My own intuition is that if the reality of a charter is confined to the symbolic level, it is unlikely to have a unifying effect. If the Charter is no more than a fancy document that hangs on the school-room wall, that is recited in citizenship classes and eulogized in after-dinner speeches, I doubt that it will have a significant impact, of any kind, on the attitudes of

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<sup>15</sup> House of Commons Debates, March 23rd, 1981, p. 8519.

<sup>16</sup> *Towards a New Canada* (1978), p. 15.

<sup>17</sup> (1970), p. 19.

citizens—except possibly to promote cynicism. This doubt is fortified by the experience of living for several years in one country, Uganda, whose constitution contained an elegant Bill of Rights but whose political leaders were not effectively constrained by any part of the constitution.<sup>18</sup> To take a less extreme example, I think it unlikely that the statement of rights and freedoms in the Soviet Union's constitution does much to enhance political allegiance in that country.<sup>19</sup>

Professor McWhinney contends that the Canadian Charter's symbolic power may be stultified by poor draftsmanship. He criticizes "the heavy, wooden quality" of the Charter's language and style. Its "technical lawyer's language", the "weasel-word exceptions" which qualify so many of the rights and freedoms and its excessive length will, he suggests, prevent Canada's Charter from achieving "the inspiration and grandeur of the American and French charters".<sup>20</sup> Personally I doubt whether less technical, and more inspiring language could by itself make much of a difference. The inspirational character of the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen derives at least as much from the historic significance of the revolutionary events with which these documents are associated as from their language. The phrasing of the United States Bill of Rights does not strike me as significantly more inspiring or less technical than the language of the new Canadian Charter. For Professor McWhinney the proviso in section 7 that an individual might be deprived of his right to life, liberty or security "in accordance with the principles of fundamental justice" is an example of the Canadian Charter's "timidity". But is this provision really so different from the United States Constitution's Fourteenth Amendment which stipulates, among other things: "nor shall any State deprive any person of life, liberty, or property, without the due process of law;"?

It seems to me that the trend in the drafting of modern bills of rights is to spell out in fairly precise language major qualifications of the various rights and freedoms. Take, for example, the European Convention of Human Rights and the International Convention of Civil and Political Rights.<sup>21</sup> The rights and freedoms inscribed in both are replete with qualifications phrased in language which is certainly as prolix as anything to be found in the Canadian Charter.<sup>22</sup> Nor do I find the language of

<sup>18</sup> See Jorgensen, *Uganda: A Modern History* (1981) and Morris and Read, *Uganda: The Development of Its Laws and Constitution* (1966).

<sup>19</sup> See Dmytryshn, *USSR: A Concise History* (3rd ed., 1978), pp. 608-609.

<sup>20</sup> *Op. cit.*, footnote 14, pp. 55-57.

<sup>21</sup> Both are reproduced in Brownlie, *Basic Documents on Human Rights* (2nd ed., 1981).

<sup>22</sup> The opposite criticism to McWhinney's is that the qualifications in the Canadian Charter are not specific enough. For instance the Canadian Charter does not contain provisions like Art. 4 of the International Convention or Art. 15 of the European Conven-



charters in the constitutions of such modern democratic states as West Germany, India or Ireland—all of which were, in part, intended to be nation-building instruments—either dazzling or succinct. All of these documents make tedious reading. The trend towards explicit qualification reflects, I believe, the greater sophistication of peoples who have learned through historical experience that no rights and freedoms are so “fundamental” that they can be enjoyed in an absolute sense. We may well be past that point in history where popular belief in the merits of a regime can be sustained or fortified by grandiloquent constitutional language.

There are certain parts of the Charter which are clearly intended to be unifying not only symbolically but also in terms of their real effects on government policy and citizens’ rights. These are the sections dealing with mobility and language rights. The mobility rights in section 6 aim at overcoming the “balkanization” of Canada by giving citizens the right “to take up residence and to pursue a livelihood anywhere in Canada without discrimination based on the previous province of residence”.<sup>23</sup> The language clauses, by giving formal constitutional recognition, for the first time, to English and French as Canada’s Official Languages, by extending the constitutional right to use these languages to dealings with the executive branch of the federal government and with all branches of government in New Brunswick and, most importantly, by establishing minority language education rights for the English in Quebec and the French outside of Quebec, aim at giving greater reality to the ideal of the whole of Canada being a homeland for French-speaking as well as English-speaking Canadians.

For the Liberal government these sections were the heart of the Charter. Their importance is underlined by the fact that section 33 which permits the federal and provincial legislatures to override sections of the Charter does not apply to these rights. In his speech introducing the Charter to the House of Commons, Mr. Chretien, the Minister of Justice, referred to these rights as “fundamental to what Canada is all about”.<sup>24</sup> They express the pan-Canadian nationalism which, at the level of ideology, is the counter to the nationalism of Quebec separatism. Since entering politics in the 1960’s Mr. Trudeau had, in a sense, been engaged in a rival programme of nation-building to that of Quebec independentistes. At the centre of this programme was the task of persuading the Québécois that they could best fulfill themselves by enjoying the opportunities flowing from membership in a Canadian community wider than Quebec.<sup>25</sup> It was for this reason that

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tion identifying rights and freedoms which are not to be abridged even at times of public emergency. Instead s. 1 applies to all the rights and freedoms in the Charter, limits that are “reasonable” and “can be demonstrably justified in a free and democratic society”.

<sup>23</sup> The Hon. Jean Chretien, House of Commons Debates, Oct. 6th, 1980, p. 3286.

<sup>24</sup> *Ibid.*

<sup>25</sup> This philosophy is clearly articulated in A National Understanding: Statement of the Government of Canada on the Official Languages Policy (1977).

these nationalist provisions of the Charter, especially the language rights, were of such great importance to Mr. Trudeau and his Quebec colleagues. They were also the only part of the whole constitutional package which, by any stretch of the imagination, Mr. Trudeau and his federalist allies could point to as fulfilling the commitment they had made during the Quebec Referendum campaign to "constitutional renewal".<sup>26</sup>

What is the potential of these sections for realizing their nationalist objectives? So far as mobility rights are concerned, section 6 is not likely to make any great inroads on the economic balkanization of Canada. To begin with it deals only with labour mobility and not with other major obstacles to a Canadian common market such as discriminatory tax and government purchasing policies.<sup>27</sup> Moreover, section 6's impact on labour mobility was severely curtailed by the qualification introduced as part of the November Accord between the federal government and nine provinces. This proviso will shield from the Charter the protective employment policies of provinces experiencing above average unemployment.<sup>28</sup> Still, section 6 may turn out to be an important check on provinces like Alberta endeavouring to preserve their relative prosperity by denying provincial services to Canadians from other provinces.<sup>29</sup>

The language rights relate to a more intractable dimension of the national problem—the question of identity. Here, section 23, the language of education clause, makes a more significant contribution than sections 16 to 20 which deal with the language of government. The latter do little more than elevate statutory rights into constitutional rights. Any symbolic gains for national unity that may flow from such a change are largely offset by the persistence of the government of Ontario, the province with the largest Francophone minority, in refusing to give constitutional status to bilingualism in the public life of that province. The language of education section is bound to spark controversy in the short run. In Quebec it collides directly with educational policies emanating from Franco-Quebec nationalism that deny English Canadians who move to Quebec access to the province's English schools. This collision was softened by a last minute concession that makes the rights of new Canadian citizens whose English education

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<sup>26</sup> On the need to honour this commitment to "constitutional renewal" see the Speech of Government House Leader, The Hon. Yvon Pinard, House of Commons Debates, Oct. 15th, 1980, p. 3707.

<sup>27</sup> For a catalogue of these impediments see The Hon. Jean Chretien, Minister of Justice of Canada, *Securing the Canadian Economic Union* (1980). For a more analytical treatment see Safarian, *Canadian Federalism and Economic Integration* (1974).

<sup>28</sup> S. 6(4).

<sup>29</sup> S. 6 does not explicitly refer to the right to receive provincial public services but the reference in s. 6(3) to "reasonable residency requirements as a qualification for the receipt of publicly provided social services" might be taken to imply that the right "to move and take up residence" and "to pursue the gaining of a livelihood" in any province necessarily entails a right to receive the public services provided to provincial residents.

was obtained outside of Canada to send their children to Quebec's English schools conditional on the agreement of the Quebec legislature.<sup>30</sup> The rights which section 23 extends to the small francophone minorities in the western provinces will do nothing to reduce alienation in the west where there is little respect for the fundamental nature of French-English dualism in the Canadian experience.

Nevertheless it could turn out that these divisive effects were only short term and that in the longer run were worth risking if the Charter's recognition of bilingualism makes it more likely that Canada will survive as a common homeland for English and French-speaking North Americans. But the rights contained in the Charter, even when added to all that has been done to promote bilingualism outside of the Constitution,<sup>31</sup> may be too little too late to overcome the legacy of political and judicial policies which in the late 1800's and early 1900's gave priority to provincial rights over minority cultural rights and thereby prevented the building of a dualistic society on the new Canadian frontier.<sup>32</sup> I suspect that if Canada overcomes Quebec separatism, it will be not so much because recognition of bilingualism in the "new" Canadian Constitution is decisive in the battle for the hearts and minds of the Québécois but because of the exhaustion of nationalist politics brought on by more compelling economic concerns.

But it is neither through the Charter's nationalist provisions nor its symbolic force that the Charter is likely to have its strongest centripetal effect on the Canadian polity. I think the Charter's nationalizing influence will be felt most through a process scarcely mentioned by its political sponsors—the process of judicial review. It is primarily through judicial decisions interpreting the Charter—applying its general terms to particular laws and government activities—that the Charter will come to play an important part in the on-going political life of Canada.

Now it may seem rather perverse to think of judicial interpretation of the Charter as a unifying process. Judicial decisions based on the Charter will frequently be concerned with sensitive political issues and are therefore bound to be controversial. Consider, for instance, the sharp divisions of opinion within Canadian society on such issues as censoring pornogra-

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<sup>30</sup> Constitution Act, 1982, which is part of the Canada Act 1982, 1982, c. 11 (U.K.), s. 59. The significance of this concession may be significantly reduced by s. 23(2) which is now in force in Quebec and extends the right to minority language education to citizens' children who are brothers or sisters of a child who "has received or is receiving" in Canada education in the minority language. Thus once Quebec parents become citizens, providing one of their children has attended or is attending an English school somewhere in Canada (e.g. in Ontario), then, even if they themselves were not educated in English, they should be able to place all the rest of their children in an English school in Quebec.

<sup>31</sup> See Gérald A. Beaudoin, *Linguistic Rights in Canada*, in Macdonald and Humphrey, *op. cit.*, footnote 10.

<sup>32</sup> See W.L. Morton, *Manitoba Schools and Canadian Nationality, 1890-1923* (1951), and F.R. Scott, *The Privy Council and Minority Rights*, [1930] *Queen's Q.* 668.

phy, school prayers, abortion, police powers, compulsory retirement and affirmative action. Judicial decisions on claims made under the Charter will touch on all of these issues. American experience demonstrates that judicial decisions in these areas are bound to anger the losers as much as they please the winners. Given the political sparks that judicial interpretation of the Charter will set off, why do I ascribe unifying consequences to the process of judicial review?

Judicial decisions on the Charter will be unifying in that the very debates and controversies they produce will be national and on issues that transcend the regional cleavages which are usually a feature of national political controversy in Canada. Court cases on the Charter normally will not pit region against region or the provinces against the "feds".<sup>33</sup> Instead the principal protagonists will be interest groups and aggregations of individuals from all parts of Canada. For instance, litigation dealing with police powers (the first major policy field in which judicial interpretation of the Charter is likely to be of political importance) will find small "c" conservatives aligned against small "l" liberals all across the country. Although the controversy will be intense, it will be waged on a national level in the arena of national politics and on grounds that do not call into question the legitimacy of Canada as a national political community. It is in this sense that the Charter may well turn out to be a nation-building instrument.

There is an even more direct sense in which judicial interpretation of the Charter will be a nationalizing process. In interpreting the Charter, the Supreme Court of Canada, at the top of the judicial structure, will set uniform national standards—often in policy areas which otherwise would be subject to diverse provincial standards. Film censorship, school prayers and discrimination in employment practices are all clear examples. In contrast to the executive and legislative power, the judicial power in Canada is essentially unified. Policy directives flowing from Supreme Court decisions on the Charter are transmitted through a single hierarchy of appeals that binds all the courts in the land, and shapes the rights of all Canadians and the powers of all who govern.

It is true that section 33 by permitting legislatures to override certain sections of the Charter—for five years at a time—modifies judicial supremacy. However, because of the adverse political consequences that a government would usually risk in using this power, I very much doubt that it will be frequently used.<sup>34</sup> In the case of Quebec, where the P.Q.

<sup>33</sup> An important exception may be the decision of Quebec's Superior Court holding unconstitutional provisions of Quebec's Bill 101 denying access to Quebec's English schools to children of parents who received their English education in some other part of Canada. *Quebec Association of Protestant School Boards v. Le Procureur Général du Québec*, (1983), 140 D.L.R. (3d) 33 (Que S.C.).

<sup>34</sup> I have developed this argument more fully in *The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts* (1982), 25 Can. Pub. Admin. 1.

Government has already purported to have used the section on a blanket basis, it has been invoked not to protect provincial policies from the impact of judicially established standards but as part of a campaign challenging the legitimacy of changes in the constitution made without the consent of Quebec's provincial government.<sup>35</sup> This symbolic use of section 33 will, I believe, be confined to Quebec. While this rejection of the Charter was to be expected under a Quebec government committed to Quebec's independence, it will be interesting to see whether a non-separatist Quebec government maintains this ironic "special status" of Quebec. Elsewhere there will be a great deal of political pressure exerted against a province's immunizing itself from the Charter. This is apt to be especially true where the Supreme Court has established a new national standard—for example, the standard of reasonableness which must be met by provincial censorship arrangements. There may be difficulty in securing effective compliance with the Supreme Court decisions from all those whose behavior in the field of activity concerned is supposed to be governed by the court's decision.<sup>36</sup> But direct rejection by the legislature of the Supreme Court's definition of a constitutional requirement is quite another thing.

In selling the Charter, the federal government tended to ignore this dimension of the Charter. Federal representatives were at pains to point out that the Charter involves "no transfer of powers from the provinces to the federal government".<sup>37</sup> These disavowals of any centralizing implications of the Charter are entirely valid providing one interprets "government" narrowly to exclude the judicial branch. However, in this day and age, it is only on the basis of a blind, and most anachronistic view of the judicial process that the policy making role of the judiciary, above all in interpreting the broad language of a constitutional Bill of Rights, could be denied. Once the discretion and choice necessarily involved in interpreting that language is recognized, the centralizing tendencies of judicial review must be acknowledged. As the Supreme Court's capacity to function as a kind of national Senate reviewing the reasonableness of provincial laws and policies becomes evident, the reality of judicial power will overtake the rhetoric of federal politicians. Among other things, this will mean that the federal government's monopoly of the power to appoint judges, not only to the Supreme Court of Canada but to all of the higher provincial courts, will

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<sup>35</sup> Bill 62 was introduced in the Quebec National Assembly on May 5th, 1982, just 19 days after the Charter came into force and was assented to on June 23rd, 1982. It is arguable that this blanket use of s. 33 without a separate legislative Act on each exempted piece of legislation is unconstitutional. The 5-year limitation on use of the override power suggests that it was intended the power be used only through deliberate and responsible decision-making by the legislature.

<sup>36</sup> To the best of my knowledge no studies of compliance with decisions of the Supreme Court of Canada have been carried out. For a review of literature on compliance with constitutional decisions of the U.S. Supreme Court see Becker, *Comparative Judicial Politics: The Political Functioning of Courts* (1970), pp. 244-246.

<sup>37</sup> The Hon. Jean Chretien, House of Commons Debates, Oct. 6th, 1982, p. 3283.

be increasingly questioned. To be able to maintain that a transfer of power from politicians to judges entails "no transfer of power from the provinces to the federal government" it may become necessary to give provincial governments a share of the action in the judicial appointment process.<sup>38</sup>

Such a development assumes a widening recognition of the importance of judicial power in determining the actual policy consequences of a constitutional charter. Public awareness of that power is still in the making. The popularity of the Charter was based primarily on a belief that one basic policy would flow automatically from the Charter—the better protection of fundamental rights and freedoms. It is to the analysis of that belief and the likelihood of the Charter's fulfilling it that I now turn.

## II. *Protecting Rights and Freedoms.*

"Protecting rights and freedoms" is a deceptively simple idea. Those who accept such a slogan as a fair summary of what a constitutional Bill of Rights is all about could hardly be expected to be anything other than enthusiastic about adding a charter to the Canadian Constitution. As Yvon Pinard, the government's House Leader, echoing so many of his colleagues, put it, "what is wrong with the fundamental freedoms of Canadian citizens being protected forever by the Canadian constitution"?<sup>39</sup> What indeed could possibly be wrong with such a project if that was basically all there was to it? Surely all of us would be mad to reject or even to question a proposal that is guaranteed to protect our individual rights and freedoms forever.

While this simplistic language undoubtedly assisted in winning public support for the Charter, it is not very helpful in understanding the real political consequences of such an instrument. The trouble with this language is that it tends to reify fundamental rights and freedoms, by treating them as things which people either possess in their entirety or not at all. But in our actual civic experience we do not encounter these rights and freedoms in such a zero-sum fashion. We enjoy more or less of them. What we have to settle about these rights and freedoms is not whether or not we will "have" them but what limits it is reasonable to attach to them and how decisions about these limits should be made.

Those parts of the Charter which deal with what might be termed universal rights and freedoms (as opposed to rights and freedoms based on the particular circumstances of Canadian history) are related to core values or ideals of all contemporary liberal democracies: political freedom, reli-

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<sup>38</sup> For some time there has been agreement in principle between the two levels of government on the need for a constitutional amendment which would give provincial governments a voice in selecting Supreme Court justices. For a review of constitutional proposals to achieve this end, see W.R. Lederman, *Current Proposals for Reform of the Supreme Court* (1979), 57 *Can. Bar Rev.* 687.

<sup>39</sup> House of Commons Debates, Oct. 15th, 1980, p. 3704.

gious toleration, due process of law and social equality. In Canada for some time now there has been no serious debate about the *minimum* extent to which each of these values should be realized in the laws and practices of our state. The right to criticize the government and to organize non-violent opposition to it has been basically unquestioned since the middle of the last century. Since the Quebec Act of 1774, it has been accepted that individuals should not suffer civil disabilities because of their religious beliefs nor be forced to subscribe to the tenets of any religion. At least since the advent of legal aid, Canadians charged with a criminal offence have had access to a fair trial. As in other liberal democracies, social equality has been the last of the core values to gain effective recognition. But now there is wide-spread acceptance of the ideal that each person should be treated as an individual on his or her merits and not penalized or denied opportunities by the state because of gender, skin colour, ethnic background or other distinguishing characteristics of birth.

As we move out from the central core of these values, we encounter restrictions and limits on each, and considerable controversy about the right limits. Have we gone far enough in removing restrictions on political speech or should we go further and narrow the civil wrong of defamation when politicians are the targets of criticism, or perhaps eliminate the crime of inciting race hatred? Should the protection of political speech extend to the public exhibition of all kinds of sexual activities? Is it right to limit the freedom of broadcasters in order to nurture our national culture? Should religious freedom be extended to the point where no one should suffer an economic penalty (like closing a business on Sundays) in order to comply with a law originally introduced for religious reasons, or to the point where no one is obliged to obey a law that offends his religious or philosophic beliefs—no matter how eccentric those beliefs? How far back in the pre-trial proceedings of our criminal justice system should we extend the right to counsel? Should it apply (and in the case of indigent persons, be paid for by the state) to all offences however minor—even to infractions of parking by-laws? Should the police be able to use evidence from private premises only when they have obtained it through a judicially authorized search warrant? What about evidence they come upon by chance in effecting an arrest or responding to a citizen's complaint? Should we begin to make amends for inequalities suffered in the past by adopting laws that discriminate against males and Caucasians? Should the premises of private clubs that practice racial discrimination receive police protection? Should our courts enforce wills that discriminate on the basis of religion or race or gender? How far should we go in ensuring that all of our public facilities are fully accessible to the physically handicapped?

It is in the way we deal with these questions that the Charter will have its main effect. A constitutional charter guarantees not that there will be no limits to rights and freedoms but that a change will be made in the way our society makes decisions about these limits. At the initial level, decisions on

these limits will still be made, for the most part, by the legislature and executive, although where common law remains important—for instance, contempt of court, the law of libel and the law of evidence—even the initial decisions will be judge-made rules of law. A charter introduces a second level of decision making in which decisions made at the first level are subjected to a process of judicial review triggered by litigants who claim that a particular limit is excessive or unreasonable. Not only that, but what is most dramatic about this process when it is based on a constitutional as opposed to a statutory charter—and accounts, of course, for the language of “entrenchment” and “guarantees”—is that the results of this second level of decision-making, especially when they issue from the highest court, are very difficult to change. These judicial decisions can only be altered by the difficult process of constitutional amendment,<sup>40</sup> by a change in judicial outlook (resulting, perhaps, from a change in the composition of the bench) or through the exercise of that unique Canadian option—the legislative override power.

Considered from this point of view, the legislative override is not as contradictory a feature of the new Canadian Charter as some of its detractors have claimed. Section 33 has been denounced as incompatible with the Charter’s basic purpose.<sup>41</sup>

The whole object of a charter is to say, you never opt out, they’re inalienable rights. If you believe in liberty, if you believe in rights, the rights are not inalienable.

But note how this objection assumes the zero-sum, absolute nature of rights and freedoms. Once the fallaciousness of that assumption is recognized, and the hard issues concerning the proper limits of rights are acknowledged, the legislative override appears in a more acceptable light. The legislative override simply enables a legislature to put off for five years judicial review of its decision to accept a particular limit on a right or freedom.

In treating the Charter as primarily affecting the way we make decisions about the limits on fundamental rights and freedoms, I do not mean to call into question beliefs about the fundamental nature of certain rights or principles of government. I believe that the right to government based on

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<sup>40</sup> Except for national language rights, all other sections of the Charter can be amended by the general procedure provided for in the Constitution Act, 1982. This procedure requires resolutions of the House of Commons and Senate (or the House of Commons alone if after 180 days the Senate has not approved a resolution) and of the legislative assemblies of at least two-thirds of the provinces that have at least 50% of the population of all the provinces. A dissenting province can opt out of an amendment affecting the rights of its legislature or government. Amendments affecting the right to use English and French require the support of the House of Commons and the legislatures of all the provinces, unless the amendment relates to one or more but not all the provinces in which case only the support of the provinces affected is required.

<sup>41</sup> Edward Greenspan as quoted in *We Feel Betrayed on Charter*, National, Feb. 1982, p. 26.



the consent of the governed rather than on coercion, freedom from the theocratic enforcement of a particular religious creed, the right to be secure from arbitrary and unlawful deprivations of one's personal liberty or property, and recognition of the essential dignity of every human being regardless of race, colour, creed or gender are basic requirements of good government that derive from man's nature. For countries in the liberal democratic tradition these principles constitute fundamental purposes of government. As general principles, I cannot see that they are any less fundamental to liberal democracies without constitutional charters—for example, Australia, pre-charter Canada, and the United Kingdom—than they are in countries with constitutional charters—for example, Ireland, Japan, the United States and West Germany.<sup>42</sup> What I am insisting upon is the difference between a right stated as a general principle and operative rules of law affecting that principle. For instance, the political traditions and practices of liberal democracies, those with and those without charters, recognize the fundamental principle of government by consent and its corollary that such consent requires, among other things, freedom to criticize the government and to persuade one's fellow citizens that the government should be changed by electoral means. But among the liberal democracies there are different rules and practices concerning the extent to which there is freedom to advocate the use of violence to change the regime to one that does not tolerate political opposition, or to the extent to which free expression should extend outside the political realm to public displays of lewd or violent acts or commentary on trials in progress. These various rules and limits affect the outer limits of fundamental rights and freedoms while preserving their inner core.

The expectation of those who supported a constitutional charter on the grounds that it would guarantee rights and freedoms might be more realistically phrased as a belief that a charter will at least work against tightening existing limits on rights and freedoms and might even lead to the reduction of some restrictions. In this way, it might be argued, a constitutional charter will preserve and possibly expand fundamental rights and freedoms.

There can be no doubt that the Charter will promote a more systematic review of public policies in terms of the rights and freedoms included in the Charter. At least initially, this review will involve more than the judiciary. Already police officials have been taking steps to bring police practices into line with the standards of due process set out in the Charter.<sup>43</sup> Ministries of the Attorney General have been scouring statute books for possible

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<sup>42</sup> For a comparison of the treatment of rights and freedoms in the constitutions of Australia, Canada, Ireland, Japan, the U.S.A. and West Germany see Murphy and Tanenhaus, *Comparative Constitutional Law: Cases and Commentaries* (1977).

<sup>43</sup> *New Ground Rules for Police Prosecutors: Charter's Effect on Legal System to be Studied*, Toronto Globe & Mail, Jan. 20th, 1982.

breaches of the Charter.<sup>44</sup> The three-year postponement of the coming into force of the equality rights in section 15 is designed to facilitate an intensive review of discriminatory aspects of law and policy so that potential conflicts with the Charter can be minimized.<sup>45</sup> Even though the Charter does not contain an equivalent of section 3 of the Canadian Bill of Rights which required the Minister of Justice to scrutinize draft regulations and Bills for inconsistencies with the Bill of Rights,<sup>46</sup> still it is likely that at both the federal and provincial levels legal advisers to the government will examine legislative proposals in the light of the new Charter's provisions.

But the judicial branch will be the most important forum for the systematic application of Charter standards. Judicial opinions will be authoritative on the specific meanings to be given to the Charter's general principles. In most instances judicial decisions will be final and definitive on the proper limits of rights and freedoms. Moreover, initiation of the judicial review process is essentially independent of the executive and legislative branches of government. Where constitutional rights and freedoms rather than the division of powers are at issue, the process of judicial review will normally be "turned on", so to speak, by individuals and groups, not by governments.<sup>47</sup> As a result the spectrum of interests that can influence the agenda of law reform is considerably widened.

Already in the first few months under the Charter private litigants have instigated judicial review of a substantial number of laws and policies. The list includes:

- a provincial tax legislation providing for a lien on property associated with but not owned by a delinquent tax-payer;<sup>48</sup>

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<sup>44</sup> For instance, Mr. Jim Macpherson of Saskatchewan's Attorney General's Department is reported as indicating that "the provincial government had initiated a review of its own legislation and that over 300 sections had thus far been identified which may offend the Charter," *National*, May, 1982, p. 21.

<sup>45</sup> S. 32(2).

<sup>46</sup> S. 3 of the Canadian Bill of Rights also required the Minister of Justice to report inconsistencies to the House of Commons. Though Ministers of Justice have rarely, if ever, acknowledged inconsistencies, the section has prompted parliamentary debates questioning the Minister's judgment with regard to particular Bills. See Tarnopolsky, *op. cit.*, footnote 5, pp. 125-128.

<sup>47</sup> S. 32(1) states that the Charter applies to the legislatures and governments at the federal, provincial and territorial levels so that one would expect court cases to be initiated by private parties challenging legislation or government action. However, under the reference case procedure it is possible for federal or provincial governments to request a judicial opinion on whether enacted or proposed legislation violates the Charter. Also governments can assist the initiation of court challenges under the Charter by financing interest groups and by intervening in support of interest groups as the federal government has done in the challenge launched by English parents against Quebec's Bill 101.

<sup>48</sup> *The Queen in right of New Brunswick v. Fishermen's Wharf Ltd.*, April 28th, 1982, N.B.Q.B., not yet reported.

- police seizure of evidence for which a search warrant was not obtained but which was in full view in private premises they entered legally;<sup>49</sup>
- a section of the Narcotics Control Act requiring the accused to establish that possession of narcotics was not for the purpose of trafficking;<sup>50</sup>
- a provincial law forcing striking school board employees back to work;<sup>51</sup>
- the firing of a federal civil servant for criticizing metric conversions programme;<sup>52</sup>
- the power of anti-combines investigators to search newspaper offices;<sup>53</sup>
- a municipal by-law preventing strippers from uncovering their private parts;<sup>54</sup>
- provincial censorship restrictions on the public display of pornographic films;<sup>55</sup>
- Law Society rules preventing non-citizens from practicing law;<sup>56</sup>
- the application of obscenity provisions in the Criminal Code to homosexual publications;<sup>57</sup>
- the limitation on the presumption of innocence implicit in the offense of possessing housebreaking tools;<sup>58</sup>
- the inability of a person charged with impaired driving to independently assess the validity of a breathalyzer test.<sup>59</sup>

I doubt that very many, indeed if any, of these matters were slated for consideration in the immediate future by the responsible legislatures. Indeed it is the unpredictable character of the law reform programme inaugurated by a constitutional charter which I find so intriguing. This

<sup>49</sup> *Regina v. Shea* (1982), 7 W.C.B. 365 (Ont. Prov. Ct).

<sup>50</sup> *Regina v. Therrien*, May 5th, 1982, Ont. Co. Ct. not yet reported.

<sup>51</sup> *Toronto Globe & Mail*, April 26th, 1982.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Southam Inc. v. Hunter et al.*, May 20th, 1982, Alta Q.B., Cavanagh J., not yet reported.

<sup>54</sup> *Toronto Globe & Mail*, April 26th, 1982.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Re Skapinker and Law Society of Upper Canada* (1982), 15 A.C.W.S. (2d) 82, July 19th, 1982, Ont. H.C., Carruthers J.

<sup>57</sup> *Toronto Globe & Mail*, June 3rd, 1982.

<sup>58</sup> *R. v. Holmes* (1982), 8 W.C.B. 41, June 18th, 1982, Ont. Co. Ct, Clements Co. Ct J.

<sup>59</sup> *R. v. MacDonald*, July 15th, 1982, Ont. Prov. Ct, Charles Prov. Ct J., not yet reported.

point is confirmed by the experience of other countries which some time ago superimposed a constitutional charter on an established legal order. In West Germany and Ireland for example constitutional litigation has led to judicial review of old laws and a consideration of relatively new policies quite independently of the priorities of the politicians and officials who control the other branches of government.<sup>60</sup>

This opening up of the law reform process may be the major democratizing consequence of a constitutional charter. But what are the substantive results of this process likely to be? There can be no doubt that old and new restrictions on rights and freedoms are more apt to be challenged under a charter. But will the results of these challenges necessarily expand rights or freedoms or prevent their contraction? Here we must acknowledge a great deal of uncertainty. The political orientations and legal philosophies of the judiciary are not static. If American experience with constitutional "guarantees" teaches us anything it is that over the decades or even centuries of judicial interpretation we should expect periods of both judicial conservatism and judicial liberalism. Because politicians play the crucial role in the selection of judges it is unlikely that the ideological profile of the judiciary will differ dramatically from that of the countries' dominant political elite. Changes in judicial attitudes may lag behind changes in the political culture, but in the long run these attitudes will reflect major shifts in popular political orientations.<sup>61</sup>

Even if Canada does experience a relatively liberal period of judicial review under the Charter, it does not follow that all of the consequences for fundamental rights and freedoms will be positive. To begin with rights and freedoms conflict with one another. A freedom may be expanded at the expense of another right. It is not difficult to think of possibilities: review of our laws concerning contempt of court may expand free speech while adversely affecting the right to a fair trial;<sup>62</sup> contraction of police powers through interpretation of legal rights may better protect the rights of criminally accused while diminishing the effective protection to the right to life and personal security of the victims of crime. Nor can it be said that the rights of minorities are bound to be beneficiaries of a liberally interpreted charter. Leaving aside the question of why in a democratic society the views of minorities should be systematically favoured on basic policy questions over the view of the majority, there is the difficulty of identifying

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<sup>60</sup> See Kommers, *Judicial Politics in West Germany* (1976), esp. ch. 6 and Kelly, *Fundamental Rights in the Irish Law and Constitution* (1961).

<sup>61</sup> For an analysis of how the U.S. Supreme Court as a constitutional arbiter "is inevitably a part of the dominant national alliance", see Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker* (1958), 6 *J. of Pub. L.* 294.

<sup>62</sup> In *Re Regina v. Begley et al.*, Aug. 27th, 1982, Ont. H.C., Smith J., not yet reported, the court acknowledged a conflict between freedom of the press in s. 2(b) and the right to a fair hearing in s. 11(d) and held that the latter should take priority where a trial court had banned disclosure of the fact that the accused had asked for a change of venue.

the relevant minority on the legislative issues which will be the subject of judicial review. On the pornography issue, for instance, which is the preferred minority—the conservatives who believe present restrictions provide insufficient protection of human dignity or radicals who regard these same restrictions as an illegitimate encroachment on free expression?<sup>63</sup> On many of the issues to be decided under the Charter the interested public consists not of a majority and *the* minority but of a number of minorities some of which will feel benefited by and others which will feel offended by the outcome of judicial review.

Lawyers are too prone to think of rights and liberties entirely in legal terms. They are apt to ignore the possibility that judicial decisions which remove or narrow legislative restrictions on rights and freedoms can have the effect of expanding social or economic constraints. The issues raised by the Kent Commission on corporate concentration of the press provide a good illustration.<sup>64</sup> It is possible that the courts will find legislation enacted in response to the Kent Commission to be an unconstitutional violation of “freedom of the press and other media of communication”. If this occurs, it would mean the continuation of restrictions on the expression of political opinion stemming from the concentration of ownership of the means of mass communication. Harold Innis warned Canadians some years ago of the bias which results from viewing freedom of speech through the prism of an excessive legalism.<sup>65</sup> It would be a pity if adoption of a constitutional charter of rights blunted our capacity to recognize that the state is not the only centre of power in our society capable of restricting freedom or equality or of abusing rights.

Here again we encounter the complexity of rights and freedom issues. Rights and freedoms do not form a simple piece of whole cloth which by some new constitutional mechanism can be made to expand in a single direction. Around any civil liberties issue there will likely be a cluster of rights and social interests some of which will be affected positively and others of which will be affected negatively by contracting a legal restriction on a particular right or freedom. This does not mean that we must be agnostic about what is the right way to treat an issue or that there is no better way than that embodied in the existing legislative arrangements.<sup>66</sup> But it

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<sup>63</sup> For a discussion of these issues see Clor, *Censorship and Freedom of Expression: Essays on Obscenity and The Law* (1971).

<sup>64</sup> Report of Royal Commission on Newspapers (1981).

<sup>65</sup> Innis, *The Bias of Communication* (1951). See especially his essay in this volume on *Technology and Public Opinion in the United States*.

<sup>66</sup> One theory of how right solutions may be arrived at by the judiciary is put forward by Ronald Dworkin in *Taking Rights Seriously* (1978). Dworkin distinguishes questions of principle concerning individual or group rights from policy questions concerning the general welfare of the community. Unlike the latter, the former he argues can be determined correctly by non-elected judges if they are successful in identifying the hierarchy of principles upon which a society's institutions are based. Even if we accept Dworkin's

does suggest how facile it is to regard a broad liberal construction of a guarantee as always yielding the most reasonable balance—the result which provides the fairest treatment of rights and freedoms.

There is also the possibility that the courts will render conservative decisions—that is decisions that uphold existing laws and practices as not violating rights and freedoms or at least as not constituting unreasonable limitations on these rights and freedoms. The libertarian enthusiast of a charter of rights may think that while such decisions will be disappointing in that they represent missed opportunities for expanding rights and freedoms, still such decisions cannot reduce rights and freedoms. Conservative decisions, it might be contended, may not push out the limits on rights and freedoms but neither will they push those limits in. But this argument overlooks the way in which a decision upholding existing arrangements as constitutional can legitimize the status quo. There may be a tendency under a constitutional charter of rights and freedoms to accept as a corollary of the proposition that “if it is unconstitutional it must be wrong” the proposition that “if it is constitutional it must be right”. There is an element of this in American constitutional history. The Supreme Court decision in *Plessy v. Ferguson*<sup>67</sup> did not establish racial segregation in American schools, but by putting the constitutional seal of approval on separate but equal facilities it created an additional obstacle for proponents of integration. In Canada it is well within the realm of possibilities that if the Charter had been in force during the 1970 October crisis the Supreme Court would have found the restrictions imposed on civil liberties under the War Measures Act to be “reasonable” and “demonstrably justified in a free and democratic society”. Such a decision would have made it even more difficult than it already is to mobilize political support for much needed reforms of Canada’s emergency legislation.<sup>68</sup>

The point in questioning libertarian expectations of the constitutional Charter is not to renew the debate on whether Canada should “entrench” rights. For all practical purposes that debate is over. Canada has a constitutional charter and all of us, its former opponents and supporters alike, must learn to live with it intelligently. To do this it is necessary to discard the rhetoric of the Charter’s political salesmen and adopt a more realistic appraisal of the Charter’s potentialities. Such an understanding requires that we bear in mind the Charter’s consequences not only for policy results but also for the policy process.

The principal impact of a charter on the process of government can be neatly summarized as a tendency to judicialize politics and politicize the

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formulation, it does not follow that the judicial treatment of rights is necessarily correct and the legislature’s treatment necessarily wrong.

<sup>67</sup> (1896), 163 U.S. 537.

<sup>68</sup> See, for instance the proposals contained in *Freedom and Security Under the Law* (Second Report of the Commission of Inquiry Concerning Certain Activities of the R.C.M.P., 1981), Part IX, ch. 1.

judiciary. The political leaders who led the campaign for the Charter gave little attention to this consequence of a charter. When they did refer to it, they did so in a very optimistic vein. Mr. Chretien, for instance, in acknowledging the important policy questions which judges will have to decide in interpreting the language of education section of the Charter, said:<sup>69</sup>

I think we are rendering a great service to Canada by taking some of these problems away from the political debate and allowing the matter to be debated, argued, coolly before the courts with precedents and so on.

Unquestionably Canada can benefit from the rationality which a thoroughly researched, well reasoned judicial decision can bring to the resolution of a difficult question of social or political justice. Such benefits will contribute to national unity if cogent judicial decisions help build a stronger national consensus on such historically divisive issues as language rights. But, while acknowledging these possible benefits, we should not lose sight of the possibility that excessive reliance on litigation and the judicial process for settling contentious policy issues can weaken the sinews of our democracy. The danger here is not so much that non-elected judges will impose their will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions and the great bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for working out reasonable and mutually acceptable resolutions of the issues which divide them.

Mitigation of this danger to Canadian democracy will require, on the part of both judges and the public, a sensitivity to the hazards of a judicial imperium. It would be a tragic self-delusion for judges to believe that they can escape the dilemmas of the new power which the Charter has thrust upon them by resorting to a kind of knee-jerk conservatism. An automatic upholding of virtually everything challenged under the Charter would bestow the mantle of constitutionality on all manner of legislation, government practice and police activity. It would be equally unfortunate if Canadian judges were to go to the other extreme of "government by judiciary" and become guilty of what an American critic of the United States judiciary refers to as "a kind of moral arrogance and judicial imperialism in undertaking to solve social problems for which they lack the competence, wisdom, or, for that matter, charter to undertake".<sup>70</sup>

No simple recipe for avoiding these extremes can be written. But there is one change in the methodology of judicial decision making that Canadian judges should consider. That is softening, if not discarding, the taboo against the use of legislative history in interpreting the general language of

<sup>69</sup> Minutes of Proceedings and Evidence of the Special Committee of the Senate and of the House of Commons on the Constitution, Issue No. 48, Jan. 29th, 1981, p. 110.

<sup>70</sup> Theberge, *The Judiciary in a Democratic Society* (1979), p. 129.

the Charter.<sup>71</sup> There was an extensive parliamentary discussion of the Charter. If counsel and judges mine the record of this discussion, I think there is less danger of the Canadian judiciary constituting itself a constituent assembly fabricating constitutional law without reference to the expectations of the original framers.<sup>72</sup> No doubt the light which the historical record casts on some points will be scant and uncertain. The trouble with such a massive constitutionalization of rights as was undertaken in the new Canadian Charter is that, despite many days of discussion in the Joint Parliamentary Committee on the Constitution and debate in the House of Commons and the Senate, some difficult points were glossed over lightly or settled in last minute, private negotiations.<sup>73</sup> Still there are sections which were extensively discussed in Parliament. The concepts and purposes embodied in some of these sections evolved through well reported political negotiations outside of Parliament. A good example is section 23 on the language of education. Examination of this legislative and political background material may rarely, if ever, uncover the full range of meaning which it was intended should attach to a constitutional guarantee, but it may often be a reliable guide to what was *not* included in the intentions of the constitution makers.

A new discipline will also be required by the public that evaluates the work of judges. If Canadians are to enjoy the cool rationality which Mr. Chretien and others believe should result from the adjudication of disputes about constitutional rights, there must be a wider public capacity for giving consideration to judicial reasons. If for the public it is only the judicial outcome—"the bottom line"—that counts, our judges will tend to become simply another group of politicians and we will realize little of the distinctive benefits to be derived from expanding the judiciary's policy-making responsibilities.<sup>74</sup> On the other hand, public debate and discussion of judicial decisions must not be muted by awe of the judicial office. It must

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<sup>71</sup> See Hogg, *Constitutional Law of Canada* (1977), pp. 85-6 and Barry, *Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Charter of Rights* (1982), 60 *Can. Bar Rev.* 259. The Supreme Court of Canada quoted extensively from the Debates on Confederation in the Parliament of the Province of Canada in *Reference re Legislative Authority of Parliament to Alter or Replace The Senate*, [1980] 1 S.C.R. 54.

<sup>72</sup> For an account of the tendency of U.S. Supreme Court judges to ignore the historical record in interpreting the Fourteenth Amendment of the American Constitution see Berger, *Government by Judiciary* (1977).

<sup>73</sup> An interesting example of the latter is s. 6(4), the qualification of mobility rights added as a result of the constitutional accord of Nov. 5th, 1981. The absence of any recorded debate on s. 6(4) will make it difficult for counsel and judges to know the statistical significance of basing the qualification on a province's having a "rate of employment below the rate of employment in Canada" rather than a rate of unemployment above the Canadian rate.

<sup>74</sup> For an analysis of the way in which the political left and right in the United States contend for control of that country's judiciary see Gettschall, *Nixon's Judicial Appointments and The Emergence of the New Right*, Paper delivered at the Annual Meeting of the Law and Society Association, Toronto, June 6th, 1982.



be remembered that what is at stake in applying the norms of a constitutional charter of rights to the ever-changing details of our public life is the balance to be struck among our fundamental political values. In a democracy the public should not be disenfranchised from this area of decision-making. Unfortunately, the political rhetoric of "guarantees", "entrenchment" and "inalienable rights" used to promote the Charter has left the Canadian public ill-prepared for life under the Charter.

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