

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS IN THE SUPREME COURT OF CANADA

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The entrenchment of the Canadian Charter of Rights and Freedoms will not transform the Canadian system of government. Instead, the Supreme Court of Canada will strive to ensure that the legislatures continue to bear the ultimate responsibility for determining social policy. The court is also unlikely to use the Charter to control effectively police behaviour. The approach of the court to the Canadian Bill of Rights was characterized by restraint, a restraint which was demanded by neither the status nor the wording of the Bill. There is nothing in the Charter which requires the abandoning of this tradition. Indeed, there are many features of the Charter which will assist the Supreme Court of Canada in maintaining its attitude of restraint. Nevertheless, the Charter will not become meaningless. It will provide an additional lever for the Supreme Court of Canada to intervene where unprecedented and unjustifiable deviations from the accepted, although largely unarticulated, political principles of the Canadian state occur.

L'enchâssement de la Charte canadienne des droits et libertés n'est pas appelé à transformer le système canadien de gouvernement. Au lieu de cela, la Cour suprême du Canada doit s'efforcer d'assurer que les législatures continuent à endosser la responsabilité finale dans la détermination de toute politique sociale. Il est aussi peu probable que la Cour utilise la Charte pour contrôler de façon efficace le comportement de la Police. L'attitude de la Cour vis-à-vis de la Déclaration canadienne des droits était caractérisée par la réserve, réserve que ni le statut ni le contenu de cette loi n'exigeaient. Rien dans la Charte ne requiert l'abandon de cette tradition. En fait, plusieurs aspects de la Charte permettront à la Cour suprême du Canada de conserver cette attitude réservée. Néanmoins, la Charte ne sera pas dénuée de portée; elle va constituer pour la Cour suprême du Canada un levier supplémentaire pour lui permettre d'intervenir là où surviendront des déviations injustifiables et sans précédent aux principes politiques établis, bien que pour une grande partie non énoncés, de l'Etat canadien.

I. Introduction.

It is widely believed that the entrenchment of the Canadian Charter of Rights and Freedoms¹ presages a transformation of our system of govern-

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¹ Constitution Act, 1982 Part 1 of Schedule B, Canada Act 1982, 1982, c. 11 (U.K.).

ment. This view, which is heavily influenced by the United States experience of the last three decades, assumes that the courts will be forced to play a new, activist role in our society. We do not share this view. We believe that the courts, and in particular the Supreme Court of Canada, will seek to avoid such an institutional realignment. They will, instead, strive to ensure that the legislatures continue to bear the responsibility for determining social policy. The history and traditions of the Supreme Court of Canada favour an attitude of restraint. There is nothing in the Charter which will compel the court to renounce its accustomed role. Indeed, there is much which will be serviceable to judges disinclined towards activism.

We are restricting our analysis to the Supreme Court of Canada because the hierarchical structure of our court system dictates that it is the approach of the Supreme Court which must determine whether the courts generally will adopt an activist role under the Charter. Accordingly, we make no attempt to analyse the growing number of lower court decisions dealing with the Charter.²

We will develop our argument by examining first the traditions of the Supreme Court of Canada as evidenced by its approach to the Canadian Bill of Rights.³ We will then assess the provisions of the Charter with a view to determining their effect on those traditions.

II. *The Supreme Court of Canada and the Canadian Bill of Rights.*

A. *Introduction.*

The Supreme Court of Canada accepted that the Canadian Bill of Rights, enacted as an ordinary statute by the Parliament of Canada in 1960,⁴ imposed three distinct duties on the courts. First, it required them to interpret federal laws in accordance with the rights and freedoms recognized in the Bill.⁵ Secondly, it authorized them to ensure that administrative acts taken pursuant to federal legislation observed the procedural safeguards specified in the Bill.⁶ Thirdly, it empowered them to rule that

² See, for example, Professor Tarnopolsky's regular column in Canadian Lawyer entitled Charterwatch. Two interesting journalistic surveys are Taber, *New Rights, But Our Lives Unchanged*, *The Ottawa Citizen*, Aug. 6th, 1982, p. 33, and Vienneau, *Challenging the Charter*, *Toronto Star*, Aug. 14th, 1982, p. B5.

³ R.S.C. 1970, Appendix III.

⁴ For more detailed analysis of the Bill, see W.S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed., 1975), and Hovius, *The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights* (1982), 28 McGill L.J. 31.

⁵ *Brownridge v. The Queen*, [1972] S.C.R. 926; *The Queen v. Burnshine*, [1975] 1 S.C.R. 693, at p. 714, per Laskin J. dissenting; *Jumaga v. The Queen*, [1977] 1 S.C.R. 486; *Chromiak v. The Queen*, [1980] 1 S.C.R. 470; and *R. v. Shelley* (1981), 37 N.R. 320 (S.C.C.).

⁶ *Leiba v. Minister of Manpower and Immigration*, [1972] S.C.R. 660; *Lowry and Lepper v. The Queen*, [1974] S.C.R. 195; *Attorney General of Ontario v. Reale*, [1975] 2 S.C.R. 574; and *Mitchell v. The Queen*, [1975] 2 S.C.R. 570.

any law of Canada⁷ which was in conflict with the Bill, was inoperative or of no effect.⁸ In other words, the court accepted that the Bill while subject to alteration and repeal by the ordinary legislative process, had many of the same attributes, at the federal level, as a constitutionally entrenched bill of rights. Any attempt to discern the approach which the Supreme Court of Canada will take to the Charter must, therefore, take into account the attitude adopted by the court to the Canadian Bill of Rights. That attitude illustrates the tradition of judicial restraint which, we argue, will determine the court's interpretation and application of the Charter.

B. *Judicial Restraint Illustrated.*

The Supreme Court of Canada has heard approximately thirty cases involving the Canadian Bill of Rights. In six of these cases, the Bill did affect the result. Only once, in the famous *Drybones* case,⁹ did the court actually hold that a provision in a federal statute was rendered inoperative. On the other five occasions the Bill either influenced the court's interpretation of federal legislation¹⁰ or buttressed the imposition of fair procedures in the application of the law.¹¹ These six cases notwithstanding, the court generally refused to protect individual rights and freedoms.

Canadian courts have become accustomed to reviewing administrative action to ensure that it is statutorily authorized. In doing so they have frequently imposed procedures which accorded with the rules of natural

⁷ Defined in s. 5 of the Bill as "an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule, or regulation thereunder, and any law in force in Canada or any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada".

⁸ In *The Queen v. Drybones*, [1970] S.C.R. 282, the court held that s. 94(b) of the Indian Act, R.S.C. 1952, c. 149 was rendered inoperative. This effect of the Bill on prior enactments which conflicted with the Bill was never doubted in the later cases. The court also repeatedly accepted that the Bill would have similar effect on an inconsistent law passed after 1960. *The Queen v. Appleby*, [1972] S.C.R. 303; *Curr v. The Queen*, [1972] S.C.R. 889; *Duke v. The Queen*, [1972] S.C.R. 917; *Brownridge v. The Queen*, *supra*, footnote 5; *Hogan v. The Queen*, [1975] 2 S.C.R. 680, (1975), 18 C.C.C. (2d) 65; and *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 all involved legislation enacted after 1960. Yet, in none of these cases did any of the justices suggest that legislation enacted subsequent to the Bill should be treated differently than that enacted before 1960. In *Bliss*, for example, the court simply stated the legal issue as follows: "Is s. 46 of the *Unemployment Insurance Act*, S.C. 1970-71-72, c. 48 as amended, rendered inoperative by the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, as amended?"

Regarding the legal justification for holding that the Canadian Bill of Rights bound future Parliaments, see Tarnopolsky, *op. cit.*, footnote 4, p. 143 and P. Hogg, *Constitutional Law of Canada* (1977), pp. 437-438.

⁹ *The Queen v. Drybones*, *supra*, footnote 8.

¹⁰ *Brownridge v. The Queen*, *supra*, footnote 5; *R. v. Shelley*, *supra*, footnote 5.

¹¹ *Leiba v. Minister of Manpower and Immigration*, *supra*, footnote 6; *Lowry and Lepper v. The Queen*, *supra*, footnote 5; *Attorney General of Ontario v. Reale*, *supra*, footnote 6.

justice. One might have expected the Supreme Court of Canada, therefore, to embrace the Canadian Bill of Rights as a standard for the review of federal administrative action. However, even here, the court interpreted the Bill narrowly. The court refused in several cases¹² to use section 2 to impose minimum procedural safeguards on the exercise of administrative power under federal statutes. This was largely accomplished by adopting a restrictive definition of the expression "rights and obligations" used in section 2(e) of the Bill. In *Mitchell v. The Queen*,¹³ for example, the court ruled six to three that the right to a fair hearing provided for in that subsection did not apply to the suspension or revocation of parole by the National Parole Board. The majority concluded that such action did not affect the rights of the parolee even though it caused the forfeiture of his statutory and earned remission.

The court also interpreted the Bill narrowly in cases where it was given the opportunity to use the Bill in construing open-ended or ambiguous provisions in federal statutes. This was most apparent in the subsequent refinements placed on the court's holding in the *Brownridge* case.¹⁴ In *Brownridge*, the Supreme Court of Canada held that a refusal of a police officer to permit the appellant to speak to his lawyer, in the circumstances of that case, deprived him of his right to retain and instruct counsel without delay as set out in section 2(c)(ii) of the Bill. This denial was held to constitute "reasonable excuse" for the appellant's refusal to comply with the demand of the police officer that he provide a sample for a breathalyzer. As section 223(2) [now section 235(2)] of the Criminal Code expressly provided that it was only an offence to refuse to comply without reasonable excuse, the appellant's conviction under that section was overturned. Then, in *Hogan v. The Queen*,¹⁵ all nine members of the court recognized that the accused, who was charged under section 236 of the Criminal Code with being in control of a motor vehicle while having a blood alcohol level greater than .08, would have had a "reasonable excuse" for refusing to provide a breath sample on the basis of the *Brownridge* decision. But seven members¹⁶ rejected the argument that the breath sample was inadmissible because it was obtained in violation of section 2(c)(ii) of the Canadian Bill of Rights.

Subsequently, the court held in *Jumaga v. The Queen*¹⁷ that the appellant had not been deprived of his rights under section 2(c)(ii) when the

¹² *Guay v. Lafleur*, [1965] S.C.R. 12; *The Queen v. Randolph*, [1966] S.C.R. 260; and *Mitchell v. The Queen*, *supra*, footnote 6.

¹³ *Ibid.*

¹⁴ *Brownridge v. The Queen*, *supra*, footnote 5.

¹⁵ *Supra*, footnote 8.

¹⁶ Ritchie J. gave the reasons for the majority. Fauteux C.J., Abbott, Martland, Judson, and Dickson JJ. concurred in these reasons. Mr. Justice Pigeon gave separate, concurring reasons while Laskin and Spence JJ. dissented.

¹⁷ *Supra*, footnote 5. Laskin C.J., Spence, Dickson and Beetz JJ. dissented.

only opportunity afforded to him to contact his lawyer was by use of the telephone in the main room of the police station while officers stood by and took notes. Accordingly, he did not have a "reasonable excuse" for his later refusal to provide a breath sample. *Chromiak v. The Queen*¹⁸ also dealt with the relation between section 2(c)(ii) and "reasonable excuse" for refusal. The accused was stopped by the police, who suspected impaired driving, and was requested to submit to a road-side breathalyzer test. He refused, stating that he wanted his lawyer present before he took the test. An appearance notice was then issued for impaired driving and for refusal, without reasonable excuse, to provide a breath sample for the purposes of a road-side test contrary to section 234.1(2) of the Criminal Code. Holding that the accused had never been arrested or detained, the Supreme Court of Canada unanimously ruled that section 2(c)(ii) of the Bill was inapplicable because it required arrest or detention. The accused, therefore, did not have reasonable excuse for his refusal.

In all of the cases, except *Drybones*,¹⁹ where the Supreme Court of Canada was asked to find that a law was inoperative because of conflict with the Bill, the court concluded that the law in question did not abrogate, abridge or infringe any of the rights and freedoms listed. For example, in *Attorney General of Canada v. Lavell*,²⁰ an Indian woman challenged section 12(1)(b) of the Indian Act²¹ which specified that Indian women who married non-Indians lost their Indian status. Under the Act an Indian man did not lose his Indian status upon marriage to a non-Indian woman. In explaining the majority's view that this did not deny equality before the law to Indian women, Mr. Justice Ritchie concluded that section 1(b) of the Canadian Bill of Rights did not import the "egalitarian concept exemplified by the Fourteenth Amendment of the United States constitution as interpreted by the courts of that country" but simply required "equality in the administration or application of the law by the law enforcement authorities and ordinary courts of the land".²² This definition, which appears to require only that the same procedures be applied to the individuals affected by a particular law, was referred to in two subsequent cases²³ where the court refused to find conflict between a federal law and section 1(b) of the Bill. It is, in fact, impossible to reconcile the result in *Drybones*²⁴ with the reasoning in *Lavell*.

¹⁸ *Supra*, footnote 5.

¹⁹ *The Queen v. Drybones*, *supra*, footnote 8.

²⁰ [1974] S.C.R. 1349, (1974), 38 D.L.R. (3d) 418.

²¹ R.S.C. 1970, c. I-6.

²² *Supra*, footnote 20, at pp. 1365-1366.

²³ *The Queen v. Burnshine*, *supra*, footnote 5, at pp. 703-704; *Bliss v. Attorney General of Canada*, *supra*, footnote 8, at p. 192.

²⁴ *The Queen v. Drybones*, *supra*, footnote 8.

*Bliss v. Attorney General of Canada*²⁵ also involved the allegation that a federal law denied women equality before the law on the basis of sex. Bliss challenged section 46 of the Unemployment Insurance Act²⁶ which stipulated that unemployed pregnant women and women who had recently given birth were not entitled to regular unemployment insurance benefits. The Supreme Court of Canada dismissed Bliss' appeal. Giving the reasons for the court, Mr. Justice Ritchie accepted the following assertion:²⁷

If s. 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.

These examples could easily be multiplied. In case after case, a majority of the court construed the open-ended language of the Bill restrictively, focussing on every phrase or word that could justify a narrow interpretation.

On occasion,²⁸ the court seized on the fact that section 1 of the Bill specified that the enumerated rights and freedoms "have existed and shall continue to exist" and that section 2 referred to "the rights and freedoms recognized and declared" to hold that the Canadian Bill of Rights did not create any rights or freedoms not already in existence in Canada in 1960. Other reasoning techniques also ensured that federal legislation would not be found to be in conflict with the Bill. These were evident in the cases where individuals challenged federal legislation on the basis that it violated "equality before the law". The court held that discrimination on the basis of one of the categories listed in section 1 of the Bill did not, without more, infringe equality before the law.²⁹ Even so, the court was reluctant to conclude that a law did, either directly³⁰ or indirectly,³¹ discriminate in this way. It also seemed to take the view that section 1(b) of the Bill did not apply if the law in question could be characterized as granting a benefit to a particular group or individual.³² Again, section 1(b) was held inapplicable

²⁵ *Supra*, footnote 8.

²⁶ S.C. 1971, c. 48.

²⁷ *Supra*, footnote 8, at pp. 191-192.

²⁸ See e.g., *Curr v. The Queen*, *supra*, footnote 8, at p. 916, per Ritchie J.; *R. v. Burnshine*, *supra*, footnote 5, at pp. 702 and 705, per Martland J.; and *Miller and Cockriell v. The Queen* (1976), 31 C.C.C. (2d) 117, [1977] 2 S.C.R. 680, at p. 704, per Ritchie J.

²⁹ *Attorney General of Canada v. Lavell*, *supra*, footnote 20, at pp. 1363-1364 per Mr. Justice Ritchie. Fauteux C.J., Martland and Judson JJ. concurred in these reasons. Mr. Justice Pigeon gave separate reasons agreeing with the result reached by Mr. Justice Ritchie. Laskin, Abbott, Hall and Spence JJ. dissented.

³⁰ In *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, Mr. Justice Martland, Judson J. concurring, held at p. 189 that s. 43 of the Indian Act, *supra*, footnote 21, which related only to the administration of estates of Indians ordinarily resident on reserves could not be considered to discriminate on the basis of race.

³¹ *Bliss v. Attorney General of Canada*, *supra*, footnote 8.

³² *The Queen v. Burnshine*, *supra*, footnote 5, at p. 707, per Martland J. Fauteux C.J., Abbott, Judson, Ritchie, and Pigeon JJ. concurring and *Bliss v. Attorney General of Canada*, *ibid.*, at p. 191, per Ritchie J. for the court.

where legislation simply granted to an administrative official a discretion which might be exercised so as to infringe equality before the law.³³ Finally, the Supreme Court of Canada indicated on several occasions³⁴ that, in order to establish that a law conflicted with section 1(b) of the Bill, the individual challenging the law had to satisfy the court that the Parliament of Canada was not seeking to achieve a valid federal objective in enacting the law. This placed the individual in the difficult position of proving a negative. Moreover, the court's apparent equation of a "valid federal objective"³⁵ with any purpose which brought the legislation within the power of Parliament under section 91 of the British North America Act, 1867, made effective reliance on section 1(b) of the Bill impossible.

C. *Was the Supreme Court of Canada's Approach Required by the Status or Wording of the Bill?*

(i) *Status.*

On several occasions, the Supreme Court explicitly relied on the fact that the Bill was not an entrenched part of the Constitution of Canada in order to justify judicial restraint. The judges referred to the Bill as a "statutory" enactment³⁶ or a "quasi-constitutional instrument" representing "a half-way house between a purely common law regime and a constitutional one".³⁷ While it cannot be denied that the Bill was enacted as an ordinary statute, the importance of its status can easily be overstated in attempting to explain the court's restraint in its application.

³³ *Smythe v. The Queen*, [1972] S.C.R. 680, (1971), 19 D.L.R. (3d) 480.

³⁴ *The Queen v. Burnshine*, *supra*, footnote 5, at pp. 707-708, per Martland J. Fauteux C.J., Abbott, Judson, Ritchie, and Pigeon JJ. concurring; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, at p. 382, per Martland J. for the court; *Attorney General of Canada v. Canard*, *supra*, footnote 30, at pp. 188-189, per Martland J. Judson J. concurring; *Bliss v. Attorney General of Canada*, *supra*, footnote 8, at pp. 186 and 194, per Ritchie J. for the court; and *Mackay v. The Queen*, [1980] 2 S.C.R. 370, at p. 394, per Ritchie J. Martland, Pigeon, Beetz and Chouinard JJ. concurring.

³⁵ Compare the application of the valid federal objective test by Mr. Justice McIntyre, Dickson J., concurring in *Mackay v. The Queen*, *ibid.*, with the way that concept is used by Mr. Justice Ritchie, Martland, Pigeon, Beetz and Chouinard JJ. concurring, in the same case.

³⁶ See, for example, *Curr v. The Queen*, *supra*, footnote 8, at p. 889 per Laskin J.; *Attorney General of Canada v. Lavell*, *supra*, footnote 20, at p. 1360 (S.C.R.), per Ritchie J.; and *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 632, per Laskin C.J. dissenting. The passage from the reasons of Laskin J. in *Curr* where this characterization was made was quoted in *The Queen v. Burnshine*, *supra*, footnote 5, at p. 707, per Martland J.; *Bliss v. Attorney General of Canada*, *supra*, footnote 8, at p. 193, per Ritchie J.; and *Mackay v. The Queen*, *supra*, footnote 34, at pp. 392-393, per Ritchie J.

³⁷ *Hogan v. The Queen*, *supra*, footnote 8, at p. 597, per Laskin J. dissenting. See also *Miller and Cockriell v. The Queen*, *supra*, footnote 28, at p. 690, per Laskin C.J.; and *The Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435, at p. 467, per Dickson J. dissenting, Estey J. concurring.

In the first place, the status of the Bill did not preclude the court from concluding that it was paramount to both prior and subsequent inconsistent legislation validly enacted by Parliament.³⁸ Having accepted that an ordinary statute could have such a drastic effect on other legislation, the court could easily have gone on to give it a broad interpretation. Secondly, the refusal of the court to characterize the Canadian Bill of Rights as a constitutional document itself indicated a position of judicial restraint. The term constitution can be given a broad or narrow meaning. Used in a broad sense, it refers to all the important rules, whatever their source, which establish, empower and regulate the principal institutions of government in a state.³⁹ The term has been used in this way by academics,⁴⁰ by the drafters of the recent constitutional reforms,⁴¹ and by the Supreme Court of Canada itself.⁴² It could, therefore, be argued that the Canadian Bill of Rights, although not part of the British North America Act, was as much a part of the constitution of Canada as a great many other statutes, both of the United Kingdom Parliament and the Canadian Parliament.⁴³ To refer to the Canadian Bill of Rights as a non-constitutional, or even quasi-constitutional, document in order to justify a narrow construction was accordingly result-oriented reasoning. Thirdly, Justices of the Supreme Court of Canada sometimes indicated explicitly that their reasoning and the results produced would not have differed even had the Bill been a constitutional document.⁴⁴

Finally, the constitutional status of the Canadian Bill of Rights was never an issue in those cases where the court was asked to use the Bill as a guide to the interpretation of federal statutes or to the review of administrative action. It has never been doubted that the Parliament of Canada could enact, as ordinary legislation, a canon of construction or a guide for the judicial review of administrative action. Nevertheless, even in this context, the Supreme Court did not use the Bill to protect the rights and freedoms of individuals.

(ii) *Wording.*

The wording of the Canadian Bill of Rights, while ambiguous, did not require the court to construe the rights and freedoms listed in a narrow

³⁸ *Supra*, footnote 8.

³⁹ Hogg, *op. cit.*, footnote 8, p. 2.

⁴⁰ See, for example, *ibid.*, and Tarnopolsky, *The Supreme Court and the Canadian Bill of Rights* (1975), 53 Can. Bar Rev. 649, at p. 672.

⁴¹ S. 52(2) of the Constitution Act, 1982, *supra*, footnote 1.

⁴² *Reference re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3) (1981), 125 D.L.R. (3d) 1 (S.C.C.).

⁴³ Regarding the latter a majority of the court in the *Reference re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3) described the Saskatchewan Act, 1905, 4-5 Edw. VII, c. 3 (Can.) and the Senate and House of Commons Act, R.S.C. 1970, c. S-8, as "part of the rules of the Canadian Constitution". *Ibid.*, at p. 81.

⁴⁴ See, particularly, *Hogan v. The Queen*, *supra*, footnote 8.

fashion. In the *Drybones* case,⁴⁵ the court itself illustrated the extent to which judges could overcome any ambiguities which presented obstacles to judicial activism. Although section 2 read as if it were a canon of construction,⁴⁶ a majority⁴⁷ of the court concluded that the Bill was intended to be paramount to inconsistent federal statutes.

The Canadian Bill of Rights was, as are most bills of rights, filled with phrases and expressions whose meaning was "largely unlimited and undefined".⁴⁸ If the Supreme Court of Canada had desired to engage actively in judicial review, it could have given the open-ended concepts an expanded meaning. A comparison of the majority and dissenting reasons in some of the Supreme Court of Canada decisions on the Canadian Bill of Rights illustrates this. In the *Mitchell* case,⁴⁹ for example, the court was required to give meaning to the terms "rights and obligations" and "reason for his arrest or detention" used in section 2 of the Bill. These terms were not defined in the Bill and it was open to the court to adopt a narrow or a broad construction. By choosing the former, a majority of the court held that the suspension or revocation of parole could not be reviewed.

We acknowledge that the opening paragraphs of sections 1 and 2 of the Bill influenced the court's conclusions that the Bill declared only existing rights which had to be given a meaning that would have been accepted in 1960. But, this conclusion did not inevitably follow from the wording of the Bill. Professor Tarnopolsky has argued⁵⁰ that it was reminiscent of the approach taken by the Supreme Court of Canada in 1928 when it decided that the word "persons" in section 24 of the British North America Act did not include women.⁵¹ When that case was heard on appeal by the Judicial Committee of the Privy Council,⁵² Lord Sankey held that

⁴⁵ *The Queen v. Drybones*, *supra*, footnote 8.

⁴⁶ This was stressed by the dissenting justices Cartwright, Pigeon and Abbott.

⁴⁷ Fauteux, Martland, Judson and Spence JJ. concurred in the reasons given by Mr. Justice Ritchie.

⁴⁸ Per Mr. Justice Pigeon in dissent in *The Queen v. Drybones*, *supra*, footnote 8, at p. 306.

⁴⁹ *Mitchell v. The Queen*, *supra*, footnote 6. Compare also the reasons of Mr. Justice Ritchie, (Fauteux C.J., Abbott, Martland, Judson, Hall, Spence, and Pigeon JJ. concurring), in *The Queen v. Appleby*, *supra*, footnote 8, with those of Mr. Justice Laskin (concurring in the result); those of Mr. Justice Laskin, (Abbott, Hall, Spence and Pigeon JJ. concurring), with Mr. Justice Ritchie's (concurring in the result, Fauteux C.J. concurring) in *Curr v. The Queen*, *supra*, footnote 8; and those of Mr. Justice Ritchie, (Fauteux C.J., Martland and Judson JJ. concurring), with Mr. Justice Laskin's, (Hall and Spence JJ. concurring in the dissent), in *Attorney General of Canada v. Lavell*, *supra*, footnote 20.

⁵⁰ Tarnopolsky, A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada, Special Lectures of the L.S. U.C. on the Constitution (1978), p. 161, at pp. 184-185.

⁵¹ *Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867*, [1928] S.C.R. 276.

⁵² *Edwards v. Attorney General of Canada*, [1930] A.C. 124 (P.C.).

the court had erred in attempting to discover what the word could possibly have meant in 1867. Describing the British North America Act as a "living tree capable of growth and expansion within its natural limits", he suggested that it "should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subject with which it purports to deal in a few words".⁵³ The application to this approach to the Canadian Bill of Rights would have enabled the court to give a broad meaning to the concepts it embraced.

D. Conclusion.

The status of the Canadian Bill of Rights, although it may have contributed to the apparent reluctance of the Supreme Court of Canada to engage in judicial review, did not dictate judicial restraint. References in the cases to the status of the Bill can best be viewed as attempts to justify an approach adopted for other reasons. Similarly, the wording of the Bill did not demand a narrow construction of the open-ended concepts it contained. A court which favoured judicial activism could have defined those concepts differently.

III. The Charter.

A. Introduction.

There is nothing in the language or structure of the Charter which will require the Supreme Court of Canada to renounce the restraint which characterised its approach to the Canadian Bill of Rights. Although the entrenchment of the Charter and the wording of some of its substantive provisions will generally preclude reliance on precisely the same reasoning as was used to justify a narrow construction of the Bill, the Charter nonetheless provides ample scope for judicial discretion. Doctrines culled from other areas of Canadian constitutional jurisprudence will serve to reinforce this tendency.

The Charter is a disappointing piece of constitutional craftsmanship.⁵⁴ The rights and freedoms which the Charter purports to protect are presented

⁵³ *Ibid.*, at p. 136.

⁵⁴ Edward McWhinney has described the Charter as "... disappointing and lacking in romance and poetry". *Canada and the Constitution, 1979-1982: Patriation and the Charter of Rights* (1982), p. 60. See generally, Ch. VI, *The Patriation Package*. There appears to be, in at least one instance, direct conflict between different provisions of the Charter. Thus, it would seem that s. 12(1)(b) of the Indian Act, *supra*, footnote 21, infringes a right guaranteed by s. 15(1) of the Charter, in that Indian men are treated in a different manner from Indian women who are, therefore denied equality "before and under the law" on the basis of sex. But that does not end the matter. S. 25 provides that "the guarantee in this Charter of certain rights and freedoms shall not be construed" so as to deny any rights of aboriginal people. Native groups in Canada argue that one of their rights is to choose who shall or shall not be members of their nations and that s. 12(1)(b) of the Indian Act exists in order to permit the exercise of that right. Thus, s. 25 of the Charter would seem

as undefined abstractions, often coupled with open-ended qualifications. It is the judiciary that will be required to give concrete meaning to both the abstractions and the qualifications. Judges inclined towards restraint will be able to define the rights narrowly and the exceptions broadly. Section 1 of the Charter will provide a simple means through which they can defer to the legislatures. The tendency to do so will be reinforced if the court looks for guidance to the jurisprudence developed in Commonwealth states which have bills of rights which derive from the same sources as the Charter.

B. *Interpreting the Charter.*

(i) *General Considerations.*

The first step to be taken by the Supreme Court of Canada will be the creation of a general approach to the Charter, a jurisprudential methodology. There are, in the abstract, at least three broad approaches, none of which mutually excludes any of the others, that the court might take. These are: first, to look to the jurisprudence developed in the United States concerning that country's Bill of Rights; secondly, to be guided by the jurisprudence created in Commonwealth states which have constitutional bills of rights; and, finally, to adopt a uniquely Canadian approach.

The text of the charter owes little to the United States Bill of Rights.⁵⁵ The occasional phrases—"unreasonable search and seizure" in section 8 and "cruel and unusual . . . punishment" in section 12—have been borrowed from the United States Bill of Rights, but even a superficial reading of the Charter suggests that one must look elsewhere for its main textual sources. In a number of cases which involved the interpretation of the Canadian Bill of Rights, the Supreme Court of Canada stated explicitly that United States caselaw was of no assistance.⁵⁶ We see nothing in the Charter to suggest a change of direction. Further, the United States jurisprudence, at least since 1954, has been developed by courts, in particular the Supreme Court of the United States, whose judges perceive themselves as playing an activist role. The United States jurisprudence is premised on a perception of the judicial function which has historically found little favour with Canadian judges.

to protect s. 12(1)(b) against an attack based on s. 15(1) of the Charter. But that is still not the end of the matter. S. 28 of the Charter states that "*notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons*". That could be interpreted to mean that s. 25 of the Charter will not protect s. 12(1)(b) of the Indian Act. In fact, we have been led round a circle.

⁵⁵ For the text see Ian Brownlie, *Basic Documents on Human Rights* (1971), p. 11.

⁵⁶ *Smythe v. The Queen*, *supra*, footnote 33, at p. 486 (D.L.R.), per Fauteux C.J.; *A.G. Canada v. Lavell*, *supra*, footnote 20, at p. 494 (D.L.R.), per Ritchie J; *Hogan v. The Queen*, *supra*, footnote 8, at pp. 71-72 (C.C.C.), per Ritchie J; *R. v. Miller and Cockriell*, *supra*, footnote 28, at pp. 197-198 (C.C.C.), per Ritchie J.

There are, in contrast, a number of reasons that the commonwealth jurisprudence should prove attractive. First, the standard bill of rights found in Commonwealth constitutions,⁵⁷ what Professor de Smith called the "Nigerian Model",⁵⁸ is largely derived from the same international sources as the Charter. The international textual antecedents to which the Charter can lay claim are, in chronological order: the Universal Declaration of Human Rights of 1948; the European Convention on Human Rights of 1950; and the International Covenant on Civil and Political Rights of 1966.⁵⁹ A few illustrations will suffice. Section 11(d) of the Charter provides that everyone charged with an offence has a right to "a fair and public hearing by an independent and impartial tribunal". These words appear in article 10 of the Universal Declaration, article 6(1) of the European Convention, and article 14(1) of the International Covenant. Section 7 of the Charter begins by reproducing the exact wording of article 3 of the Universal Declaration and then draws heavily on article 5(1) of the European Convention and article 9(1) of the International Covenant. Canadians are guaranteed, by section 10(a) of the Charter, the right, when arrested, to be "promptly" informed why. The adverb is taken from article 5(2) of the Convention and article 9(2) of the Covenant.

There already exists, then, a substantial body of commonwealth caselaw which has sought to interpret constitutional texts similar to the Charter. This body of law appears likely to be attractive to Canadian judges when one considers that it was developed by judges steeped in the same judicial culture. In fact, many of the leading decisions emanate from the Judicial Committee of the Privy Council. Given the tendency of Canadian judges to feel themselves reflexively bound by English decisions, these cases should prove irresistible. Finally, the general purport of the commonwealth caselaw is judicial restraint. This jurisprudence will be looked to, we believe, because at bottom it will provide powerful justification for the instinctive inclination of the Canadian judiciary.

Finally, the large number of decided cases interpreting the Canadian Bill of Rights will provide guidance. A considerable amount of the language used in the Charter has been drawn from the Canadian Bill of Rights. In some instances the Charter reproduces words or phrases from the Bill of Rights which had themselves been borrowed from other sources. The Charter in section 12 follows the pattern of section 2(a) of the Bill of Rights

⁵⁷ An exception is the Bill of Rights of Trinidad and Tobago which is based on the Canadian Bill of Rights. For general discussion of these bills of rights, see S.A. de Smith, *The New Commonwealth and Its Constitutions* (1964), Ch. V. See also, James S. Read, *Bills of Rights in the Third World* (1973), 1 *Verfassung und Recht in Übersee* 21.

⁵⁸ de Smith, *op. cit.*, p. 193.

⁵⁹ The texts are to be found in Brownlie, *op. cit.*, (2nd ed., 1981), as follows: Universal Declaration, p. 21; European Convention, p. 242; International Covenant, p. 118. The International Covenant was obviously not a source for the "Nigerian Model" bill of rights.

by guaranteeing that persons shall not be subjected to "cruel and unusual treatment or punishment". This form of words is a refinement of the phrase "cruel and unusual punishment" in the United States Bill of Rights, a phrase which was, in turn, taken from the English Bill of Rights of 1688. Similarly, the guarantees derived from the international sources noted earlier and found in sections 11(d), 7 and 10(a) of the Charter were refracted through the Canadian Bill of Rights. In other and fewer cases the Charter draws on forms of words which were unique to the Canadian Bill of Rights. Section 10(b) reproduces a form found only in the Canadian Bill of Rights. Section 10(c) is based on words in section 2(c)(iii) of the Canadian Bill of Rights which draw their inspiration from the European Convention, but which have been substantially altered. On further reflection it becomes clear that the judges will be profoundly influenced by this jurisprudence. There can be no more accurate statement of the way the judges of the Supreme Court of Canada see the judicial role than in the decisions they themselves have rendered in the interpretation of the Canadian Bill of Rights.

In practice the bulk of the litigation that will require an interpretation of the Charter will be based on two circumstances. In the first, an individual will allege that a statute denies one of the rights guaranteed him under the Charter. In the second, a person being tried for a criminal offence will aver that the police infringed his rights in the course of their investigation. Each of these situations will now be analyzed.

(ii) *Assessing Statutes.*

In assessing the constitutionality of a statute, whether federal or provincial, according to the standards of the Charter the court will have to address itself to two questions. First, does the statute "infringe" or "deny" any of the rights and freedoms enumerated in the Charter? Secondly, if the answer to the first question is yes, can the infringement or denial be "demonstrably justified in a free and democratic society"? We shall deal with these two issues in turn.

a. *Defining the Rights.*

Whether a statute is adjudged to deny a right will depend on how that right is defined. There is substantial authority in both the Canadian and the commonwealth jurisprudence to suggest that the rights set out in the Charter will be narrowly defined. The first step in the analysis must, logically, involve a determination as to the general nature of the rights found in the Charter. Does the Charter create new rights or does it simply declare existing rights? The textual evidence is uncertain. The Charter does create certain rights which had not previously existed, but for the most part it restates, albeit in a constitutional form, rights which Canadians had

enjoyed either by statute or under common law.⁶⁰ As we noted above, the Supreme Court of Canada took the view that the Canadian Bill of Rights was merely declaratory. While this view was largely necessitated by the language of the Bill, we believe that it has been and will continue to be an attractive approach for courts disinclined to activism. The Commonwealth jurisprudence, as expounded by the Judicial Committee, supports the interpretation that constitutional bills of rights are essentially declaratory.⁶¹ The significance of this approach is substantial. If the Charter is regarded as nothing more than a statement of the rights that Canadians already enjoyed on April 16th, 1982, it follows that the statute law in force on that date must, *prima facie*, be consistent with the Charter.

Having resolved this general methodological question, the court will now have to attempt a definition of the specific right which, it is claimed, has been infringed. Once more, the Canadian jurisprudential tradition is suggestive. Where questions have arisen as to the extent of basic rights the response of Canadian courts has been to adopt narrow definitions of those rights. The practice is illustrated in *Walter v. Attorney General for Alberta*.⁶² This case turned on the *vires* of an Alberta statute which was evidently designed to discourage the spread of the Hutterite system of communal land-holding. The Hutterites argued that their special form of land-holding was an integral and essential part of their religion. Thus, a provincial statute which purported to restrict their ability to acquire land was a statute which interfered with their freedom of religion and was, therefore, beyond the competence of a provincial legislature. The Supreme Court of Canada made short shrift of this argument, holding that freedom of religion had to do with "... the profession and dissemination of religious faith and the exercise of religious worship" and nothing else.

The Judicial Committee has taken an equally restrictive approach. In *Collymore v. A.G. Trinidad and Tobago*⁶³ it was held that a statute which abridged the right of trade unions to engage in collective bargaining and effectively abolished the right to strike did not infringe a constitutional guarantee of "freedom of association". Their Lordships believed that as long as individuals could still form and belong to trade unions there was no interference with freedom of association.

⁶⁰ For example, s. 3 restates, though without qualification, the right to vote which s. 14 of the Canada Elections Act, R.S.C. 1970 (1st Supp), c. 14, gives to citizens. Likewise, s. 6(1) affirms the right given to Canadian citizens by s. 4(1) of the Immigration Act, S.C. 1976-77, c. 52 to enter Canada.

⁶¹ See *Runyowa v. R.*, [1966] 1 All E.R. 633 (P.C.); *de Freitas v. Benny*, [1976] A.C. 239 (P.C.); and *Maharaj v. A.G. Trinidad and Tobago (No. 2)*, [1979] A.C. 385 (P.C.). It should be noted that the latter two cases involved the interpretation of the Trinidad Bill of Rights which is patterned after the Canadian Bill of Rights.

⁶² [1969] S.C.R. 383. See also *Oil, Chemical and Atomic Workers v. Imperial Oil Ltd.*, [1963] S.C.R. 584; *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651; and *Dupond v. City of Montreal* (1978), 84 D.L.R. (3d) 420.

⁶³ [1970] A.C. 538.

The drafting of the Charter suggests in places an apprehension that the courts might continue to define rights narrowly. For example, in section 15(1) the traditional phrase "equality before the law" is altered through the addition of the words "and under". It is said that these words were added in order to prevent the courts interpreting equality before the law in the same fashion as in *A.G. Canada v. Lavell*.⁶⁴ It is not clear to us how the words "and under" are sufficient to displace the established jurisprudence about equality before the law.⁶⁵ The point, however is that the drafters apparently shared our view that the courts, without additional prodding, would maintain their tradition of restraint.

Finally, the various rights as set out in the Charter are qualified by adjectives and adverbs whose meaning is, at best, gelatinous. The words "reasonable" or "unreasonable" appear no less than seven times. They are joined by others such as "arbitrarily", "promptly", "sufficient", "appropriate" and "primarily". These words invite the judges to define the rights largely as they choose.

b. Deciding Whether a Right Has Been Infringed or Denied.

Judicial restraint may also be maintained by reliance upon existing doctrines of Canadian constitutional jurisprudence in determining whether an impugned statute infringes or denies a right guaranteed by the Charter. One such doctrine could permit the court to hold that an incidental interference with, say, freedom of expression was not the same thing as an infringement or denial of freedom of expression. In characterising statutes for the purposes of sections 91 and 92 of the Constitution Act, 1867 the courts have made a distinction between legislation which is "in relation to" a particular subject-matter and legislation merely "affecting" that subject-matter.⁶⁶ The effect of this is that a federal statute will be upheld if it is characterised as being in relation to a matter found within section 91. The fact that the statute also affects or incidentally interferes with a section 92 matter will not render it invalid. The court could drastically limit the ambit of the Charter's application if it were to adopt this sort of analysis.

c. The Meaning of Section 1.

If the court does accept that a statute has infringed or denied a guaranteed right, that does not end the matter. The structure of the Charter

⁶⁴ *Supra*, footnote 20.

⁶⁵ See Peter W. Hogg, *Canada Act 1982 Annotated* (1982), p. 51 for a suggestion to this effect. Similarly, the addition of the words "equal benefit of the law" in s. 15(1) is an apparent attempt to ensure that the provision applies even if a law confers a benefit. The Supreme Court of Canada seemed to take the view that s. 1(b) of the Canadian Bill of Rights did not apply if the law being challenged could be characterized as granting a benefit to a particular group or individual. See *supra*, footnote 32.

⁶⁶ The classic statement is found in *A.G. Saskatchewan v. A.G. Canada*, [1949] A.C. 110 (P.C.).

suggests that the process of assessing a statute has a second stage. The validity of a statute may still be upheld if it can, in the words of section 1, be "demonstrably justified in a free and democratic society". It would seem that the burden of proof should, at this stage, shift to the party seeking to uphold the validity of the statute,⁶⁷ although it may not in practice make a great deal of difference which party has the burden. Section 1 is easily the most significant provision in the Charter. It functions so as to create a general exception to all the rights.⁶⁸ More important, it gives carte blanche to the Court to make of the Charter what it wills.

In this regard the Commonwealth jurisprudence is particularly instructive. The typical Commonwealth bill of rights contains exception clauses which are couched in language generally similar to that of section 1 of the Charter.⁶⁹ Two points about the interpretation of these exception clauses are important. First, there is evinced a strong predisposition towards finding that impugned laws are "reasonably required",⁷⁰ or "reasonably justifiable".⁷¹ The Judicial Committee in *A.G. v. Antigua Times Ltd*⁷² stated that:

... the proper approach to the question is to presume, until the contrary appears or is shown, that all acts passed by the Parliament of Antigua were reasonably required.

Strictly speaking the words quoted may be directed to the question of burden of proof, an issue which, we have suggested, may have been resolved by the wording of section 1 of the Charter. But we believe these words have a broader significance, that they bespeak a profound reluctance on the part of judges to overturn deliberate legislative decisions. The striking thing is that there exists only one Commonwealth decision in which a statute was held not to be "reasonably justifiable". In *Akar v.*

⁶⁷ This is the view taken by Hogg, *op. cit.*, footnote 65, p. 10. The adverb "demonstrably" modifying the adjective "justified" is, presumably, the textual basis for this view. Hogg quotes the chief official responsible for the drafting of the Charter in support of his interpretation.

⁶⁸ It might be argued that certain of the guarantees are not to be read subject to this general exception. First, it is difficult to see how the exception could be applied to s. 12. That is, it is difficult to imagine how any treatment or punishment which had been found to be "cruel and unusual" could be justified in a free and democratic society. Secondly the guarantees found in ss 25 and 28 appear by their terms to be excluded from the ambit of s. 1.

⁶⁹ In the Commonwealth bills of rights the exception clauses are not of a general nature as is s. 1 of the Charter. The pattern, which derives from the European Convention, is to attach an exception to the particular right guaranteed. Thus, within a given bill of rights, the precise terms of the exceptions may vary from guarantee to guarantee, while certain guarantees may permit of no exceptions.

⁷⁰ This was the phrase used in Antigua, Jamaica, Kenya, and Zambia.

⁷¹ This was the phrase used in the 1959 Nigerian Bill of Rights and generally followed in other Commonwealth states which adopted bills of rights. The precise form of words adopted in an exception clause is not, in our view, crucial to its interpretation.

⁷² [1976] A.C. 16 (P.C.).

*A.G. Sierra Leone*⁷³ the Judicial Committee decided that it could not uphold an explicitly racist law which restricted citizenship in Sierra Leone to persons who were "negroes of African descent".

The caselaw developed under the European Convention is also apposite, since the basis which it recognises for permitting derogations from the rights guaranteed is the origin of the exception clauses in both Commonwealth bills of rights and in the Charter. In decision after decision the European Human Rights Commission has found laws which clearly interfered with rights guaranteed by the Convention to be "necessary in a democratic society". The approach adopted by the Commission is, generally, to determine, first, whether a law pursues a legitimate policy aim and then to ask whether the measures adopted are proportionate to that aim. In only a handful of cases has it been determined that an impugned law was not necessary.⁷⁴

Secondly, the Commonwealth cases suggest that the courts have used the exception clauses as a means of re-introducing parliamentary supremacy through the back door. The decision of the Nigerian Federal Supreme Court in *D.P.P. v. Obi*⁷⁵ is a leading case. The court had to determine whether the provisions concerning sedition in Nigeria's Criminal Code were "reasonably justifiable in a democratic society". The court expressed some uncertainty as to exactly how, and by reference to what standard, it was to determine what was or was not justifiable. It discovered a way out of this uncertainty by looking to the legislature and holding, in effect, that if a statute has been enacted by a democratic legislature, it must be justifiable in a democratic society. Or, to put it another way, the court suggested that if the members of a democratic legislature found a statute to be justifiable, then who were they, as judges, to dispute that opinion?

The Canadian jurisprudence reflects a deep and long-standing attachment to the principle of parliamentary supremacy. Section 52 of the Constitution Act, 1982, appears, by its terms, to be an express rejection of parliamentary supremacy as one of the organizing principles of the Canadian state. But the judicial approach adopted in *Obi* suggests a means whereby Canadian courts, forced to abandon parliamentary supremacy as

⁷³ [1970] A.C. 853. In *Oliver v. Buttigieg*, [1967] 1 A.C. 115 (P.C.) an administrative act which imposed a restriction on freedom of speech was held not to be reasonably justifiable. See also, *Wadhwa v. City Council of Nairobi*, [1968] E.A. 406 and *Shah Vershi Devshi Ltd v. Transport Licensing Board*, [1971] E.A. 289.

⁷⁴ See the useful, if brief, discussion in Marx, Entrenchment, Limitations and Non-Obstacle: ss 1, 33 and 52 in Walter S. Tarnopolsky and G  rald-A. Beaudoin (eds), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), p. 61, at pp. 63-66. See also Bayefsky, *The Impact of the European Convention on Human Rights in the U.K.: Implications for Canada* (1981), 13 *Ottawa L. Rev.* 507; and Mendes, *Interpreting the Canadian Charter of Rights and Freedoms* (1982), 20 *Alta L. Rev.* 383.

⁷⁵ [1961] All N.L.R. 186. See also, *Olawoyin v. A.G.*, [1961] All N.L.R. 269 and *Cheranci v. Cheranci*, [1960] N.R.N.L.R. 24.

an explicit principle, could, nonetheless, re-introduce its practical effects. They would undoubtedly be comforted in such an endeavour by section 33 of the Charter which establishes what might be characterised as *residual* parliamentary supremacy with respect to certain rights. At the very least, section 33 suggests that parliamentary supremacy has not been totally abandoned.

Two other doctrines from existing Canadian constitutional jurisprudence might be pressed into service in the interpretation of section 1. The first is the "valid federal objective" doctrine.⁷⁶ The purport of the doctrine appears to be that any Act of Parliament which seeks to achieve a valid federal objective is not to be tested by the standards of the Canadian Bill of Rights. While the basis for the doctrine is unclear, the result of its application is not. If the court determines that a statute is directed towards a legitimate policy goal, then the statute will be considered to have met the "valid federal objective" standard. In practice, there does not seem to be much of a distinction between holding that a statute is *intra vires*, as determined by the application of the traditional techniques developed for the interpretation of sections 91 and 92 of the Constitution Act, 1867, and deciding that it was enacted in pursuit of a "valid federal objective". While this doctrine has only been used with respect to the "equality before the law" provision of the Canadian Bill of Rights, it is easily transposable to the interpretation of section 1 of the Charter. The court would simply hold that where a statute is directed to a "valid federal (or provincial) objective" it is to be accepted as justified in a free and democratic society. Such an approach would be another plausible judicial tactic to establish section 1 as the means of indirectly reasserting parliamentary supremacy. Further support for the adoption of this approach comes from the fact that it is almost identical to the approach taken in interpreting the various exception clauses in the European Convention.

Secondly, to restate in a slightly different form a point made above, the court could hold that a mere "incidental interference" with a right could be justified in a free and democratic society.

The point, in summary, is simple. There is a considerable range of interpretative techniques, all of which are grounded in perfectly respectable jurisprudence, which the Supreme Court of Canada will be able to call upon in order to avoid concluding that an otherwise valid statute is "inconsistent" with the Charter and, therefore, of "no force or effect".⁷⁷

⁷⁶ *A.G. Canada v. Lavell*, *supra*, footnote 20; *R. v. Burnshine*, *supra*, footnote 5; *A.G. Canada v. Canard*, *supra*, footnote 30; *Bliss v. A.G. Canada*, *supra*, footnote 8; and *Mackay v. The Queen*, *supra*, footnote 34. In the latter case, it is instructive to compare the application of the "valid Federal objective" first by the majority with that of Mr. Justice McIntyre, Dickson J. concurring.

⁷⁷ This is the formula used in s. 52(1) of the Constitution Act, 1982, *supra*, footnote 1.

(iii) *Improper Police Behaviour.*

a. *The Problem.*

By improper police behaviour we mean any conduct by the police during the investigation of an offence which involves the infringement or denial of rights guaranteed by the Charter. We will discuss this issue as it will most commonly be manifested in litigation. The person whose rights were infringed or denied will have been charged with an offence. We will assume that, apart from the improper behaviour by the police, this person is guilty of the offence and would be so found by a court. From the perspective of the accused the only legal issue that matters is whether the behaviour of the police will lead to his being acquitted. Will the infringement or denial of the rights of an accused person vitiate a subsequent criminal prosecution? This could, in the abstract, happen in one of two ways. First, it could occur directly by a court holding that, for example, the fact that the accused was not, on arrest, "informed promptly of the reasons therefor"⁷⁸ or was not permitted to "retain and instruct counsel without delay"⁷⁹ would be sufficient to entitle him to be acquitted. The same result could, secondly, be achieved indirectly by a court holding that evidence obtained in violation of the rights of the accused was not admissible against him, thereby effectively destroying the state's case.

The common law approach is clear. Police behaviour is not relevant, whether directly or indirectly, to a determination of the guilt or innocence of an accused person.⁸⁰ The commonwealth jurisprudence strongly supports the view that the entrenchment of due process rights in a constitution is not, of itself, sufficient to require a different approach.

For example, in *King v. R.*,⁸¹ it was alleged by the accused and accepted by the Judicial Committee that the police had knowingly infringed one of his constitutionally guaranteed rights in the course of their investigation. The Board held that the mere fact that a right, in this instance the right not to be searched without consent, had been "enshrined in a written constitution" was not sufficient to change the common law. That is, the Board dealt with the case in exactly the same manner as it would have had there been no constitutional guarantee of rights. Other Commonwealth decisions⁸² reinforce the view that the courts, absent clear language to the contrary, are not obliged by the existence of constitutional guarantees to alter the traditional common law approach to improper police behaviour.

⁷⁸ Charter, s. 10(a), *supra*, footnote 1.

⁷⁹ *Ibid.*, s. 10(b).

⁸⁰ The classic case is undoubtedly *Kuruma v. The Queen*, [1955] A.C. 197 (P.C.). Except perhaps in very special circumstances such as occurred in *Brownridge v. The Queen*.

⁸¹ [1969] 1 A.C. 304 (P.C.).

⁸² As examples, see *S. v. Seboni*, [1968-70] Botswana L.R. 158 and *Ochieng v. Uganda*, [1969] E.A. 1.

Canadian courts have never been willing to accept that unlawful acts by the police will lead to an acquittal. In *The Queen v. Wray*⁸³ the Supreme Court of Canada permitted the introduction of evidence obtained through police intimidation and in *Rothman v. The Queen*⁸⁴ admitted evidence which resulted from a police subterfuge. *Hogan*⁸⁵ is the most striking case. The police consciously denied to the accused the right to "retain and instruct counsel" as provided in the Canadian Bill of Rights. Nonetheless, the Supreme Court of Canada held that the results of a breathalyzer examination administered to the accused under such circumstances were admissible.⁸⁶

b. *Section 24(1).*

There is little in the wording of section 24(1), the general remedial provision of the Charter, to suggest that Canadian courts should adopt the activist approach to police procedures which the United States Supreme Court began to fashion in the 1960's.⁸⁷ Indeed, without clear and compelling language to this effect we see no reason to imagine that our courts will adopt this approach to the control of police behaviour. Such clear and compelling language is not to be found in the Charter. It is simply provided that when someone's rights have been infringed or denied a court may grant such remedy as it considers "appropriate and just in the circumstances". It must be stressed that, from the perspective of an accused person, the only meaningful remedy that can be awarded in a criminal prosecution is acquittal. In our view substantially more robust language than appears in the Charter would be required to induce a Canadian court to order the acquittal of an otherwise evidently guilty person on the basis of improper police behaviour.

c. *Section 24(2).*

The fact that the Charter deals with the matter of improperly obtained evidence in a separate provision from the general statement concerning remedies is of interest. This seems to suggest an apprehension, or perhaps even an intention, that the other strictures concerning police behaviour will be applied in the fashion that we have suggested. Secondly, and paradoxically, the provision itself must be one of the more ephemeral bits of drafting in the Charter. It does not provide a clear and precise remedy. To repeat a point made above, from the perspective of the accused the only

⁸³ [1971] S.C.R. 272.

⁸⁴ [1981] 1 S.C.R. 640.

⁸⁵ *Supra*, footnote 8.

⁸⁶ One commentator observed of *Hogan* that "... a totalitarian state could ask for little better". Grant, *The Supreme Court of Canada and the Police: 1970-76 (1977-78)*, 20 Cr. L.Q. 152, at p. 161.

⁸⁷ As for example, in *Mapp v. Ohio* (1961), 367 U.S. 643; *Gideon v. Wainwright* (1963), 372 U.S. 335; and *Miranda v. Arizona* (1966), 384 U.S. 436.

meaningful remedy with respect to improperly obtained evidence is its exclusion.⁸⁸ But section 24(2) merely resurrects the notion, propounded by the Ontario Court of Appeal and rejected by the Supreme Court of Canada in *Wray*, that a trial court possesses a discretion to exclude otherwise admissible evidence which has been obtained improperly.

d. *Defining the Rights Revisited.*

The practical effect of the Charter on improper police behaviour will also be limited if the relevant rights are, as we have suggested above in a different context, defined narrowly by the courts. This approach is, again, consistent with that traditionally taken by the Supreme Court of Canada. For example, the right to counsel as established in section 2(c)(ii) of the Canadian Bill of Rights was given a limited definition.⁸⁹ It has meant simply that persons subject to criminal investigation or prosecution should not be expressly prevented from retaining and instructing counsel. In more direct language this means, for example, that a person in police custody must be allowed to attempt to get hold of a lawyer. But there the right ends. The duty cast upon the state is one of not putting obstacles in the path of the solicitor-client relationship; it is not obliged, as in the United States, to create or facilitate that relationship.⁹⁰

IV. *Conclusion.*

Within the limits of Canada's federal system, the principle of parliamentary supremacy has been central both to our political process and our political culture. Parliamentary supremacy is made manifest in the courts through judicial restraint. Restraint is at once a legal doctrine and an expression of the judges' perception of their own political role.⁹¹

We believe that restraint is a principle too deeply imbedded in the thought processes of Canadian lawyers and judges to be abruptly displaced through the adoption of the Charter. Conversely, activism as either an approach to judging or a style of judging does not sit well with Canadian judges. The judges of the Supreme Court of Canada flirted with activism briefly in *Drybones*,⁹² but quickly perceiving that they had taken the first steps along on a path that would lead them to an abyss, they retreated in horror in *Lavell*⁹³ and subsequent cases. As we have demonstrated, there

⁸⁸ This is the approach followed in the United States. *Mapp v. Ohio*, *ibid*.

⁸⁹ As an illustrative decision, see *O'Connor v. The Queen*, [1966] S.C.R. 619; *Brownridge v. R.*, *supra*, footnote 5; and *Hogan v. R.*, *supra*, footnote 8.

⁹⁰ See *Gideon v. Wainwright* (1963), 372 U.S. 335; *Re Gault* (1967), 387 U.S. 1; and *Argersinger v. Hamlin* (1972), 407 U.S. 25.

⁹¹ An illustrative discussion of the legal meaning of parliamentary supremacy in Canada can be found in P. Hogg, *op. cit.*, footnote 8, pp. 197-203.

⁹² *Supra*, footnote 8.

⁹³ *Supra*, footnote 20.

is, on the one hand, an abundance of devices to be found in the Charter to justify maintaining the attitude of restraint and, on the other hand, nothing to force the judiciary onto the path of activism.

A contrary argument might be advanced that the Supreme Court of Canada has, in fact, gone through activist periods in the past and that there is no reason it should not do so in the future. Restraint, on this view, is not the characteristic feature of the Canadian judicial culture, but simply a function of the personal views of the individuals who have happened from time to time to make up a majority in the Supreme Court. Different judges, different approaches. Further, when the time arrives that both Justices Martland and Ritchie, the two most "conservative" members of the court will have departed, new appointments could transform the court. It is, obviously, beyond dispute that the personal experience and predilections of a judge will affect the way that individual behaves on the bench. This is not much of an insight. In our view the general argument is misconceived.⁹⁴

In the first place, it is not all that clear which judges are the activists and which are not. Laskin C.J., who would seem to be everyone's favourite candidate for most activist judge, has, in fact, eschewed activism in a number of cases, most notably *Reference re Anti-Inflation Act*.⁹⁵ Furthermore, while the majority in the Supreme Court were willing in 1981 to concede the legal right of the Government of Canada to ask Westminster for an amendment to the British North America Act, 1867 (as it then was) without substantial, or perhaps even any, provincial concurrence, Martland and Ritchie JJ. transformed themselves into activists and were prepared to deny Ottawa such a right.⁹⁶ A theory which seeks to explain the functioning of the Supreme Court of Canada as an institution on the basis of the personalities of its individual judges must be rejected. It possesses explanatory value at only the most superficial level.

The fact is that when we view the Supreme Court as an institution we find a remarkable degree of consistency. But, it will immediately be replied: How do you explain *Reference re Alberta Statutes*?⁹⁷ in 1938 and

⁹⁴ This argument has had many proponents. For variations on essentially the same theme, see Cavalluzzo, *Judicial Review and the Bill of Rights: Drybones and Its Aftermath* (1971), 9 O.H.L.J. 511; Tarnopolsky, *The Supreme Court and Civil Liberties* (1976), 14 Alta L. Rev. 58; Maloney, *The Supreme Court and Civil Liberties* (1976), 16 Cr. L.Q. 202; Gibson, *And One Step Backward: The Supreme Court and Constitutional Law in the Sixties* (1975), 53 Can. Bar Rev. 621; Schmeiser, *The Role of the Court in Shaping the Relationship of the Individual to the State: The Canadian Supreme Court* (1980), 3 Canada U.S.L.J. 67; Berger, *The Supreme Court and Fundamental Freedoms: The Renunciation of the Legacy of Mr. Justice Rand* (1980), 1 Supreme Ct L. Rev. 460.

⁹⁵ [1976], S.C.R. 373. See also *Gay Alliance Toward Equality v. Vancouver Sun*, *supra*, footnote 37 and *Bhadauria v. The Board of Governors of the Seneca College of Applied Arts and Technology* (1981), 124 D.L.R. (3d) 193.

⁹⁶ *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*, *supra*, footnote 42, at pp. 49-79.

⁹⁷ [1938] S.C.R. 100.

the judicial assault on Maurice Duplessis⁹⁸ in the 1950's? It would be easy to avoid the question by simply dismissing these instances as aberrations where some judges succumbed to brief and random outbreaks of judicial activism. This, clearly, will not do. Both instances are perfectly consistent with the Canadian judicial tradition. Restraint is the normal, everyday stance of the Supreme Court of Canada. But where unprecedented and unjustifiable deviations from the accepted, although largely unarticulated, political principles of the Canadian state occur, the court will intervene to enforce compliance with those principles. Even a superficial reading of the decisions makes it evident that the court regarded the first Social Credit government in Alberta and the Duplessis regime in Quebec as odious and, more important, as having overstepped the boundaries of permissible political behaviour.

The courts, and in particular, the Supreme Court of Canada will not, then, permit litigants to use the Charter as a means of bringing about basic changes in our political system. They will not arrogate to themselves the authority to resolve the great political and social questions of the day. They will maintain the Canadian judicial tradition.

This is not, however, to say that the Charter will suffer the same fate as the Canadian Bill of Rights. It will not become, for all concrete purposes, meaningless. The Charter will be useful in three respects. First, it is bound by its very existence to have some effect on the people who draft statutes and the people who administer them. The most significant result of the adoption of the Charter may well be its implicit effect as a statement of principles on the behaviour of state functionaries. Secondly, the courts will likely permit the Charter to be used as a basis for removing certain anomalies in the legal system. Which is to say that the Charter will be relied upon to perform a legal housekeeping function. The law of contempt of court might be tidied up;⁹⁹ our legal system might purge itself of writs of assistance.¹⁰⁰ Finally, the Charter will provide an additional lever for the judges on some future occasion when they find themselves confronting a new Maurice Duplessis.

⁹⁸ *Boucher v. The King*, [1951] S.C.R. 265; *Saumur v. The City of Quebec*, [1953] 2 S.C.R. 299; *Switzman v. Elbling and A.G. Quebec*, [1957] S.C.R. 285; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

⁹⁹ See the discussion in Martin, *Criticising the Judges* (1982), 28 McGill L.J. 1, at pp. 18-19.

¹⁰⁰ Writs of assistance may be issued under the Customs Act, R.S.C. 1970, c. C-40, s. 145; the Excise Act, R.S.C. 1970, c. E-12, s. 78; The Food and Drugs Act, R.S.C. 1970, c. F-27, s. 37; and the Narcotic Control Act, c. N-1, s. 10. The relevant wording in the first two statutes is the same. The latter two statutes employ a different form of words. The form used in the Customs Act and the Excise Act appears to authorize searches under a writ in any place in Canada. The form of the Food and Drugs Act and the Narcotic Control Act refers only to "any dwelling-house". This is no limitation on the powers of the authorities since s. 37(1)(a) of the Food and Drugs Act and s. 10(1)(a) of the Narcotic Control Act authorize searches without warrant of "any place other than a dwelling-house".